IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON RICHARD LOFTHOUSE,	)	NO. 70587
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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REPLY ARGUMENT

I. Lofthouse Did Not "Kidnap" M.T.

A. NRS 200.310(1)'s plain meaning.

The State argues Lofthouse could be charged and convicted for kidnapping M.T. because NRS 200.310(1) plainly prohibits perpetuating any unlawful act whatsoever upon a minor's person and NRS 201.540 is an unlawful act. RAB 4. Essentially, NRS 201.540 could be perpetuated "upon" M.T. because NRS 201.540 involves sexual conduct and "...upon means, in or into complete or approximate contact with." RAB 4 (citing Webster's Dictionary, 2093, Random House Value Publishing, Inc., 2nd Edition, 1996).

Generally, when a statute's words are facially clear they should be construed according to their plain meaning. See Anthony Lee R., A Minor v. State, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997). However, if the plain meaning "leads to an unreasonable or absurd result, this court may look to other sources for the statute's meaning." Newell v. State, 131 Nev. ___, ___, 364 P.3d 602, 604 (2015).

In Newell, the defendant lit the victim on fire at a gas station. Newell, 131 Nev. at ___, 364 P.3d at 603. Newell claimed self-defense pursuant to NRS 200.160 and submitted a jury instruction advising because the victim had committed felony coercion, Newell could use deadly force in response. Id. The district court altered Newell's proposed instruction to explain the force Newell used had to be reasonable and Newell could only use deadly force if the victim threatened Newell with serious bodily injury. Id. On appeal Newell claimed the district court erred because NRS 200.160's plain language allows deadly force to be used against one committing or attempting to commit **any felony**. Id. This Court acknowledged NRS 200.160's plain language, but to avoid potentially absurd results the Court held pursuant to NRS 200.160, the force used against a felony or attempted **must** be reasonable and necessary under the circumstances" and the

person killed **must** pose "a threat of serious bodily injury to the slayer or others." Id. at ___, 364 P.3d at 604-05 (citing State v. Weddell, 118 Nev. 206, 211, 43 P.3d 987, 990 (2002)).

Here, NRS 200.310(1) is similar to NRS 200.160. Like 200.160, NRS 200.310 also uses the term **any** when discussing unlawful acts. However, interpreting NRS 200.310(1) to prohibit perpetuating any unlawful act whatsoever "upon" a minor's person would also lead to absurd results. See AOB 22. Indeed, certain unlawful acts simply cannot be perpetuated "upon" a person. Crimes by and against the executive, crimes against the state, and crimes against public decency cannot be perpetuated "upon" a person. *Malum prohibitum*[1] crimes which "...are evil only because they are prohibited by statute, often to further public policy" (21 Am. Jur. 2d Criminal Law § 25) are victimless crimes which cannot be perpetuated "upon" a person. See William L. Barnes, Jr. Revenge On Utilitarianism: Renouncing A Comprehensive Economic Theory Of Crime and Punishment, 74 Ind. L.J. 627, 646-49 (1999). Also, one

[1] *Malum prohibitum* offenses do not require any criminal intent. See Wayne R. LaFave, 1 Subst. Crim. L. § 1.6 (3d ed.) (October 2017).

arguably cannot intend to perpetuate a status offense[2] or strict liability offense[3] "upon" another's person, or specifically intend to perpetuate a "negligent" or "reckless" act upon a person.[4] See Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988); Curry v. State, 106 Nev. 317, 319, 792 P.2d 396, 397 (1990).

Here, NRS 201.540 does not strictly prohibit engaging in sexual conduct with a 16 or 17 year old. Rather, NRS 201.540 prohibits sexual conduct between persons who occupy certain statuses. Therefore, NRS 201.540 is a *malum prohibitum*, strict liability, status offense correctly classified as a crime against morality and decency.[5] Thus, one cannot specifically intend to perpetuate NRS 201.540 "upon" a person. Accordingly, to avoid legally impossible and absurd

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[2] When a crime requires the defendant specifically intend to commit another criminal act, the criminal act cannot be a "status offense" because a status offense is complete before the defendant acts. Essentially, if a status offense is the intended act for kidnapping under NRS 200.310(1), the State would not have to prove the defendant's specific intent beyond a reasonable doubt.

[3] NRS 201.540 is a strict liability offense because the statute does not the words "knowingly" or "willfully." See generally Morrisette v. U.S., 342 U.S. 246, 251-52 (1952).

[4] For example, NRS 200.310(1) is a specific intent crime. See Jensen v. Sheriff, 89 Nev. 123, 126, 508 P.2d 4, 5-6 (1973). However, the State could not allege a defendant kidnapped a minor by specifically intending to perpetuate voluntary manslaughter upon the minor's person even though voluntary manslaughter is "an unlawful act."

[5] See NRS title 15, Chapter 201.

results this Court should find NRS 200.310(1) only prohibits intending to perpetuate a "crime against the person" upon a minor's person.

B. NRS 200.310(1)'s legislative history.

The State also claims NRS 201.540's legislative history demonstrates it can be perpetuated "upon" a minor's person. RAB 5. Basically, although NRS 200.310(1) historically only prohibited perpetuating crimes involving force or threat of force upon a person, the State argues the Legislature created NRS 201.540 to protect students from sexual conduct based upon a teacher's improper "influence and control over the child." RAB 7. Therefore, NRS 201.540 can be perpetuated upon a minor's person because "individuals can be influenced in a way that results in a crime against them without the use or threat of physical force." Id. at 7-8. The State's interpretation is flawed.

First, kidnapping laws have never been applied to strict liability status offenses. Moreover, NRS 201.540 does not actually criminalize improper influence as the State suggests. NRS 201.540 does not require a teacher to actually use power and control to coerce a student to engage in sexual conduct but rather, imposes strict liability

for consensual sexual conduct between teachers and students. See Senate Daily Journal, S.B. 122, at 53, 69th Leg. (Nev., April 8, 1997).

Additionally, NRS 201.540's punishment is one to five years in prison. See NRS 201.540(c)(2). By contrast, NRS 200.310(1)'s punishment is potentially life in prison. See NRS 200.320(2)(a). Given NRS 200.310(1)'s harsh penalty the legislative history and common sense suggest the statute's goal is to punish those who commit actual threatening or forcible acts "upon" the minor's physical body. Indeed, allowing strict liability status offenses to be the associated offense under kidnapping would effectively enhance every offense involving a minor, no matter how petty, to a possible life sentence.

C. Vagueness

Lastly, the State claims NRS 200.310(1) is not vague because it provides adequate notice of prohibited conduct. See RAB 9-10. However, Lofthouse did not argue NRS 200.310(1) fails to provide fair notice of prohibited conduct. Rather, Lofthouse argued NRS 200.310(1) is vague because it promotes arbitrary enforcement. See AOB 21-22. Accordingly, the State's argument is essentially non-responsive.

II. Preemption.

The State claims Lofthouse's prosecution under NRS 201.540 did not preempt his prosecution under NRS 200.310(1). RAB 11. The State argues the Nevada Legislature intended NRS 200.310(1) to cover crimes "**not enumerated in the text of the statute**"[6] and therefore, 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." Id. (Emphasis added). Thus, Lofthouse would not have been charged with kidnapping had he merely engaged in sexual conduct with M.T. in his classroom. Id. at 12. Additionally, the State claims Lofthouse's reliance upon People v. Jones, 108 Cal.App.4th 455, 463, 133 Cal.Rptr.2d 358, 363 (2003) is misplaced as California's preemption doctrine "is not in effect in Nevada." RAB 12.

[6] Curiously, the State argued the opposite at trial in response to Lofthouse's proposed his dual liability jury instruction. See AA VI 1239. Nevertheless, if Lofthouse's prosecution under NRS 201.540 did not preempt his prosecution under NRS 200.310(1) then the district court absolutely erred by refusing Lofthouse's jury instruction regarding dual liability for kidnapping and associated offenses.

NRS 200.310(1) plainly also prohibits "detaining" a minor. Detention invariably occurs when two people engage in sexual conduct. Therefore, any time a teacher engages in consensual sexual conduct with a student the teacher would always violate both NRS 201.540 and 200.310(1). Basically, the fact Lofthouse drove M.T. to hotels rather than detain her in his classroom is immaterial. Additionally, while this Court has not expressly adopted a preemption test like that in Jones, this Court does recognize preemption generally. E.g., Gaines v. State, 116 Nev. 359, 365, 998 P.2d 166, 170 (2000). Accordingly, absent binding authority directly on point, the Jones preemption test is persuasive in Lofthouse's case.

III. Jury Instruction Errors.

A. Instruction 17

The State claims instruction 17, which advised that the prosecution did not have to prove Lofthouse knew M.T. was a minor, is a correct legal statement and Lofthouse's reliance upon Garcia v. Sixth Jud. Dist. Ct., 117 Nev. 697, 701, 30 P.3d 1110, 1112 (2001) is "misguided" because the statute in Garcia, NRS 202.055, placed the word "knowingly" before both "sells...alcohol" and "under 21 years

of age." RAB 14. In contrast, NRS 200.310(1)'s intent requirement only modifies "to perpetuate an unlawful act." Id.

Although NRS 202.055 and NRS 200.310(1) use different words to specify the requisite intent ("knowingly" vs. "intent") both are specific intent crimes. See Garcia, 117 Nev. at 701, 30 P.3d at 1112; Jensen, 89 Nev. at 126, 508 P.2d at 5-6. Moreover, like NRS 202.055, NRS 200.310(1) actually does place its specific intent language before both "the minor" and "any unlawful act." Thus, NRS 200.310(1) requires the State to prove beyond a reasonable doubt the defendant intended to perpetuate an unlawful act upon a person he knew to be a minor. See generally NRS 194.010(5); Com v. Filopoulos, 451 Mass. 234, 238-39, 884 N.E. 514, 518 (2008) (under child enticement statute the State must prove "the defendant intended that his advances be directed to an underage person."); Com. v. Deschaine, 77 Mass.App.Ct. 506, 514, 932 N.E.2d 854, 860-61 (2010) ("assault and battery upon a person of a certain type requires that the defendant know that the other is of a certain type.").

Alternately, because Lofthouse's California attorney failed to object instruction 17, the State argues even if the instruction is incorrect it is only reviewable for plain error. RAB 14. The State then

claims the instructional error fails plain error review because the evidence overwhelmingly demonstrated Lofthouse knew or should have known that M.T. was a minor. RAB 16.

The State does not cite any specific facts presented at trial that suggest Lofthouse **knew** M.T. was a minor. Nevertheless, assuming the jury could infer Lofthouse had knowledge M.T. was a minor, instruction 17 still improperly advised the jury to conclusively presume this fact against Lofthouse. See NRS 47.230(2). Therefore, the error violated Lofthouse's Constitutional right to conviction only upon proof beyond a reasonable doubt as to every material element and is reversible under plain error. See Ford v. State, 127 Nev. 608, 626, 262 P.3d 1123, 1134 (2011) (finding plain error where the court failed to instruct the jury regarding specific intent).

B. Lofthouse's Dual Liability Instruction.

The State appears to abandon its argument that the prohibition upon dual liability for kidnapping and an associated offense only applies when kidnapping is charged with an offense specifically mentioned in NRS 200.310.[7] RAB 17-19. The State now claims the

[7] See AA VI 1239. As further proof dual prohibition against kidnapping and associated offenses applies to crimes other than those

district court's refusal to instruct the jury regarding the prohibition upon dual liability was merely harmless because when Lofthouse drove M.T. to hotels he indisputably increased M.T.'s risk of harm. Id. (citing Sheriff v. Medberry, 96 Nev. 202, 606 P.2d 181 (1980); Isler v. Sheriff, 92 Nev. 248, 548 P.2d 1373 (1976)).

If Lofthouse could be charged with kidnapping (see arguments *supra*), the evidence suggests -- as a matter of law -- he did not increase M.T.'s risk of harm. Even if it is not clear as a matter of law, this Court has repeatedly noted whether a victim's movement or detention is incidental to an associated offense or increased the victim's risk of harm "are questions of fact to be determined by the jury in all but the clearest cases." E.g., Langford v. State, 95 Nev. 631, 638-39, 600 P.2d 231, 236-37 (1979). Therefore, if this Court does not vacate Lofthouse's kidnapping convictions for the reasons argued in Lofthouse's Opening Brief, it must -- at minimum -- reverse Lofthouse's kidnapping convictions so a jury can determine whether

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listed in NRS 200.310, this Court has noted "[a] conviction for first-degree kidnapping requires proof that a victim was seized or detained for one of certain specifically enumerated purposes, including (**among other things**) for the purpose of committing one of the listed predicate felonies such as sexual assault, extortion, robbery, or homicide." Gonzales v. State, 131 Nev. ___, ___, 354 P.3d 654, 665 (2015) (emphasis added).

M.T.'s movement was either incidental to Lofthouse's violation of NRS 201.540 or somehow increased her risk of harm.

IV. Lofthouse's General Verdict.

The State contends the trial prosecutor did not abandon two alternate kidnapping theories at trial but instead merely addressed the theory which "best fit" Lofthouse's actions. RAB 20-21. The record belies the State's claim.

At trial the the prosecutor explicitly argued to the jury:

> **Obviously it's not A**. The State is not arguing to you that the defendant kept her imprisoned or confined [M.T.]. **That's not what happened in this case**. And **it's not B**. The State's not arguing to you he held the minor for unlawful service. **That didn't happen either**. **It's C**, he -- he led, took, enticed her away with the intent to perpetuate upon the person of the minor, upon [M.T.], any unlawful act.
>
> AA VI 1321 (emphasis added).

The State is not required to formally amend the Information to "abandon" a theory of liability. See Anderson v. State, 121 Nev. 511, 514, 118 P.3d 184, 186 (2005) (determining the jury "clearly erred" in finding defendant guilty under a theory of liability when "the State told jurors that it presented no evidence in support of the second

alternative and that they could not base a guilty verdict upon that theory."). Here, by explicitly arguing Lofthouse's actions did not satisfy two theories of liability the State clearly "abandoned" those theories. Accordingly, Lofthouse's kidnapping convictions can only stand if the State's remaining theory -- that Lofthouse enticed M.T. to accompany him to hotels to engage in sexual conduct -- is a valid theory and supported by sufficient evidence. See Cortinas v. State, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008).

The State merely notes in passing that enticing M.T. while intending to perpetuate an unlawful act upon her person was a valid theory. RAB 21. The State then claims sufficient evidence supported the theory because "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." Id. (citing AA V 1035, 1037).

Lofthouse maintains he could not be charged or convicted for kidnapping. Therefore, when the State abandoned the only two possible valid theories the jury convicted Lofthouse under an invalid theory. Assuming the theory was valid, the State nevertheless failed to

present any evidence whatsoever that taking M.T. to hotels increased her risk of harm. The portions of the record the State cites as proof Lofthouse increased M.T.'s risk of harm merely contain M.T.'s testimony confirming she and Lofthouse went to hotels together. See AA V 1035, 1037. These citations do not prove, beyond a reasonable doubt, that Lofthouse actually increased M.T.'s risk of harm.

V. Redundant Convictions.

The State claims Lofthouse could be charged and convicted for multiple counts of violating NRS 201.540 because each time Lofthouse engaged in sexual conduct with M.T. he committed a separate chargeable offense. RAB 23. The State relies upon Shue v. State, 133 Nev. ___, ___, 407 P.3d 332, 337 (2017), in support.

In Shue this Court analyzed whether NRS 200.710(2), which prohibits "using, encouraging, enticing, or permitting **a minor** to be the subject of a sexual portrayal in a performance," authorized multiple convictions when a defendant used **two different minors** in a single "performance." Shue, 133 Nev. at ___, 407 P.3d at 336 (emphasis added). To resolve the issue this Court discussed Castaneda v. State, 132 Nev. ___, ___, 373 P.3d 108, 115 (2016) where the Court analyzed whether NRS 200.730 -- which prohibits possessing "**any**

film photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in ... sexual conduct" -- authorized prosecution on a "per image" basis. Id. The Castaneda court noted "any," as used in NRS 200.730, was ambiguous and therefore applied the rule of lenity and ultimately held NRS 200.730 only authorized a single prosecution irrespective of the number of images the defendant possessed. Id. In contrast, the Shue Court noted NRS 200.710(2) did not use the word "any" but rather the singular phrase "a minor." Shue, 133 Nev. at ___, 407 P.3d at 336. Therefore, NRS 200.710(2) "plainly defines the proper unit of prosecution as each distinct minor who is the subject of a sexual portrayal in a performance." Id.

NRS 201.540 is unlike NRS 200.710(2), the statute at issue in Shue, and more like NRS 200.730, the statute at issue in Castaneda. Although the State asserts NRS 201.540's phrase "engage in sexual conduct"[8] unambiguously allows prosecution on a per sexual act basis because "engage" means "taking part in one event" (RAB 23 (citing Black's Law Dictionary 608 (9th Ed. 2009)), "engage" also means a course of conduct. See AOB 41. Therefore, as used in NRS 201.540,

[8] NRS 201.520 lists various activities qualifying as "sexual conduct."

"engage" is ambiguous as to the proper unit of prosecution. Accordingly, this Court should turn to other legitimate tools of statutory interpretation, including NRS 201.540's legislative history, which Lofthouse did in his Opening Brief and which the State neglected to do in its Answering Brief. Doing so makes clear that the legislature sought to prohibit sexual "relationships" between teachers and students and to punish teachers who engage in those relationships and not to punish each individual sexual act occurring within the relationship.[9] See AOB 43-45. If the legislative history fails to clarify NRS 201.540's proper unit of prosecution then this Court should apply the rule of lenity and find NRS 201.540 only authorizes prosecution on a per sexual relationship basis.

VI. The Jury Question.

The State claims the district court did not err by refusing to provide a clarifying jury instruction regarding "entice." RAB 25. The State relies upon Dawes v. State, 110 Nev. 1141, 881 P.2d 670 (1994)

[9] Lofthouse is unable to find authority from other jurisdictions directly addressing this issue. However, in State v. Nicoletto, 845 N.W.2d 421, 423 (Iowa 2014) (superseded by statute on other grounds as stated in In re J.C., 857 N.W.2d 495 (Iowa 2014)) the state charged the defendant with **one count** of sexual exploitation by a school employee even though the defendant engaged in sexual intercourse with a student "every week or two" for roughly a year.

and argues "enticement," as used in NRS 201.540, "...was being used in its ordinary meaning, which ran parallel to the dictionary definition." RAB 25. The State's reliance upon Dawes is misplaced.

Dawes merely held trial courts are not required to **initially** define every term used in a statute, especially when those terms do not have a technical legal meaning.[10] Id. at 1145, 881 P.2d at 672. Here, Lofthouse never claimed the district court erred by not initially defining "entice." Rather, because the court did not initially define entice, when the jury expressed confusion the court was required to clarify the confusion by giving a supplemental instruction. See AOB 49-50. Thus, Lofthouse's situation is governed by Gonzalez[11] or Jefferies,[12] and not Dawes. Moreover, the court had explicitly instructed the jury that if it desired to be "further informed on any point of law" the jury should send the court a note and the court **would actually respond to the note after consultation with counsel**. AA I

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[10] Importantly, when the Dawes jury requested clarification the trial court actually gave a clarifying instruction. Id. at 1145, 881 P.2d at 672.

[11] Gonzalez v. State, 131 Nev. ___, 366 P.3d 680 (2015).

[12] Jefferies v. State, 133 Nev. ___, 397 P.3d 21 (2017).

260. Therefore, the court also created an independent obligation to provide clarification if asked.

VII. Prosecutorial Misconduct.

A. Voir Dire

The State argues the prosecutor did not discuss legal instructions or engage in argument during *voir dire* but instead merely ensured jurors could determine Lofthouse's guilt or innocence by correctly understanding NRS 200.310(1)'s requirements.[13] RAB 29. In truth however, the prosecutor impermissibly asked "questions" which addressed anticipated legal instructions. For example, the prosecutor repeatedly explained NRS 201.540 is a status offense and therefore, consent is not a defense for either NRS 201.540 or 200.310(1). See AA III 714, 717, 723-25, 730.

Next, the State claims the prosecutor never asked jurors who were teachers and educators to explain the law to other jurors. RAB 29. Rather, the State claims the prosecutor only asked these teachers and educators their opinions on the law. Id. Assuming this is true, the prosecutor's questions were nevertheless inappropriate.

[13] The State does not address Lofthouse's claim that the prosecutor improperly discussed M.T.'s anticipated testimony and offered personal opinions. See AOB 55.

While the State can question juror's regarding their opinion on the law to ascertain potential bias (see Khoury v. Seastrand, 132 Nev. ___, ___, 377, P.3d 81, 88 (2016)), the State cannot effectively introduce legal instructions, through jurors, during *voir dire*.

The State also claims the prosecutor "never asked the potential juror to explain [school district] policies and procedures to other potential jurors," but merely inquired into classes educators attend regarding sexual boundaries with students.[14] RAB 29. Admittedly, the prosecutor did not **explicitly** ask jurors to explain CCSD's policies and procedures regarding inappropriate contact between teachers and students. However, the prosecutor did so in substance by asking leading questions -- to which the jurors agreed -- regarding the classes' subject matter. See AA III 717-19. Therefore, the prosecutor effectively used these jurors to explain to other jurors CCSD's policies and procedures.

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[14] Although the State claims Lofthouse made numerous factually inaccurate statements in his Opening Brief (see RAB 30 fn. 4), the State does not cite the alleged inaccurate statements nor contrast these supposed inaccurate statements with the *voir dire* transcript. The State's failure arguably violates NRAP 28(e) and moreover, by not citing the alleged inaccuracies Lofthouse cannot respond to the State's allegation.

Next, the State acknowledges the prosecutor used "we," "our," and "us" when addressing the jurors but relying upon Valdez v. State, 124 Nev. 1172, 196 P.3d 465 (2008) and Johnson v. State, 112 Nev. 1344, 1355 (2005), claims these words only referenced society and the prosecutor's and potential jurors' community and not the jurors or their children. RAB 30. Valdez is inapposite however as Valdez did not involve a prosecutor who aligned the jurors with the State by using words like "we," "our," and "us." Additionally, there is no "Johnson v. State" found at 112 Nev. 1344 and therefore, Lofthouse cannot address this supposed authority.

Finally, the State claims because Lofthouse failed to object to the prosecutorial misconduct this Court can only review for plain error. RAB 30. The State then concludes perfunctorily that the potential *voir dire* errors did not involve constitutional rights, or infect the trial with unfairness, and therefore do not warrant reversal. Id. at 30-31. However, contrary to the State's conclusory assertion otherwise, the state's misconduct during *voir dire* was: obvious; patently prejudicial and inflammatory; prejudicially impacted the verdict; and adversely affected the trial's integrity. Accordingly, the misconduct is reversible under plain error.

B. Obstructing Lofthouse's access to M.T.

The State does not directly address Lofthouse's argument that the prosecutor either attempted to obstruct or did obstruct Lofthouse's access to M.T. when the trial prosecutor insinuated to the district court that Lofthouse's counsel improperly spoke with M.T. Instead, the State presupposes that speaking with M.T. and discussing Lofthouse's potential sentence was improper, but because the district court accepted Lofthouse's representations and eventually "moved on" Lofthouse's claim is not eligible for review. RAB 34. In a footnote the State further claims the court never threatened Lofthouse's counsel with sanctions. RAB 34 fn. 6 (citing AA V 1010).

As Lofthouse noted in his Opening Brief, it was not improper to either contact M.T. or advise her regarding Lofthouse's potential sentence, assuming Counsel did so. See AOB 61-62. Additionally, although the prosecutor did not **explicitly** request sanctions, there would be no need to raise the issue if the prosecutor did not believe counsel did something improper. Moreover, when the court broached possible sanctions by asking if the prosecutor wanted "some sort of action taken against counsel" and if so "make a motion and we'll...contemplate whether we need any sort of evidentiary hearing

at that point," the prosecutor's coy response, "[a]nd we can address that later, Your Honor[,]" left the possibility of sanctions open just before Lofthouse cross-examined M.T. See AA V 1009-10.

Without question the Court's suggested "hearing" involved potential sanctions because the court could only impose sanctions after an evidentiary hearing. Therefore, the prosecutor requested sanctions in substance by raising the issue and not summarily rejecting the court's invitation to hold a hearing. Accordingly, when the court advised it would conduct a hearing if the State desired one, Lofthouse's counsel could reasonably assume the prosecutor controlled whether he faced sanctions. Knowing this, Lofthouse's counsel would naturally temper cross-examination to placate the prosecutor.

C. Rebuttal argument

(1) Personal Opinion and Superior Legal Knowledge.

The State asserts the prosecutor did not offer personal opinion during rebuttal argument but merely commented on the evidence. RAB 34. Additionally, when the prosecutor argued her interpretation

of kidnapping's legislative history and intent, that argument merely summarized the prosecutor's theory of the case. Id. at 36.

Assuming the prosecutor merely summarized the State's "theory," she nevertheless impermissibly argued the legislature specifically crafted NRS 200.310(1) **with Lofthouse's factual situation in mind**. The prosecutor could only glean this alleged legislative intent through her employ. Therefore, the prosecutor clearly invoked her supposed superior legal knowledge (which also happened to be factually incorrect) to the jury.

More importantly, immediately after explaining NRS 200.310(1)'s supposed legislative intent the prosecutor offered her personal opinion regarding Lofthouse's guilt. See AA VI 1344-48 (explaining NRS 200.310(1)'s legislative history); AA VI 1349, 1351 (personally opining that finding Lofthouse not guilty "I think, flies in the face of the evidence."). Thus, the jury could reasonably, but incorrectly, believe the prosecutor "knew" the legislature crafted NRS 200.310(1) to **specifically** include teacher-student sexual relationships.

(2) Inflaming the Jury's Passions.

The State first argues the prosecutor did not inflame the jury's passions because the prosecutor did not suggest Lofthouse could have targeted the juror's children but simply acknowledged NRS 200.310(1) protects the children of the State of Nevada where the jurors and prosecutor reside. RAB 37. This explanation strains credulity.

Obviously NRS 200.310(1) protects children who reside in Nevada. Had the prosecutor actually intended to suggest NRS 200.310(1) broadly and generally protects all children she could have explicitly said "the children" or "children." Instead, by using the pronoun "our," the prosecutor clearly intended to align the jurors with the State or have the jurors place their children in M.T.'s position which is absolutely prohibited.[15]

The State next claims the prosecutor did not compare Lofthouse's conduct to a pedophile who uses a van and candy to lure children. RAB 38. Rather, the prosecutor simply "explain[ed] what

[15] The State attempts to distinguish McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) by noting the McGuire prosecutor referred to the jury's children as "your daughters" while Lotfhouse's prosecutor referred to the jurors' children as "our children." See RAB 37 fn. 7. However, the State does not explain how this alleged difference is significant.

enticement was in a practical context and gave examples of what kind of conduct could potentially be enticement." Id. This contention is preposterous. The record clearly establishes the prosecutor **actually argued** Lofthouse's behavior was **the exact same thing** as luring a child into a van with candy. See AA VI 1347.

(3) Defining "Entice"

The State initially suggests the prosecutor did not improperly define "entice" but only responded to Lofthouse's argument that "entice" requires dominion and control. RAB 39. However, Lofthouse did not argue "entice" **required** dominion and control. Rather, Lofthouse merely theorized "entice" **suggested** dominion and control. See AA VI 1333. While the prosecutor could certainly argue "entice" does not only suggest dominion and control, the prosecutor committed misconduct when she provided a supposed "dictionary definition" when the court had not previously provided a legal instruction defining entice.

Next, the State claims when the prosecutor defined "entice" she did not change the State's legal theory and instead merely defined a word that "carries its plain meaning **as it's used in NRS 201.540**." Id. (emphasis added). Problematically, "entice" does not have a "plain

meaning" **as used in NRS 201.540** because NRS 201.540 does not use the word "entice." Rather, NRS 200.310(1) prohibits "enticing" a minor with the intent to perpetuate upon the minor's person an unlawful act.

Assuming the State meant to say "entice" has a plain meaning as used in NRS 200.310(1), and not NRS 201.540, it is unclear whether "entice," actually has a "plain meaning." For example, in Ford, 127 Nev. at 617, 262 P.3d at 1129, this Court noted the "dictionary definition" for entice is "to lure or induce; esp., to wrongfully solicit (a person) to do something." (Citing Black's Law Dictionary at 1260, 607, 901, 611, 321 (9th ed. 2009)). Thus, Ford's "dictionary definition" is different than the "dictionary definition" the State used in Lofthouse's case. Accordingly, the State cannot credibly claim "entice" has a uniform or "plain meaning."[16]

Finally, the State asserts the district court cured any potential error by responding to the jury question. RAB 39. However, as noted *supra*, the court actually did not "respond" to the jury's question nor

[16] Similarly, NRS 205.220(3)(a)-(b) prohibits **enticing** "one or more **head of livestock** owned by another person[.]" However, the State would certainly not suggest "entice," as used in NRS 205.220(3)(a)-(b), means "to attract or arouse hope or desire."

clarify the jury's confusion. Accordingly, the court did not "cure" the error.

D. Plain error

The State argues assuming the prosecutor committed misconduct, Lofthouse's counsel did not object to the misconduct and therefore, his arguments "fail plain error review because his rights were not affected." RAB 40. Specifically, Lofthouse admitted to violating NRS 201.540 and admitted "all 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."[17] RAB 40 (citing AOB 58).

Lofthouse concedes convictions are rarely reversed based solely upon prosecutorial misconduct, either preserved or unpreserved.[18] However, refusing to find reversible misconduct in Lofthouse's case, merely because his California attorney failed to object, would effectively suggest prosecutorial misconduct is "cost-free." See Mary

[17] Lofthouse never argued he did not violate NRS 200.310(1) merely because M.T. consented to the relationship.

[18] Lofthouse searched Westlaw for Nevada cases between January 1, 2010 and February 22, 2018, involving prosecutorial misconduct. The search found only 11 of 399 cases were reversed solely or in-part on "prosecutorial misconduct."

Nicol Bowman, Mitigating Foul Blows, 49 Ga. L. Rev. 309, 315-16 (2015) (when courts apply plain error or waiver to prosecutorial misconduct claims they provide "prosecutors with a comfort zone that fosters and perhaps even encourages a culture of wrongdoing."). Therefore, notwithstanding counsel's failure to object below, this Court should reverse Lofthouse's conviction based upon pervasive and egregious instances of prosecutorial misconduct which deprived Lofthouse of his Constitutional right to a fair trial.

VIII. Lofthouse's Confrontation Right.

The State first argues the district court correctly restricted M.T.'s cross-examination based upon NRS 50.090, Nevada's rape shield law.[19] RAB 43-45. Essentially, the State claims NRS 50.090 applied in Lofthouse's case because a 17 year-old with prior sexual history could be susceptible to an authority figure's persuasion. See RAB 46-47.

[19] By relying upon NRS 50.090 the State incorrectly claims the district court did not abuse its discretion by refusing to allow Lofthouse to question M.T. about her virginity. RAB 42, 45. However, Lofthouse's claim involves his Constitutional right to confrontation which is reviewed *de novo* and for constitutional harmless error, not merely abuse of discretion. See AOB 72-73.

The State's continued insistence that NRS 50.090 applied in Lofthouse's case is baffling. NRS 50.090 **only** applies in sexual assault or statutory sexual seduction prosecutions and not prosecutions involving NRS 201.540. Nevertheless, to the extent this Court accepts the State's argument the State did not allege nor prove Lofthouse actually used his position to persuade M.T. to have sex with him. Rather, the evidence clearly showed: (1) Lofthouse did not use his position to compel M.T. to engage in sexual conduct; (2) M.T.'s relationship with Lofthouse was "nothing serious;" and (3) M.T. would have engaged in sexual conduct with Lofthouse had he not been her teacher. AA V 1128-29, 1148.

Additionally, the State claims the district court did not err because it allowed Lofthouse to ask a question "getting to the heart of the point he was trying to make on cross-examination." RAB 45. However, the court only allowed Lofthouse to question M.T. regarding whether she was honest with her parents. AA V 1144. While this question was marginally relevant to the State's abandoned theory that Lofthouse took, enticed, carried away, or detained M.T. with the intent to keep, imprison, or confine her from her parents, the question was not relevant, nor impactful, to rebut the State's only viable theory that

Lofthouse **enticed** M.T. with the intent to perpetuate upon her person an unlawful act. See AA VI 1321; 1346-47. Therefore, the question did not "get to the heart of the point [Lofthouse] was trying to make" nor satisfy Lofthouse's Constitutional right to "'a meaningful opportunity to present a complete defense.'" See Coleman v. State, 130 Nev. ___, ___, 321 P.3d 901, 906 (2014) (quoting Holmes v. South Carolina, 547 U.S. 319, 324 (2006)).

The State further argues because Lofthouse's charges were based upon his "status at the time he committed the crimes charged," questions regarding M.T.'s prior sexual history were irrelevant and would only "harass and humiliate the witness." RAB 45-46. It is the height of hypocrisy to suggest Lofthouse's **single question** regarding whether Lofthouse took M.T.'s virginity would "harass" or "humiliate" M.T. when the State abusively forced M.T. to graphically testify, over her express wishes to not be involved in Lofthouse's prosecution, regarding consensual sexual acts with Lofthouse. See AA I 74-76; AA V 1026, 1028-30, 1038-42, 1044, 1051-53. Moreover, the State sadistically forced M.T. to read graphic text messages during trial even though Lofthouse stipulated to messages'

admission.[20] See Id. at 1058-90, 1095-98, 1106-21. By contrast, Lofthouse's **single question** was significantly relevant to this defense theory that M.T. was not particularly enticed by Lofthouse or his status and was also necessary to rebut the State's portrayal of M.T. as sexually naïve.

Furthermore, Nevada's age of consent is 16. See NRS 200.364(6). Essentially, the Legislature has recognized 17 year-olds like M.T. possess the emotional maturity to choose to engage in sexual conduct, even with a 32 year-old man. Therefore, contrary to the State's puritanical and patriarchal assertion otherwise, it is not necessarily embarrassing for a 17 year-old woman to simply admit she was not a "virgin" at the time she engaged in consensual sexual conduct.

Finally, the State claims it did not "benefit" from the court's ruling because the prosecutor did not improperly suggest Lofthouse enticed M.T. based upon M.T.'s "sexual inexperience." RAB 46. Rather, at 17, M.T. was sexually inexperienced compared to

[20] The district court expressed unease regarding State's decision to have M.T. read the text messages, because Lofthouse had already stipulated to the messages' admission, but did not stop the State from doing so. See Id. at 1100-03

Lofthouse. RAB 46. Even if this was the State's point, the State's argument is based upon pure speculation because the State never presented any evidence Lofthouse possessed greater sexual experience than M.T. Accordingly, because the district court violated Lofthouse's Constitutional right to confrontation this Court must reverse Lofthouse's convictions.

IX. Officer Caldwell's Improper Opinion.

The State asserts Caldwell did not improperly opine on Lofthouse's guilt but merely testified "how he gathered the information he included in his report[.]" RAB 49-50. Alternately, if Caldwell's testimony was improper, the State claims the impropriety did not rise to the level of plain error.[21] Id. at 50.

A witness may give testimony which creates an **inference** "that the witness is of the opinion the defendant is guilty." Collins v. State, 133 Nev. ___, ___, 405 P.3d 657, 664-65 (2017) (citing Ogdon v. State, 34 P.3d 271, 277 (Wyo. 2001)). However, a witness cannot

[21] The State applies the plain error standard applicable to prosecutorial misconduct even though Lofthouse never asserted Caldwell's improper testimony amounted to prosecutorial misconduct. See RAB 49.

opine, either directly or indirectly, that the defendant is actually guilty of the charged crimes. Id.

Here, Caldwell did not merely testify regarding what he learned during his investigation, or that he arrested Lofthouse based upon his investigation. Instead, Caldwell testified he only included certain text messages in his report which "prove[d] a crime had been committed." AA V 1165. Therefore, Caldwell impermissibly opined in "absolute terms" (see State v. Quaale, 182 Wash.2d 191, 340 P.3d 213, 215 (2014)) that Lofthouse had committed, and was guilty, of the charged crimes. This error is plain from the record and affected Lofthouse's fundamental right to a fair trial.

X. Increasing Lofthouse's Maximum Sentence.

At Lofthouse's sentencing hearing the district court relied upon the prosecutor's miscalculation and orally pronounced Lofthouse's total aggregate sentence as 72 to 180 months in prison. AA VI 1448-49. Thereafter, the court filed the Judgment of Conviction memorializing the oral pronouncement. AA II 382. However, Lofthouse's 180 month maximum sentence violated NRS 176.035(2)(b) because the aggregate maximum sentence should have been 228 months. To "correct" this illegality the court later re-

sentenced Lofthouse and increased his maximum sentence to 228 months. AA VII 1579-80. The court also filed an amended Judgment of Conviction to reflect the new aggregate sentence. Id. at 1588.

The State argues the district court did not violate double jeopardy by re-sentencing Lofthouse to an additional 48 months in prison because the Court merely corrected a "clerical error."[22] RAB 50-51 (citing NRS 176.565). The State is incorrect.

A clerical error is "...a mistake in writing or copying" or "[a]s more specifically applied to judgments and decrees a clerical error is a mistake or omission by a clerk, counsel, (or) judge, or printer which is not the result of the exercise of a judicial function." Channel 13 of Las Vegas, Inc. v. Ettlinger, 94 Nev. 578, 580, 583 P.2d 1085, 1086 (1978) (interpreting NRCP 60(a), the civil counter-part to NRS 176.565); see also <https://thelawdictionary.org/clerical-error/>, last accessed February 26, 2018 (a clerical error is a "mistake in writing or copying[.]"); Robertson v. State, 109 Nev. 1086, 1088 fn. 1, 863 P.2d 1040, 1041 fn. 1 (1993) (overruled on other grounds by Krauss v. State, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000) (a clerical error is

[22] The State did not specifically address whether the district court had jurisdiction to increase Lofthouse's maximum sentence while the case was pending in this Court. See AOB 84-85.

an error that fails to "make the record speak the truth concerning acts done."). Here, the district court's original sentence resulted from a miscalculation, **not** a "clerical error." The miscalculation, later incorporated into the original judgment of conviction, was not due to a "mistake in writing or copying" or a "mistake or omission" by the clerk, judge, or printer, **in the judgment or decree**. Likewise, the miscalculation did not fail to "make the record speak the truth concerning acts done" because the original Judgment of Conviction accurately reflected the court's oral pronouncement which was the "act done." Therefore, when the court re-sentenced Lofthouse and increased the maximum sentence the court violated Lofthouse's Nevada Constitutional right against double jeopardy. See Miranda v. State, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998). Accordingly, if this Court is not inclined to reverse Lofthouse's convictions then at minimum, this Court must remand Lofthouse's case for the district court to modify Lofthouse's sentence to 60 to 180 months.

XI. Cumulative Error.

The State asserts Lofthouse's cumulative error claim "fails" as he "has not presented any meritorious claims of error." RAB 51. Additionally, the evidence of Lofthouse's guilt was not close. Id.

Essentially, the State claims even if Lofthouse has asserted a substantiated error that error would be harmless "given the overwhelming evidence of guilt in this case." Id. at 52.

In actuality, numerous errors occurred in Lofthouse's case which individually and collectively violated his Due Process right to a fair trial. Moreover, although Lofthouse concedes he violated NRS 201.540, assuming Lofthouse could be charged with violating NRS 200.310(1) the issue of guilt for this offense is close as Lofthouse's conduct did not increase M.T.'s risk of harm. Accordingly, if this Court does not believe any individual error independently warrants reversal the cumulative effect of the errors absolutely warrants reversal.

CONCLUSION

Based upon the foregoing arguments, Lofthouse respectfully requests this Court reverse his conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

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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 5 day of April, 2018.

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

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