IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN LIPSITZ,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 72057

RESPONDENT'S ANSWERING BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN LIPSITZ, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 72057

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ROUTING STATEMENT

This case is not presumptively assigned to the Nevada Court of Appeals because it is a post-conviction appeal involving a conviction for offenses that are Category A and B Felonies. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

I. Whether the district court erred by not referring Appellant for a competency evaluation.
II. Whether the district court erred by permitting the victim to testify via simultaneous audiovisual transmission equipment.
III. Whether Appellant's conviction for Count 2 is valid.
IV. Whether there was sufficient evidence to convict Appellant.
V. Whether there was cumulative error.
VI. Whether NRS 50.700 is Constitutional.

STATEMENT OF THE CASE

On July 21, 2016, Ryan Lipsitz (hereinafter "Appellant") was charged by way of Indictment as follows: Count One – Indecent Exposure in the Presence of a Child or Vulnerable Person; Count Two – Sexual Assault; Count Three – Attempt Sexual Assault; Count Four – Battery with Intent to Commit Sexual Assault; Count Five – Sexual Assault; Count Six – Attempt Sexual Assault; Count Seven – Open or Gross Lewdness; Count Eight – Sexual Assault; and Count Nine – Coercion Sexually Motivated. 1 Appellant's Appendix (hereinafter "AA") 1-6. On August 2, 2016, Appellant was arraigned on the above charges, pleaded not guilty, and invoked his right to a speedy trial. 2 AA 300-09.

On September 1, 2016, the State filed a Motion to use Audiovisual Technology to Present Live Testimony at Trial. 1 AA 198. On September 2, 2016, Appellant filed an opposition. 1 AA 208. On September 8, 2016, the district court granted the State's motion. 2 AA 330-31.

On September 12, 2016, an Amended Indictment was filed, charging Appellant as follows: Count One – Indecent Exposure; Count Two – Sexual Assault; Count Three – Attempt Sexual Assault; Count Four – Battery with Intent to Commit Sexual Assault; Count Five – Sexual Assault; Count Six – Open or Gross Lewdness; Count Seven – Sexual Assault; and Count Eight – Coercion Sexually Motivated. Motivated. 1 AA 218-20. Appellant's jury trial commenced on September 12, 2016,

and concluded on September 19, 2016. 3 AA 339; 2 AA 260. The jury found Appellant guilty on all counts except Count Seven, for which they found him not guilty. 2 AA 260-61.

On November 29, 2016, Appellant was sentenced as follows: Count One – 364 days in the Clark County Detention Center; Count Two – 10 years to Life, concurrent with Count One; Count Three – 30 to 96 months, concurrent with Count Two; Count Four – 2 years to Life, concurrent with Count Three; Count Five – 10 years to Life, consecutive to Count Four; Count Six – 364 days in the Clark County Detention Center, concurrent to Count Five; Count Eight – 12 to 36 months, concurrent to Count Six, for an aggregate total sentence of 20 years to Life. 7 AA 1152-72. The Judgment of Conviction was filed on December 13, 2016. 2 AA 262-64.

On December 22, 2016, Appellant filed a Notice of Appeal. 2 AA 265. On April 2, 2018, he filed the instant Opening Brief (hereinafter "AOB"). The State herein responds.

STATEMENT OF THE FACTS

The Sexual Assault of H.C. by Appellant

On April 15th, 2016, H.C. voluntarily resided in Desert Hope, a substance abuse and alcohol facility. 4 AA 623. In addition to drug abuse, H.C. also suffered

from post-traumatic stress disorder stemming from being kidnapped and forced into sex trafficking. 4 AA 634.

On April 14, 2016, H.C. had been clean from narcotics for nearly 14 days. 4 AA 625. She felt that she was doing well in the program and was really excited for the future. Id.

At around 3:00 a.m. the following day, H.C. woke up and began to prepare for her day. 4 AA 629-30. H.C. put on a dress her old roommate let her borrow and jewelry. Id. It wasn't abnormal for H.C. to borrow clothes as she didn't come to Desert Hope with many. 5 AA 740. H.C. also wore makeup, as she does every day. 5 AA 739-40. At around 4:00 a.m., H.C. went to a designated lounge area called the T-Zone to read her NA (Narcotics Anonymous) book on the lounge couch. 4 AA 631. Shortly after beginning her book she fell asleep. Id.

After falling asleep, H.C. awoke to the sight of Appellant at the foot of the couch. 4 AA 634. H.C. had never seen this man before, but remembered that he was wearing all black and looked to be in his thirties. 4 AA 632. During her testimony H.C. recognized and identified the man as Appellant. 4 AA 652. Appellant stood at the foot of the couch smoking a cigarette with his pants dropped below his waist and his penis exposed. 4 AA 633. Thinking the man was a confused new patient, H.C. told him to pull his pants up and warned him that he should not smoke in the building. Id. Appellant responded by laughing and calling her cute, so H.C. closed

her eyes in an attempt to go back to sleep. Id. H.C. felt Appellant staring at her, so she opened her eyes to see him standing over her. Id. Appellant then forced himself on top of H.C. Id.

Appellant pulled down H.C.'s dress and began to touch, bite and lick her breasts. 4 AA 634. H.C. tried to push Appellant off of her but she was unsuccessful. 4 AA 636. She even tried to explain that they were in a rehab facility and that she was there for assistance with her drug abuse and post-traumatic stress disorder. 4 AA 634. Appellant simply replied, "bullshit." 4 AA 634-35. Appellant tried to kiss H.C., but she kept her lips shut, refusing to kiss back. 4 AA 636. Appellant then forced H.C.'s dress up to her stomach and penetrated her vagina with his fingers, while holding her hand with the other hand. 4 AA 636-38. While Appellant assaulted her, H.C. cried quietly. 4 AA 638. Her prior experiences as a victim of sex trafficking caused her to be afraid that Appellant would hurt her if she cried too loudly or cried out for help. Id. After assaulting her with his fingers, Appellant then inserted his penis into H.C.'s vagina. 4 AA 639-70. At this point, H.C. called out for help from staff but was not loud enough to draw attention. 4 AA 638-39. After a time, H.C. managed to push Appellant off of her. As she sat up, Appellant attempted to force H.C. to provide oral sex by holding the back of her head so her lips touched his penis and told her to "suck his dick." 4 AA 640-41. H.C. refused to

perform oral sex on Appellant, and he got angry and walked away mumbling to himself. 4 AA 641.

After Appellant walked away, H.C. fixed her clothing and remained in the T-Zone, crying. 4 AA 642. G.M., another patient of the Desert Hope facility, saw H.C. crying and asked what was wrong. 5 AA 716, 720-21. H.C. disclosed the rape to G.M. 5 AA 720. G.M. convinced H.C. to tell the nursing staff and the two walked over to the nurse's station. 5 AA 722. H.C. told nurses what had happened and then followed Appellant into the cafeteria where he got a drink before leaving the cafeteria and going outside. 4 AA 643. Once outside, Appellant hopped the fence outside the front entrance and left the premises. Id. One of the nurses in the facility called 911 from her cell phone while keeping following Appellant from a distance. 5 AA 757-58. Appellant was taken into custody by police shortly after. 5 AA 758.

After speaking with police at Desert Hope, H.C. was transported to the hospital where a rape kit was completed. 4 AA 644. Once the rape kit was completed, semen was detected on H.C.'s underwear, and Appellant's DNA was found on her neck, jaw, and chest. 6 AA 914-18.

Appellant's Competency During his Proceedings

Appellant's competency was a point of issue during the criminal proceedings. 2 AA 321. The State raised multiple concerns to the competency of Appellant during his proceedings. 2 AA 321, 331. During calendar call on September 6, 2016, the

State informed the court that Appellant had been sent to competency in another case and raised the point of competency in this case. 2 AA 321. The State's concern was met with rebuttal by defense counsel stating that she had no concerns regarding Appellant's competency and asking to proceed in the interest of a speedy trial. Id.

At calendar call on September 8, 2016, the State again raised concerns regarding the competency of Appellant based on the competency proceedings in his other case. 2 AA 331. The court ruled that it had seen nothing to suggest Appellant was incompetent. 2 AA 331-32. Specifically, the court noted that defense counsel represented that Appellant was communicating with his attorneys and was able to understand the nature of the charges, and that in court the judge observed that Appellant appeared to have a clear understanding of the facts of the case and his discussions with his attorneys. 2 AA 331-32. Thus, the court ruled, nothing appeared to give rise to a competency concern. 2 AA 332.

SUMMARY OF THE ARGUMENT

First, the district court did not err by not sua sponte referring Appellant for a competency evaluation because there was not substantial evidence that he was not competent to stand trial. To the contrary, his counsel and the district court both observed that he was able to communicate with his attorneys and to understand the proceedings against him.

Second, Appellant's right to confrontation was forfeited when he asked to be removed from the courtroom. Moreover, the victim's testimony via two-way live video did not violate the Confrontation Clause because she could see the courtroom, the jury could observe her demeanor, and she was under oath and subject to cross examination.

Third, the State agrees that Appellant cannot be guilty of attempting and completing the same act. However, Appellant's contention that it is the greater offense of sexual assault that should be vacated is without merit because the jury was properly instructed on the law of sexual assault and their conviction is valid.

Fourth, Appellant's claim that the victim's testimony alone is insufficient evidence is not supported by the law. Further, her testimony was corroborated by Appellant's presence and his DNA on her skin.

Fifth, Appellant has failed to show that there was more than one error, thus there is nothing to cumulate. Moreover, he has failed to show that the issue of guilt was close, or that this Court should doubt the outcome of his case.

Finally, Appellant has failed to show that NRS 50.700 violates the Constitution. This is particularly true because Appellant failed to raise this issue before the district court and this issue must therefore be analyzed for plain error. Appellant has failed to show that the statute is unconstitutional on its face, nor that he was prejudiced by the statute.

For these reasons, the State respectfully requests that the Judgment of Conviction be AFFIRMED.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR BY NOT REFERRING APPELLANT FOR A COMPETENCY EVALUATION

The test for whether a defendant is competent to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational and factual understanding of the proceedings against him. Jones v. State, 107 Nev. 632, 637-38, 817 P.2d 1179, 1182-83 (1991) (citing Melchor-Gloria v. State, 99 Nev. 174, 178-180, 660 P.2d 109, 113 (1983)). NRS 178.405 requires that "if doubt arises as to the competence of the defendant, the court shall suspend the proceedings, the trial or the pronouncing of the judgment, as the case may be, until the question of competence is determined." The "doubt" at issue in the statute is defined as "'substantial evidence' that the defendant may not be competent to stand trial." Olivares v. State, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008) (quoting Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113). A court is not required to institute the statutory mechanism for a determination of a defendant's competence in the absence of sufficient and reasonable doubt as to competency. Warden v. Conner, 93 Nev. 209, 210-211, 562 P.2d 483, 484 (1977). "The doubt mentioned in NRS 178.405 means doubt in the mind of the trial court, rather than counsel or others." Williams v. State, 85 Nev.

169, 174, 451 P.2d 848, 852 (1969). The determination of whether such doubt exists is within the discretion of the trial court. Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113.

In this case, Appellant never requested a competency hearing. After learning of competency concerns in Appellant's other case, it was the State who raised the subject of competency. 2 AA 321. However, Appellant's counsel specifically stated that she did not have concerns regarding his competency and would like to move forward with trial. Id. Indeed, defense counsel – who was in the best position to evaluate Appellant – stated multiple times that there were no competency concerns. Id.; 3 AA 347.

Appellant begins by arguing that his decision to wear a jail uniform at trial caused the district court to question his competency and therefore the court was obligated to pause the proceedings. AOB, 32. However, Appellant egregiously misrepresents the record. Although Appellant did state that he did not want to change into the provided street clothing because he is "particular" about his suits, the moment he learned that he would not be handcuffed in front of the jury he chose to wear street clothing. 3 AA 344. Immediately following the court's discussion with Appellant regarding clothing, the following exchange took place:

> THE COURT: Okay. Anything from the defense?
>
> MS. DOYLE: No, Your Honor.

MS. HAMERS: Judge – sorry. We would just ask – usually once they're dressed out they're not cuffed right here. I'd like him to be able to write and be able to –

THE COURT: Yeah, I don't see – I mean we would normally – is that –

THE CORRECTIONS OFFICER: It's a question – I'm going to ask my supervisor but it doesn't really matter –

[APPELLANT]: If I'm not –

THE CORRECTIONS OFFICER: -- if he's in a suit or if he's dressed like this.

[APPELLANT]: If I'm not going to be in –

THE COURT: Yeah.

[APPELLANT]: - belly cuffs I – I'll wear the suit.

THE COURT: I'm sorry, what?

MS. HAMERS: Oh.

[APPELLANT]: I just don't – I don't want to be handcuffed in a suit.

THE CORRECTIONS OFFICER: You're not going to be-

MS. HAMERS: You won't.

MS. DOYLE: Oh you won't be.

THE COURT: No.

MS. HAMERS: We'll take the handcuffs off.

[APPELLANT]: Oh, if the handcuffs come off, I'll – I'll dress out.

3 AA 344. Appellant was then removed from the courtroom to change his clothing. 3 AA 345. The district court confirmed with defense counsel that there were still no competency concerns on their behalf, and stated:

> Well again, noting for the record I mean in listening to him this morning actually he seemed – you know, and I didn't realize he didn't understand that the cuffs would come off if he – during the course of the trial. His rationale for why he didn't want to wear a suit if he was going to have handcuffs on, he would rather just have the prison clothes on actually is I think relatively a rational expression on his part so again, in terms of statements, communication and logic, it appears that – to the Court that he does meet the standard to be considered competent to move forward with the trial.

3 AA 347. The record is abundantly clear that Appellant did not lack a rational and factual understanding of the proceedings. He had a rational basis for initially refusing to wear street clothes – he thought he would look ridiculous in a suit and belly chains in front of the jury. The moment he realized his misunderstanding he sought to correct his mistake, even going so far as interrupting the corrections officer twice in order to quickly rectify the situation. Given the unusualness of the situation and the prior conversations regarding competency, the district court properly confirmed with defense counsel that their viewpoint had not changed, and then made a record regarding why the exchange regarding Appellant's clothing had not caused the court to doubt Appellant's competency.

Appellant next complains that his decision to be absent from the courtroom during trial should have caused the district court to sua sponte order a competency evaluation. AOB, 34. NRS 178.388(2)(a) states that "[t]he defendant's voluntary absence after the trial has commenced in the defendant's presence ***must not*** prevent continuing the trial to and including the return of the verdict." (Emphasis added). On the second day of trial, after jury selection, Appellant declared that he was unhappy with his attorneys because he felt they were not listening to him, and was unhappy that the victim was allowed to testify via audio-visual means. 4 AA 559-60. After learning that the court was steadfast in its ruling to allow the victim to testify in such a way, Appellant became upset and argued that the State had no evidence and the proceeding was a farce. 4 AA 556-95. Specifically, Appellant argued that "[i]f you're going to do it without the victim, you can do it without the defendant, I can go and play pinochle. I don't need to be here if I'm not going to be listened to word one. I don't need to be here." 4 AA 571. Appellant repeatedly stated that he felt he was not being listened to and that the trial would not be fair, and therefore he did not want to be present. 4 AA 571, 573, 582-83, 584, 585, 588-89. Finally, Appellant stated firmly "[o]nce more and the last time, I'm not going to participate in this. How can I leave immediately? Enjoy your trial." 4 AA 592. The district court confirmed that Appellant understood he had a right to be present, and then permitted him to leave. 4 AA 592-95.

Nobody who was present – not defense counsel, not the district court judge, not even the State who had previously raised the issue of competency – saw Appellant's outburst and refusal to be present as an indication that he was not capable of understanding the proceedings. They all saw it for what it was, a childish refusal to participate when things did not go his way. See 4 AA 572. Appellant was angry that the victim would not be appearing in person and made the decision to not participate in his case. The law provides for him to do so; simply availing oneself of that law cannot be enough for a defendant to be incompetent. While the record indicates that Appellant was angry, it does not indicate that he did not understand his actions or the proceedings. He was angry that the victim was not physically present, and declared that he would not be either. He even went so far as to argue that his absence would be noted by this Court, asking "Yeah, on appeal when – when a conviction's handed down and they said I'm sorry, they didn't have a victim or a defendant, how – how bad is that going to look?" 4 AA 592-93. Appellant's decision to waive his right to be present at trial was assuredly ill-advised, and may have even been a ploy to cause a reversal on appeal, but nothing in the record shows that he was incompetent when he made that decision and the district court did not err by not sua sponte referring him for a competency hearing when he waived that right.

Overall, the district court's determination that no reasonable doubt as to Appellant's competence was not an abuse of discretion given the lack of concern from Appellant's own counsel and the court's interactions with Appellant. Appellant's claim is therefore without merit and his conviction should be affirmed.

II. THE DISTRICT COURT DID NOT ERR BY PERMITTING THE VICTIM TO TESTIFY VIA SIMULTANEOUS AUDIOVISUAL TRANSMISSION EQUIPMENT

Appellant next complains that the victim in this case was not "unavailable" to testify, and therefore permitting her to testify via simultaneous audiovisual transmission equipment violated his Sixth Amendment rights. This complaint is without merit. As an initial matter, Appellant forfeited his confrontation right when he asked to be removed from the courtroom. He cannot choose to not be present at trial and also complain that he was unable to face the witness who testified at trial. Moreover, the use of live two-way video testimony does not violate the Confrontation Clause.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364 (2004). Thus, testimonial hearsay—i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony—may only be admitted at trial if the declarant is

"unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S. Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52, 60 n.9, 124 S. Ct. at 1369 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82 (1985)).

Regarding a witness's physical presence in the courtroom, this Court has established a rule which permits the use of audiovisual testimony at trial in criminal proceedings. Supreme Court Rules Part IX-A(B). Rule 2 within that Part is entitled, "Policy favoring simultaneous audiovisual transmission equipment appearances," and states:

> The intent of this rule is to promote uniformity in the practices and procedures relating to simultaneous audiovisual transmission appearances. To improve access to the courts and reduce litigation costs, courts ***shall*** permit parties, to the extent feasible, to appear by simultaneous audiovisual transmission equipment at appropriate proceedings pursuant to these rules.

(Emphasis added.) Thus, where applicable, Nevada Courts must allow witnesses to testify via audiovisual transmission equipment.

Rule 4 of the same Part provides further guidance on when the use of audiovisual equipment is appropriate. The entirety of Rule 4 follows:

1. Except as set forth in Rule 3[1], a witness may appear by simultaneous audiovisual transmission equipment in all other criminal proceedings or hearings where personal appearance is required unless the court determines that the personal appearance of the witness is necessary.

2. If, at any time during a proceeding conducted by simultaneous audiovisual transmission equipment, the court determines that a personal appearance is necessary, the court may continue the matter and require a personal appearance by the witness.

3. A party wishing to offer the appearance of a witness at a criminal proceeding by simultaneous audiovisual transmission equipment under this rule shall, not later than 5 judicial days before that proceeding, notify the opposing party by certified mail in a form substantially similar to Form 1 attached hereto, unless good cause is shown why such notice could not have been provided.

4. ***Private vendor; charges for service.*** A court may provide simultaneous audiovisual transmission equipment for court appearances by entering into a contract with a private vendor. The contract may provide that the vendor may charge the party appearing by simultaneous audiovisual transmission equipment a reasonable fee, specified in the contract, for its services. The court or the vendor may impose a cancellation fee to a party that orders services and thereafter cancels them on less than 48 hours' notice. A court, by local rule, may designate a particular audiovisual provider that must be used for audiovisual transmission equipment appearances.

5. ***Procedure.***

(a) The court must ensure that the statements of participants are audible and visible to all other

[1] Rule 3 states that audiovisual testimony may be used in all criminal proceedings except juvenile and appellate proceedings.

participants and the court staff and that the statements made by a participant are identified as being made by that participant. The court may require a party to coordinate with a court-appointed person or persons within a certain time *before* the proceeding to ensure the equipment is compatible and operational.

(b) Upon convening a simultaneous audiovisual transmission proceeding, the court shall:

(1) Recite the date, time, case name, case number, names and locations of the parties and counsel, and the type of proceeding;

(2) Ascertain that all statements of all parties are audible and visible to all participants;

(3) Give instructions on how the proceeding is to be conducted, including notice if necessary, that in order to preserve the record, speakers must identify themselves each time they speak; and

(4) Place the witness under oath and ensure that the witness is subject to cross-examination.

6. ***Reporting.*** All proceedings involving simultaneous audiovisual transmission equipment appearances must be reported to the same extent and in the same manner as if the participants had appeared in person.

7. ***Information on simultaneous audiovisual transmission equipment.*** The court must publish a notice providing parties with the particular information necessary for them to appear or have a nonparty witness testify by simultaneous audiovisual transmission equipment at proceedings in that court under this rule.

> **8.** ***Public access.*** The right of public access to court proceedings must be preserved in accordance with law.

There is no contention that the State or district court violated the procedure established by this Court. Instead, Appellant contends that because the victim was not required to be physically present in the courtroom, Appellant's Sixth Amendment right to confrontation was violated. Appellant spends a great deal of time complaining about the district court's determination that H.C. was not available to be physically in the courtroom, but fails to cite to ***any*** legal authority which supports his contention that a defendant is entitled to ***physically*** face his accuser. AOB, 37-43. Rather, each case cited by Appellant discusses either out of court statements made to a third party or the admission of prior testimony. See Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004); Power v. State, 102 Nev. 381, 724 P.2d 211 (1986); Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980); Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318 (1968); Motes v. United States, 178 U.S. 458, 20 S. Ct. 993 (1900). He states that "there is [] little doubt that video testimony does violate the confrontation clause and can be tolerated only when absolutely necessary," AOB, 43, and cites to Roberts, which mentions the Framers' "preference" for face-to-face accusation, but analyzed a situation in which a witness's preliminary hearing testimony was introduced but the witness did not testify at trial. Roberts, 448 U.S. at 65. Unlike Roberts, or any of the other cases cited by Appellant, H.C. was under oath, in front of the jury (via video), and subject

to cross-examination. Therefore, the law relied on by Appellant is inapplicable here. It is the appellant's responsibility to provide relevant authority and cogent argument, and when an appellant fails to adequately brief the issue, it will not be addressed by this court. Maresca v. State, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987); see also Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this Court need not consider claims that are not cogently argued or supported by relevant authority); Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707 (2000) (issue unsupported by cogent argument warrants no relief). Therefore, this claim should be summarily denied because Appellant has failed to support his claim that he was entitled to physically face his accuser when (1) he waived his right to be present at trial, and (2) the victim testified via live video feed, the jury could observe her demeanor, she could view the courtroom, and she was subject to cross-examination.

Nonetheless, to the extent this Court is inclined to address Appellant's unsupported argument, the State is aware that the United States Supreme Court has stated that the elements of confrontation include physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Maryland v. Craig, 497 U.S. 836, 846, 110 S. Ct. 3157, 3163 (1990) (internal citations omitted). However, the Court recognized that physical presence is not an essential condition of the Confrontation Clause and the Court has "never insisted on an actual face-to-

face encounter at trial in *every* instance in which testimony is admitted against a defendant." Craig, 497 at 847, 110 S. Ct. at 3164 (internal citations omitted) (emphasis in original). Indeed, the Court has also held that "oath, cross-examination, and demeanor provide 'all that the Sixth Amendment demands: substantial compliance with the purposes behind the confrontation requirement.'" Id. (quoting Roberts, 448 U.S. at 69, 100 S. Ct. at 2540).

In Craig the Court addressed whether a Maryland rule permitting a child victim of abuse to testify via one-way closed circuit television violated the Confrontation Clause. Craig, 497 U.S. at 841, 110 S. Ct. at 3161. Under the rule, the child was examined and cross-examined in a room separate from the defendant, and the questioning was displayed to the jury via one-way video. Id. The defendant could communicate with counsel electronically. Id. at 842, 110 S. Ct. at 3161. Thus, the defendant and the jury could view the child's demeanor and the child was under oath and subject to cross-examination, but the child could not see the defendant or the courtroom. Id. at 841, 110 S. Ct. at 3161. The Court ruled that "[s]o long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case." Id. at 860, 110 S. Ct. at 3171.

Obviously, the case at hand is different in that H.C. did not testify via a one-way closed circuit television, but rather through two-way video. Therefore, just like in Craig, the jury could view her demeanor, and she was under oath and subject to cross-examination but, in addition, H.C. could also see the courtroom, and would have been able to see Appellant if he had not waived his right to be present. The United States Supreme Court has not yet ruled on this procedure. In denying a petition for writ of certiorari, the Court recognized that whether a defendant's Confrontation Clause rights "were violated when the State introduced testimony at his trial via a two-way video that enabled the testifying witness to see and respond to those in the courtroom, and vice versa…is obviously not answered by [Craig]." Wrotten v. New York, 560 U.S. 959, 960, 130 S. Ct. 2520, 2520 (2010). The Court further explained that while a defendant's confrontation right can be satisfied without a physical face-to-face confrontation where it is necessary to further an important public policy, the required finding of necessity must be a case-specific one and since Wrotten was strikingly different than Craig, Craig was not controlling. Id.

As discussed, the instant case is also strikingly different than Craig. However, even relying on Craig's requirement that a physical confrontation is not necessary so long as it is for an important public policy and necessary for the specific case, the use of two-way video here was appropriate. This Court established Rule Part IX-A(B) "to improve access to the courts and reduce litigation costs." This public policy

of widening access to the courts is an important societal need. Moreover, the district court made a specific finding that H.C. could not be physically present because of the treatment she was undergoing in Florida. Although Appellant dislikes the fact that H.C.'s treatment was lengthy and voluntary, that does nothing to change the fact that she was undergoing medical treatment and, as part of that treatment, was not allowed to travel. 1 AA 207. Many medical treatments are "voluntary," but that does not reduce the importance of them, nor does it change the treatment requirements.

Although the Supreme Court has yet to definitively weigh-in on the issue of using two-way video, Circuit Courts have deemed the use of such appropriate when it is necessary and case-specific findings are made. See Horn v. Quarterman, 508 F.3d 306, 318-20 (5th Cir. 2007); Harrell v. Butterworth, 251 F.3d 926, 930-31 (11th Cir. 2001). In Horn a terminally ill witness was advised by his doctors not to travel, so he instead testified via two-way video. Horn, 508 at 313. The Fifth Circuit found that, given the witnesses illness and inability to travel, and that the other elements of the defendant's confrontation rights were preserved, it was not an unreasonable application of federal law to permit the witness to testify via two-way video. Id. at 317. Similarly, in Harrell, the Eleventh Circuit found that when a witness was in poor health and could not travel from Argentina to the United States, and was essential to the case, it was permissible to let the witness testify via two-way video.

Harrell, 251 F.3d at 931. As to finding an important state interest, the Eleventh Circuit found that it is in the state's interest to quickly and justly resolve pending criminal matters. Id.

As in Horn and Harrell, the witness in this case was medically prevented from traveling to testify in person, and was an essential witness. The State, and Appellant, had an interest in resolving the matter in a timely fashion. Were, as here, a two-way video was utilized and all of the other elements of confrontation were preserved, there was no error with the process and reversal is not warranted.

Because Appellant has failed to show that his right to confrontation was violated, he has also necessarily failed to show that he was forced to choose between two rights. AOB, 42-43. The use of two-way live video did not violate the Confrontation Clause. Therefore, the district court did not "pit" Appellant's rights against each other, but rather ensured that Appellant's right to a speedy trial would be honored by utilizing an appropriate means to establish witness testimony in a timely manner.

III. APPELLANT'S CONVICTION FOR COUNT 2 IS VALID

Appellant was convicted and sentenced on Counts 1-6 and Count 8. Appellant argues that it was error to adjudicate him guilty of both Count 2: Sexual Assault and Count 3: Attempt Sexual Assault because they stem from the same incident. AOB, 44-48. The State agrees that Appellant cannot be guilty of an attempted and

completed act arising from the same act. However, Appellant's contention that it is the sexual assault which should be vacated is not supported by law.

Appellant argues that touching his penis to H.C.'s lips does not constitute sexual assault because there was no intrusion. AOB, 47. While Appellant is correct that NRS 200.366 defines sexual assault as "subject[ing] another person to sexual penetration…" his representation that penetration is defined only as intrusion is incorrect. AOB, 47. Appellant omits the fact that NRS 200.364(9) defines penetration as "cunnilingus, ***fellatio***, ***or*** any intrusion, however slight…" (Emphasis added). Thus, fellatio is statutorily an act of penetration which satisfies the elements of sexual assault. This Court has accepted the Black's Law Dictionary definition of fellatio as an "offense committed with the male sexual organ and the mouth," and Webster's definition as "the practice of obtaining sexual satisfaction by oral stimulation of the penis." Maes v. Sherriff, 94 Nev. 715, 716, 582 P.2d 793, 794 (1978).

Appellant claims that the trial court disagreed that Appellant touching his penis to H.C.'s lips constituted sexual assault. AOB, 47. To the contrary, the district court actually ruled that he would follow Maes and define fellatio as oral stimulation of the penis for sexual satisfaction. 7 AA 1032. Specifically, the judge stated:

> Parties can argue whether the touching of the lips, which obviously is party of the mouth, in this instance was done for oral stimulation of the penis for sexual satisfaction, but I think that gives everybody the room to make whatever

> argument they want to in that regard. But that's going to be the definition used in here. I think it does necessarily – just the touching of the penis to the mouth is not sufficient, has to be done in effort to obtain sexual satisfaction and oral stimulation.

Id. Thus, the court did not rule that Appellant touching H.C.'s lips with his penis could not be a completed act of sexual assault, just that it needed to be done in an effort to obtain sexual satisfaction and oral stimulation. That was the definition of fellatio supplied to the jury, and they ultimately found him guilty of sexual assault related to the fellatio. 2 AA 235, 260. Beyond his misleading argument regarding the district court's ruling, Appellant offers no support for his contention that he did not penetrate H.C., as defined by statute.

Because the jury was properly instructed as to the definitions of sexual assault, penetration, and fellatio, their determination that Appellant completed the sexual assault is appropriate and valid. As to whether the lesser or greater offense should be dismissed, the appropriate remedy for two offenses which are "alternative" or mutually exclusive is dismissal of the lesser of the two offenses. Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004) (reversing lewdness with a minor conviction which was redundant and mutually exclusive of the sexual assault conviction); Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 420-21 (2002) (same result). Even in the Double Jeopardy context, the appropriate remedy is to "look to

the range of punishment for the principal offenses and reverse the conviction with the lesser penalty." LaChance v. State, 130 Nev. ___, 321 P.3d 919, 923 (2014). Therefore, the State does not oppose remanding Appellant's case for the limited purpose of dismissing Count 3: Attempt Sexual Assault. The sentence on Count 3 was concurrent to Count 2, and thus added no additional time to Appellant's sentence. Accordingly, vacating Count 3 will not change Appellant's aggregate sentence.

IV. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97

Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (Court held it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (In all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court), cert. denied, 429 U.S. 895, 97 S. Ct. 257 (1976). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 319-20, 99 S. Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S. Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S. Ct. at 2789.

Finally, this Court has consistently held that "the uncorroborated testimony of a victim, ***without more***, is sufficient to uphold a rape conviction." Gaxiola v. State, 121 Nev. 633, 648, 119 P.3d 1225, 1232 (2005) (emphasis added) (citing *State v.*

Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996); *Washington v. State*, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996); *Hutchins v. State*, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994); *Rembert v. State*, 104 Nev. 680, 681, 766 P.2d 890, 891 (1988); *Deeds v. State*, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981); *Henderson v. State*, 95 Nev. 324, 326, 594 P.2d 712, 713 (1979); *Bennett v. Leypoldt*, 77 Nev. 429, 432, 366 P.2d 343, 345 (1961); *Martinez v. State*, 77 Nev. 184, 189, 360 P.2d 836, 838 (1961); *State v. Diamond*, 50 Nev. 433, 437, 264 P. 697, 698 (1928)).

Ignoring this well-established case law, Appellant argues that because the victim in this case admitted lying to the police about how closely the staff at the rehabilitation facility supervised her, and because she has a history of drug and psychological issues, there must not be sufficient evidence to support his conviction. AOB, 44-52. To the contrary, the jury – who was in the best position to judge the testimony of the victim – heard her testify in detail about how Appellant assaulted her and found her credible. Furthermore, Appellant was seen leaving the rehabilitation facility by nurses, thereby confirming his presence. 5 AA 758. Moreover, Appellant's DNA was found on the victim, and semen was found on her underwear. 6 AA 614-18. H.C.'s testimony alone was sufficient to convict Appellant, and it was within the province of the jury to evaluate her credibility. Even so, the jury had additional evidence of Appellant's guilt to consider here. Given the

evidence in this case, a reasonable jury could have been – and was – convinced of Appellant's guilt.[2]

V. THERE WAS NO CUMULATIVE ERROR

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

Appellant has only asserted one meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (Emphasis added). Second, the evidence of guilt is not close. H.C. testified in detail regarding how Appellant sexually assaulted her. 4 AA 633-642. Moreover, Appellant was seen at the crime scene by other witnesses, and his DNA was found on H.C. 5 AA 758, 6

[2] As to Appellant's suggestion that H.C. let him in the building and was expecting him, AOB, 49-50, Appellant was not convicted of impermissibly being present at the facility, but rather of sexually assaulting H.C. Even if one were to accept that H.C. let him in the building, that would not foreclose a finding of guilt for his actions once inside.

AA 614-18. Finally, Appellant certainly has not shown that the cumulative effect of these errors was so prejudicial as to undermine the court's confidence in the outcome of Appellant's case. Therefore, Appellant's claim of cumulative error has no merit and his conviction should be affirmed.

VI. NRS 50.700 IS CONSTITUTIONAL

Finally, Appellant argues that NRS 50.700 is unconstitutional. AOB, 55-64. Added by the legislature in 2015, the statute reads in relevant part:

> 1. In any criminal or juvenile delinquency action relating to the commission of a sexual offense, a court may not order the victim of or a witness to the sexual offense to take or submit to a psychological or psychiatric examination.

Appellant claims that by prohibiting the district court from ordering a victim to undergo psychological examination, a defendant is left without a defense and therefore this statute is a violation of Due Process. This claim is without merit.

This Court reviews the constitutionality of a statute de novo. Berry v. State, 125 Nev. 265, 279, 212 P.3d 1085, 1095 (2009) (citing Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)). However, this Court starts with the presumption that a statute is constitutional. Id. This Court will not invalidate it unless the party challenging the statute makes a "clear showing of invalidity." State v. Castaneda, 126 Nev. __, __, 245 P.3d 550, 552 (2010). Further, "every reasonable construction must be resorted to, in order to save a statute from

unconstitutionality." Id. (quoting Hooper v. California, 155 U.S. 648, 657, 15 S. Ct. 207, 211 (1895)).

In this case, however, Appellant failed to raise this claim below. Indeed, he not only never raised the issue of the constitutionality of NRS 50.700, he did not ever seek a compelled psychological examination of the victim. That failure waives all but plain error, if the Court chooses to review this claim at all. Maestas v. State, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012). In Maestas, this Court made clear that it would only review for plain error if the record shows an adequate basis on which to review a claim. Id. at 146, 275 P.3d at 89. Indeed, the Court specifically stated that while it "may consider constitutional issues raised for the first time on appeal, 'it will not do so unless the record is developed sufficiently both to demonstrate that fundamental rights are, in fact, implied and to provide an adequate basis for review.'" Id. (quoting Wilkins v. State, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980)).

Here, not only did the district court not have an opportunity to rule on the issue of constitutionality, Appellant never raised the subject of getting a compelled psychological examination at all. Accordingly, the district court never refused to grant a compelled examination. Moreover, given the lack of evidence in the record, Appellant cannot show that the district court would not have granted his request if it

had been made. By not raising this issue at all, in any form, before the district court Appellant has precluded this Court's ability to review it and it is therefore waived.

To the extent this Court is inclined to review this waived claim, unpreserved constitutional error is reviewed for plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (Nev. 2015). Plain error is "so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). An appellant has the burden to demonstrate that the error affected his substantial rights, by causing actual prejudice or a miscarriage of justice. Martinorellan, 131 Nev. at __, 343 P.3d at 591. Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error is prejudicial to his substantial rights. Id. Here, there is no plain error because a casual inspection of NRS 50.700 does not reveal the statute unconstitutional. To the contrary, as is apparent from Appellant's nine pages of argument, any claim that NRS 50.700 is unconstitutional requires detailed and thorough analysis of case law and legislative history. Furthermore, Appellant fails to demonstrate that NRS 50.700 is unconstitutional or that his argument for unconstitutionality actually applies to him. Therefore, he cannot show actual prejudice.

Appellant begins by pointing out that the legislative history surrounding NRS 50.700 focused on the impact on children of undergoing mandatory psychological examinations and argues that the statute goes beyond the scope of what the

legislature intended. AOB, 56-58. However, the statute as approved by the legislature clearly relates to the "victim of or a witness to the sexual offense" without limiting it. Words in a statute are given their plain meaning, and courts may not go beyond the statute's language to consider legislative intent. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). Moreover, showing that there was discussion regarding how this statute would impact one group of people, child victims, does not show that the legislature intended for it to only impact that group, especially when the language of the statute itself offers nothing to suggest such an interpretation.

Appellant next discusses this Court's ruling in Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006). In Abbott the Court overturned its ruling from State v. District Court (Romano), 120 Nev. 613, 97 P.3d 594 (2004). Romano held that a defendant was only entitled to a psychological examination of a sexual assault victim if the State intended to examine the victim using its own expert and the defendant showed a compelling need for the psychological examination. Abbott, 122 Nev. at 723, 138 P.3d at 468. The Court found that such a rule essentially allowed the State to act as a gatekeeper for whether or not a defendant could receive a court-ordered psychological examination of a victim and was impermissible. Id. at 724, 138 P.3d at 468. In discussing the concerns associated with ordering child victims to undergo psychological exams, the Court stated that permitting a child who is a "compelling,

sympathetic witness" to testify without leaving a defendant an opportunity to present an adequate depiction of the child's character for truthfulness leaves the defendant "in essence…without a defense." Id. at 726, 138 P.3d at 469-70. It is this statement – discussing a child's character for truthfulness – to which Appellant now clings.

Appellant then likens the prohibition on ordering victims to undergo psychological examinations to abolishing insanity as a criminal defense and excluding all the evidence a defendant has to present, both of which have been found to be unconstitutional. AOB, 59-60; see Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001); Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2141 (1986). Thus, Appellant argues, preventing a defendant from receiving a court-ordered psychological examination of a victim is the denial of a defense, and the complete denial of a defense is unconstitutional. AOB, 60.

Appellant's stretching argument is unpersuasive. The statement relied on so heavily by Appellant from Abbott is nothing more than judicial dictum analyzing various concerns and is not essential to the holding. As dictum, this "test" is not binding on Nevada. See Black v. Colvin, 142 F. Supp. 3d 390, 395 (E.D. Pa. 2015) ("Lower courts are not bound by dicta." (citing United States v. Warren, 338 F.3d 258, 265 (3d Cir. 2003))). Assuming, *arguendo*, that the statement is controlling, it is limited to the situation it was discussing – a child witness's character for

truthfulness. In this case, where the victim was an adult, the statement would not apply.

Moreover, Appellant has failed to show that the statute led to the complete denial of ***his*** defense. To the contrary, he argued H.C. invited him to the rehabilitation facility in order to provide drugs for her. 7 AA 1105-06. He spent a great deal of time arguing that H.C.'s version of events did not make sense, and that she "wanted to hook up with [Appellant]." 7 AA 1105-1113. He also argued that there was a lack of forensic evidence. 7 AA 1118-19. Finally, he argued that H.C. was addicted to drugs, that she lied to the police, and that she had a motive for creating a false story. 7 AA 1120. Appellant now claims that a psychological examination was necessary in order for him to present a defense, but he fails to address the fact that he was able to present a strong defense, including introducing evidence of H.C.'s psychological difficulties and attacking her credibility. In spite of hearing that evidence, the jury determined that Appellant was guilty. He has failed to show that a psychological examination of H.C. was necessary for his defense, or that having one would have changed the outcome of his case.

Because Appellant has failed to show that any error in NRS 50.700 was readily apparent and that the error was prejudicial to his substantial rights he has failed to establish plain error and his claim should be denied.

//

CONCLUSION

For the foregoing reasons, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED, with the exception of Count 3.

Dated this 23rd day of July, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,775 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 23rd day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 23, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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