IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVYN PERRY SPROWSON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 73674

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE FACTS

In 2013, 16 year old J.T. lived with her mom, grandmother and two sisters. 10AA2208. In August of 2013, J.T. met Appellant on Craigslist and began speaking with him over the Internet. 10AA2210, 2216. Appellant had an ad on Craigslist that said, "Lonely millionaire" and stated a fake age of 34. 10AA2210-11. In the course of communicating, J.T. told Appellant that she was 16 and that her mother could not know they were talking. 10AA2212-13, 2217.

At first J.T. and Appellant communicated through Craigslist e-mail, where they exchanged photos. 10AA2213. Later, they communicated through Kik, a texting application, because it was easier than e-mailing and because J.T.'s mother could not see the messages like she could with traditional texting. 10AA2217-18.

Eventually Appellant asked her to be his girlfriend and she said yes. 10AA2218-19. After they became boyfriend and girlfriend Appellant asked her for "sexy pictures" and she sent them. 10AA2219. He did not think they were sexy enough, so he directed J.T. to pose in different positions. 10AA2219-20. Specifically, J.T. testified that she did not think of taking her clothes off, but that Appellant requested her to. 10AA2226. He also asked for pictures of her butt, her crotch, and partly nude photos. 10AA2225-29. When asking for one of the crotch photos, Appellant specifically directed J.T. to "spread [her] legs." 10AA2230.

After they began talking, Appellant went to J.T.'s work without informing her to observe her working. 10AA2233. After he left he texted her and told her he had been there, describing what she was wearing. Id.

Eventually J.T. met with Appellant at a roller skating rink. 10AA2234. J.T. was there with a friend, and J.T. told her friend that Appellant was one of her old teachers. 10AA2234-35. At that point, J.T. still did not know that Appellant was really 44 instead of 34. 10AA2235-36. She did not find out his real age until she slept over at his house. 10AA2236. At the roller rink the two had a short conversation and then Appellant left. 10AA2236.

J.T. did not tell her mom that she was communicating with Appellant. 10AA2237. J.T. told Appellant that she could not tell her mom because she would

not be happy, and J.T. made sure to call Appellant first if they were going to talk so they could avoid being caught. 10AA2237.

The first time J.T. went to Appellant's house she told her mom that she was at a friend's house. 10AA2238-39. Appellant picked her up at Target and drove her to his house where J.T. stayed for two nights. 10AA2239-42. During the two nights at Appellant's house, they drank alcohol, had sexual intercourse, and did not use a condom. 10AA2241-43. On the second morning, Appellant gave J.T. a promise ring that looked like a wedding ring. 10AA2243-44.

J.T. wore the ring around her neck so her mom would not see it. 10AA2247. Her mom did see it, however, and J.T. made up multiple lies about where she got it. 10AA2247. J.T.'s mom did not believe her and took away J.T.'s phone and computer. 10AA2248-49. After looking through J.T.'s phone, her mom realized J.T. had been calling a strange number and grew suspicious. 10AA2248. J.T. had her phone on the bus one day and informed Appellant that her mom was growing wary.

On August 28, J.T. told her mom that she needed her laptop for a project, and e-mailed Appellant to tell him that they would not be able to talk for a while and they needed to figure something out. 10AA2250-51. They devised a plan where Appellant would pick J.T. up from home in the early morning while her mom slept. 10AA2251. Appellant told J.T. to bring her social security card and birth certificate with her, which she did. Id. She also found her cell phone and laptop and brought

them with her. 10AA2252. Appellant was waiting for her in front of her house; he confirmed that she brought the documents, and instructed her to turn off her cell phone so her family could not track it. 10AA2253. Appellant drove J.T. to his house, and when they arrive he changed the number on his cell phone because J.T.'s mom knew the number and he did not want her to be able to track him. 10AA2254.

J.T. lived with Appellant for two months, from August 28th until November 1st. 10AA2276. Appellant was a teacher and while he was at work, J.T. would color or watch television or movies. 10AA2262. Before J.T. lived with Appellant, she attended school but did not go to school while living with him; they planned that she would return to school when she was 17 and a half because at that point they thought she would be old enough to stay with Appellant. 10AA2256-57. Appellant gave J.T. a coloring book and one fiction book, but no educational supplies. 10AA2257-58. She was allowed to use her laptop but she could not touch her phone because her family might find her. 10AA2258-59.

J.T. testified that she had rules when she lived with Appellant that included not turning her phone on, not to go outside because she could be recognized, and to not have anyone over to the house – especially other males. 10AA2263-64.

Appellant took J.T. out of the house only a few times; once he took her to the lake because she wanted to get outside, and one time, when she missed her family, he drove her by their home at night without stopping. 10AA2264-65. On one other

occasion they went to Walmart at night, however, Appellant left J.T. in the car and had her recline her seat back while wearing a hat and glasses. 11AA2381. Indeed, whenever they left the house Appellant had the idea that J.T. should dress like a boy by wearing a hat and glasses, loose clothing, and putting her hair up. 10AA2265.

Although the doors were not locked and J.T. was physically free to leave, she did not feel emotionally free to leave. 10AA2265-66. Approximately two to three times per week Appellant would get angry and tell J.T. to pack her bags because he was taking her home. 10AA2266-68; 11AA2432. After she did, Appellant would become sad and cry and would ask J.T. to stay, so she did. 10AA2266-68. One of these occasions occurred when J.T. said she missed her family. Id.

Appellant devised a plan whereby if the two were caught J.T. would say that Appellant had been looking for a roommate on Craigslist and J.T. moved in with him, but they were not in a sexual relationship. 10AA2260. J.T. agreed to the plan. Id. Once, while she was living with Appellant, a private investigator came to the door looking for J.T. 10AA2268. After Appellant looked through the peephole, he told J.T. to gather her things and hide. 10AA2269. She sat on the stairs and could hear Appellant and the investigator talking; she could tell that the investigator was looking for her, and Appellant responded that he did not know what he was talking about. Id. After the investigator left, Appellant told J.T. they were fine and the investigator believed what he told him. 10AA2270. Another time, Appellant came

home with a missing poster looking for J.T. 10AA2278. In spite of that, Appellant would tell J.T. that her mom was not looking for her and that her mom did not care. 10AA2279. On another occasion, Appellant returned from work and told J.T. that the police had come to his work looking for her, and they did not think he was a bad guy but they thought she was a prostitute. 10AA2281-82.

In the nine weeks that J.T. was with Appellant, they were intimate two or three times a week. 10AA2279. Appellant was picky about some things, getting upset about the way J.T. did dishes and telling her that her handwriting was bad, and she could not sing. 10AA2280. While she lived with him he provided her with alcohol more than one time and on one occasion she got "pretty drunk." 10AA2281.

On November 1st, the police came to the door while J.T. was home alone. 10AA2283. J.T. spoke with them but was not entirely honest and tried to stick to the plan she and Appellant made. 10AA2284. J.T. was then taken to the Southern Nevada Children's Assessment Center where she spoke with a female and was more forthcoming, but still tried to stick to the plan. 10AA2284-85. She was then taken to her mom's house, but felt guilty because she did not stick to the plan and she wanted to return to Appellant's home. 10AA2286. After trying to leave the house and go back to Appellant's a few times, J.T.'s mother took her to Montevista, a behavioral health center. 10AA2287. J.T. stayed at Montevista for three days and returned to her mother's house; however, the treatment she received was not helpful

and all she could think about was getting back to Appellant. 10AA2287-88. J.T. and her mom later got in an argument because her mom would not let her leave the house. 10AA2288. J.T. threatened to kill herself and tried to jump off their house balcony to get out of the house and her mom took her back to Montevista. 10AA2288-89. J.T. remained at Montevista for approximately a month while awaiting a position in a long-term treatment facility, Willow Springs. 10AA2290. She was at Willow Springs for almost six months and continued to see therapists at the time of trial. 10AA2298-3000. While at Willow Springs, J.T. had to learn how to regulate her emotions as well as re-learn how to interact in society. 10AA2299-2300.

After leaving Willow Springs J.T. returned to her mother's home. 10AA2301. She believed that Appellant was in jail, however, he was not and began contacting her through Instagram using fake names. Id. J.T. was angry that Appellant was contacting her and that he gave her an STD. 10AA2307-08. Although she struggled with the decision, she knew that Appellant should not have contacted her and informed her mother and the police. 10AA2310-11.

At trial it was revealed that J.T. had lied at the preliminary hearing; she testified that she was honest on direct examination but lied during cross-examination because during the break Appellant was mouthing "I love you" and "it's okay," as well as winked at her and placed his hand over his heart. 10AA2292-97. She felt

guilty and decided to revert back to the plan they previously devised, so she tried to protect Appellant during cross-examination. Id.

SUMMARY OF THE ARGUMENT

First, Appellant's claim that the court marshal engaged in voir dire is without merit because the marshal did not question the jurors about their qualifications. Moreover, the jurors who were dismissed may have been released by a court administrator, and Appellant cannot show he was prejudiced by having an opportunity to discuss whether or not to dismiss them.

Second, the victim's prior sexual history was properly excluded as irrelevant. The information had nothing to do with the charges Appellant faced. The information that the victim had mental problems before meeting Appellant was properly admitted into evidence, however, the reasons behind her previous mental problems were irrelevant and properly excluded.

Third, Appellant's convictions on Counts 3 and 5 were proper either as sexual conduct because a minor exposing her vaginal area and pubic hair constitutes lewd exhibition of the genitals, or as sexual portrayal. Moreover, as this Court recently held, NRS 200.700(4) is not unconstitutional because child pornography is not protected under the First Amendment, the statute is not overbroad, nor is it vague.

Fourth, the district court did not err by not *sua sponte* offering to pay the expenses for Appellant's witness. This is particularly true when Appellant did not

notice the witness, did not subpoena her, and never requested funds to transport her. Although Appellant was granted funds to cover reasonable defense costs, the district court was not required to volunteer those funds for an unreasonable situation such as this.

Fifth, there was no prosecutorial misconduct because the State presented a proper introduction to the jury by providing an overview of the case, properly engaged in voir dire by questioning a juror about her knowledge of a topic that may have come up, and did not comment on Appellant's constitutional rights by pointing out that the victim was afraid of Appellant at trial and asking the jury to hold him responsible for his crimes.

Finally, Appellant has failed to exhibit cumulative error as he has failed to show there was any error or that the question of guilt was close.

For these reasons, the State respectfully asks this Court order Appellant's Judgment of Conviction be AFFIRMED.

ARGUMENT

I. THERE WAS NO STRUCTURAL ERROR WHEN JURORS GAVE UNSOLICITED STATEMENTS TO THE COURT MARSHAL

Appellant begins by complaining of structural error, alleging that the court marshal questioned potential jurors outside the parties' presence. AOB, 10-17. Before the jury was brought into the courtroom to begin voir dire, the court marshal informed the jurors about reasons which were not appropriate to excuse them from

jury service, and some of the jurors then informed the marshal of reasons they felt they were unable to serve. 8AA1747. Appellant claims this amounts to voir dire and the district court erred in not administering the truthfulness oath as required by NRS 16.030(5), therefore amounting to structural error pursuant to Barral v. State, 131 Nev. Adv. Op. 52, 353 P.3d 1197 (2015).

In Barral, this Court found that the district court's refusal to administer the truthfulness oath before conducting voir dire, and after defense counsel requested it, amounted to structural error because the conviction resulted from an improperly selected jury. Barral, 131 Nev. Adv. Op. at ___, 353 P.3d at 1200. "The structural error doctrine [exists] to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affects the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" Weaver v. Massachusetts 137 S.Ct. 1899, 1907 (2017) (quoting Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1264 (1991)). The United States Supreme Court identified issues of structural error in Fulminante, noting that such errors affect "the entire conduct of the trial from beginning to end." Fulminante, 499 U.S. at 309-10, 111 S.Ct. at 1265. The examples of structural error provided by the Court were the denial of counsel, an impartial judge, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the

right to a public trial. Id. (internal citations omitted). Thus, as this Court has found, "structural error results from a constitutional deprivation that so infects the entire framework that the result is no longer reliable." Garcia v. State, 117 Nev. 124, 129, 17 P.3d 994, 997 (2001) (citation omitted).

In contrast, a harmless error analysis is used when a trial error is involved. A trial error is an error that occurred "during the presentation of the case to the jury [that] may therefore be quantitatively assessed…to determine whether its admission was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 307-08, 111 S.Ct. at 1264.

Here, the jurors' sua sponte disclosures of their potential conflicts did not amount to voir dire. NRS 16.030(5) requires the truthfulness oath to be administered before the jurors are "examined as to their qualifications to serve as jurors." There is no indication in this case that the court marshal questioned the prospective panel to determine their "qualifications to serve as jurors." Instead, he informed them that certain reasons would not excuse their service, and some jurors "indicated that they may have reasons for getting out of jury duty which comply with the court's rules." 8AA1747. Because this did not amount to examining the jurors as to their qualifications, it was not voir dire and the court was not required to administer the truthfulness oath pursuant to NRS 16.030(5) and Barral. Accordingly, this was not structural error and must instead be analyzed for harmless error.

Although Appellant complains that the process used by the district court was improper overall, he focuses his argument on three jurors whom he claims he objected to dismissing. One was dismissed due to prearranged travel plans, one due to not being a United States citizen, and one due to caring for her young child. 8AA1753-54, 1755-57.[1]

NRS 6.010 guides who is qualified to act as a juror, and states that it is limited to "every qualified elector." Moreover, this Court has adopted rules for the Eighth Judicial District Court which permit the court administrator to excuse jurors due to certain hardships. Rule 6.50 states:

> A person summoned for jury service may be excused by the court administrator because of major continuing health problems, fulltime student status, child care problems or severe economic hardship.

EDCR 6.50. Additionally, Rule 6.70 makes clear that the rules related to trial juries and jurors "must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice."

[1] In all, twelve juror were dismissed. 8AA1747-57. Six of those were dismissed with no objection from either side due to (1) being the sole caregiver for a family member who had recent surgery, (2) having a disease which impacted her hearing, (3) being a caregiver for his child who had been run over by a school bus, (4) having prearranged, prepaid travel plans, (5) having a daughter with special needs, and (6) being a student with daytime classes. Id. at 1749-51, 1751-52, 1754, 1755, 1757. Three others were not dismissed, one at Appellant's specific request. Id. at 1747-49, 1752-53, 1754-55. The final three, discussed *supra*, were ultimately dismissed.

In this case, juror 788 was not a United States citizen and the district court properly dismissed him because he was not a qualified juror. 8AA1755. Appellant now claims that he objected to this dismissal, but in actuality he simply asked for clarification:

> THE COURT: That individual is not a U.S. citizen. They cannot sit on the jury.
> [THE STATE]: Okay.
> THE COURT: So we will have to send that one back down to Jury Services.
> [APPELLANT]: I just want to – that one's not qualified?
> THE COURT: No, you have to be a U.S. citizen.

Id. at 1755. It is not clear from the record how the district court knew juror 788 was not a United States citizen; although the conversation surrounding the majority of the prospective jurors discussed their conversation with the court marshal, such was never mentioned for this particular juror. The court just informed the parties to look at a specific page and that the juror listed was not a citizen. Nonetheless, as a non-citizen the individual was not a qualified juror and could not serve on the panel. Therefore, the district court did not err in dismissing him and Appellant cannot show that he was prejudiced by the court doing so.

Next, juror 725 presented documentation showing that he had prearranged, prepaid travel plans. 8AA1753. Appellant initially stated "I'd like to keep this one," and then immediately asked "[w]hat was his reasoning? He said he was traveling?" Id. at 1754. The court clarified that was the juror's reasoning, and that the court's

practice is to release jurors if they have provided proof that they had travel plans. Id. In accordance with EDCR 6.50, jurors may be released if serving would cause them severe economic hardship. It is reasonable that being required to forfeit payment for prearranged travel plans would be a severe economic hardship. Once Appellant understood the juror's conflict and the court's practice, he agreed to dismiss the juror, stating "all right." 8AA1754. Appellant was unfamiliar with the jury selection process in general and required explanation regarding selecting jurors, dismissing them, and when he would be required to use his preemptory challenges. Id. at 1748-49. Juror 725 was the first juror who indicated that he had prearranged travel plans, and as soon as the court's policy was explained to Appellant he agreed to dismiss juror 725. Indeed, the very next juror to be discussed also had prearranged travel plans and Appellant agreed to dismiss him without hesitation. Id. at 1754. To the extent Appellant's initial statement can be construed as an objection, he ultimately agreed to the dismissal after having the purpose and policy explained to him and he cannot show that he was prejudiced by this.

Likewise, Appellant had initial questions about juror 809. Id. at 1756. Specifically, he asked for the court to repeat the juror's reasoning and the court informed him that the juror was breast feeding her baby. Id. Appellant then asked the court if "that happens all day?" because he is "not a mother." Id. The court informed him that it would depend on the mother, at which point Appellant indicated

that he would like to keep her. Id. The marshal then certified that he had seen documentation of sorts in that the mother had her "whole bag" with her. Id. At that point the State expressed concern that the baby would not be able to eat if it does not take a bottle, and the court indicated that it would accept her representation that she was the sole food source for the baby and would probably have to be dismissed. Id. at 1756-57. Appellant then agreed to dismiss her, stating that she would probably be distracted anyway. Id. at 1757. Far from being an objection to releasing her, the record indicates this was a conversation about whether or not breast feeding was an adequate reason to release someone, particularly in light of Appellant's lack of knowledge on the subject. Again, after clarification regarding the matter, Appellant ultimately agreed to dismiss juror 809 and cannot show that he was prejudiced by this.

Not only did the marshal's conversations with the jurors not amount to examining them for their qualifications, this Court has adopted rules which permit a court administrator to excuse jurors for certain hardships. Of the three jurors specifically complained about in this appeal, one was released because he was not a qualified juror pursuant to NRS 6.010, and two were released – upon stipulation from the parties – because of (1) economic hardship, and (2) child care problems. The decision to excuse jurors for those reasons are permissibly left in the hands of a court administrator before the prospective juror is even near a courtroom in order to

"secure the proper and efficient administration of the business and affairs of the court." EDCR 6.50, 6.70. Appellant received much more than the rule entitles him to by being permitted to hear the jurors' reasoning, discuss it with the court and opposing counsel, and decide whether or not to agree to the dismissal. These jurors could have properly been dismissed by a court administrator; that Appellant received more than the rule provides for does not permit him to now receive a reversal of his conviction. This claim should be denied.

II. THE DISTRICT COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY EXCLUDING IRRELEVANT EVIDENCE

Appellant next claims that the district court improperly relied on Nevada's rape shield statutes, NRS 50.090 and NRS 48.069, to exclude evidence of J.T.'s prior sexual encounters. AOB, 17-30. Appellant contends that the statutes do not apply to his case because he was not charged with sexual assault or statutory sexual seduction. However, the district court actually based its ruling on relevancy.

NRS 48.035 states in pertinent part:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Evidence of J.T.'s prior victimization and prior sexual history was irrelevant in that it provided no probative value in the case. Beyond that, the danger of unfair prejudice from such evidence was great. In addition, such evidence did not contribute to Appellant's case and would have misled the jury as to the real issue in the case, which was whether Appellant kidnapped J.T., used her to produce pornography, and committed the crime of child abuse, neglect, or endangerment with substantial bodily and/or mental harm. The district court properly found that evidence of J.T.'s prior sexual encounters was irrelevant and prohibited Appellant from discussing them. Although the State did discuss the rape shield statutes in its motion in limine, and there was some discussion of the statutes throughout the course of the proceedings, the district court was clear that Appellant was prohibited from discussing the victim's prior sexual encounters because they were not relevant. 6AA1336-38 (holding that Appellant could introduce evidence of J.T.'s pre-existing psychological issues because they were relevant, but could not discuss specifics of her previous sexual encounters); 7AA1422 (stating that it was not relevant that J.T. was a victim in a prior case); 10AA2131 (stating that there had to be a nexus between J.T.'s prior sexual relationships and Appellant's case for it to be relevant); 11AA2320 (holding that Appellant could ask about J.T.'s prior therapy, but that she had previously run away was not relevant); 11AA2393 (informing Appellant that what J.T. did with other men is not relevant); 11AA2459-63 (finding that J.T.'s prior

conflicts with her mother were relevant to Appellant's defense, but that J.T.'s relationships with older men were not relevant to the charges against Appellant); 11AA2451 (finding that who gave J.T. an STD was not relevant to the charges against Appellant); 13AA2790 (finding that the specific instance of J.T.'s prior sexual encounter was not relevant to Appellant's case). Because the court's rulings were based on relevancy and not rape shield laws, Appellant's argument is without merit and should be denied.

As to Appellant's claim that the court's ruling prevented him from presenting a defense, such a claim is belied by the record. AOB, 20-23.

First, Appellant claims that evidence that J.T. had a history of running away to be with older men showed the Appellant did not kidnap J.T. by enticing her. AOB, 21. However, Appellant overlooks the fact that, in addition to enticement, the State could prove first-degree kidnapping by showing that he led, took away, carried away, or detained J.T. He has failed to show that the jury convicted him based on enticement.[2] Moreover, consent is not a defense to first-degree kidnapping. NRS 200.350(2). Even if Appellant could show that J.T. willingly left her home, he could not show that he did not convince her to do so, or that he did not detain her with the intent to keep her from her mother. Indeed, Appellant specifically instructed J.T. to

[2] Indeed, Appellant's citations are to two sections where the State specifically said it was ***not*** proceeding on a theory of enticement. AOB, 21; 11AA2323, 2354.

bring her social security card and birth certificate, picked her up in the early morning while her mother slept, and had her get in his car. 10AA2251-52. At that point he made her turn her phone off so it could not be tracked, and changed his phone number so he could also not be located. 10AA2253-54. Furthermore, he drove her away from her home to his home where he kept her hidden for approximately nine weeks. Id. During that time he would not let her turn her phone on or have anyone over, she did not attend school, he took her out of the house only a few times, and he had her dress in disguise when they did leave. 10AA2256, 2258, 2263, 2264-65. There was substantial evidence that he led, took, or carried her away and that was the pertinent evidence in this case. Evidence of what J.T. had done previously was not relevant to the charges against Appellant and was properly prohibited.

As to Appellant's complaint that he needed to introduce evidence of J.T.'s prior rape to show that her substantial mental harm was not caused by him, but by her prior rape, he has omitted the fact that the district court was very sensitive to this issue and permitted him to introduce evidence of J.T.'s mental status before her encounter with Appellant. AOB, 21-22. Indeed, the court ruled many times that Appellant could introduce evidence which showed that J.T. had been in therapy and had prior psychological issues. When ruling on the State's motion in limine, the court specifically stated "the psychological issues [J.T.] had before are relevant to the defense's case because I guess there's always a theory you could argue she's no

worse off after the [Appellant] incident than she was before, she was a mess before, and I think that's entirely relevant since it's an element of one of the charges. But again, at this point I don't think that the why is important." 6AA1338. Thus, the record shows that Appellant was not prevented from presenting his theory of the case – that he did not cause J.T.'s mental problems – he was simply prevented from explaining that her psychological problems stemmed from being raped previously. Indeed, Appellant asked J.T. if she was seeing a therapist before she met him, if she had previously run away, and if she had nightmares before staying with him. 11AA2317-18, 2351-52, 2425. Likewise, Appellant was able to ask J.T.'s mother if she had previously run away. 12AA2524. Moreover, the State also elicited information regarding J.T.'s prior mental health problems. J.T.'s mother testified that she and J.T. had gone to counseling together and J.T. had gone alone to counseling for a couple of years. 11AA2476. Because Appellant was not prevented from presenting his defense, this claim is without merit and should be denied.

As to Appellant's claim that he was entitled to present this information under a theory of res gestae, AOB, 22, he has overlooked that res gestate requires that he could not "describe the act in controversy or the crime charged without referring to the other act or crime…" NRS 48.035(3). He claims he had trouble explaining why he committed these crimes and that he was entitled to do so because kidnapping is a specific intent crime. AOB, 22-23. The intent the State was required to prove was

that he intended to keep, imprison, or confine J.T. from her parents, guardians, or other person having lawful custody of her, or to perpetrate upon her a crime. NRS 200.310(1). Appellant has failed to show what about J.T.'s past affected his decision making in such a way as to be at issue in the case. J.T.'s past victimization did not impact whether Appellant intended to keep J.T. from her mother, nor whether he intended to perpetrate a crime upon her. Because Appellant has failed to show that he was prevented from presenting a valid defense this claim is without merit and should be denied.

Appellant next claims that because he was prevented from discussing J.T.'s past sexual history his Confrontation Clause rights were violated. AOB, 23. This is without merit.

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). 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 evidence elicited must still comply with other applicable laws and rules. This Court generally reviews a district court's decision to admit evidence for an abuse of

discretion; however, various issues regarding the admissibility of evidence that implicate constitutional rights are reviewed as mixed questions of law and fact subject to de novo review. Hernandez v. State, 124 Nev. 60, 188 P.3d 1126 (2008); see, e.g., Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005) (adopting the mixed question of law and fact standard for reviewing a district court's decision regarding the admissibility of a criminal defendant's statement offered by the State); Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002) ("Suppression issues present mixed questions of law and fact.").

Appellant claims he was not sufficiently able to cross-examine J.T. and her mother regarding the kidnapping because he was not allowed to ask about previous times J.T. had responded to Craigslist ads or if she had previously run away to be with an older man. However, he has failed to address why this was relevant. The district court properly ruled that Appellant could question J.T. and her mother about her previous actions, just not ***why*** she took them. Thus, the jury was aware that J.T. had previously run away, and could have accepted Appellant's argument that she did so again here. However, her reasoning for running away previously was not relevant, and the district court properly excluded such testimony.

Appellant next claims that he was not permitted to ask J.T. or her mother about a 19 year old boyfriend of J.T.'s. He points out that Dr. Nwapa's letter stated J.T. tried to jump off the balcony of her home because of the alleged 19 year old

boyfriend, but that J.T. and her mother testified it was because of Appellant. AOB, 25. However, he has failed to indicate anywhere in the record showing that he attempted to impeach either of them using this information. Indeed, the section of the record he directs this Court to only discusses that he was not permitted to question J.T. about an STD that she had. AOB, 25; 11AA2390-99. Because Appellant did not seek to introduce testimony of the alleged 19 year old boyfriend, the court could not have erred.

To the extent Appellant complains that he was not permitted to question J.T. about the STD, he has again failed to show why such would be relevant. None of the charges related to an STD, and whether she had one or not, and whether it was from Appellant or not, was irrelevant.

Appellant next complains that he was not permitted to ask J.T. about why she was seeing a therapist before meeting him. Again, the district court properly ruled that the fact J.T. was in therapy was relevant to her mental health and therefore to whether or not Appellant caused substantial harm to such, but that ***why*** she was in therapy was not relevant. Appellant was permitted to question J.T. regarding her mental health prior to meeting him, including the fact that she was in therapy, but he was not permitted to elicit information regarding ***why*** she was in therapy because it was not relevant. The district court's ruling was proper.

Appellant next claims that one of the pictures taken by J.T. was pre-existing (and therefore not taken at his direction) and that he was not permitted to cross-examine her on this issue. This is belied by the record. Appellant initially asked J.T. if she had previously taken a picture of her breasts prior to meeting him. 11AA2366. The State objected as to relevance, and the district court sustained the objection and told Appellant to ask the question in a different way. Id. at 2366-67. Appellant then asked J.T. if she had previously taken a picture like this and she denied doing so. Id. at 2367-68. Rather than continue his cross-examination Appellant chose to accept her answer and move on because he did not want to upset her. Id. at 2368. That Appellant made the strategic choice to avoid the subject rather than continue and risk upsetting the victim in front of the jury was a strategic choice he made while defending his case; it was not a violation of his right to confrontation.

Next, Appellant argues that because the State asked J.T. if Appellant asked her questions regarding her virginity and whether or not she liked sex he was therefore entitled to ask her answers to those questions. AOB, 26. He claims her answers were relevant to show his mental state in pursuing J.T. and to "dispel the false impression conveyed on direct examination that [his] questions were unwelcome." AOB, 26. This is without merit. Whether J.T. had previously had sex, and her feelings about sex, were not relevant to Appellant's case. None of the crimes he was charged with could have been negated by J.T.'s virginity or feelings

about sex. Appellant's attempt to delve into J.T.'s sexual history was not relevant and the district court properly excluded such questioning. The State's questions, however, were relevant in that they laid a foundation to ask J.T. about the photographs she sent Appellant and showed the progression of their relationship. 10AA2213. Appellant was free to question her regarding other conversations they had, whether she wanted to stay at his house for two months, and perhaps even whether or not the questions regarding her virginity were welcome. However, whether or not she was a virgin and whether or not she liked sex were not relevant to these crimes and the district court did not err in so ruling.

Appellant next addresses the question of the STD head on. As discussed supra, Appellant has failed to show this evidence was relevant. He claims that the State relied on the STD information in closing to argue that he was liable for substantial bodily harm; this is belied by the record. Although the State did say that the evidence supported substantial bodily harm, it did not say that the charge was supported by the STD. 14AA3027. Indeed, that statement was made directly after commenting on the substantial mental harm caused by Appellant and may well have been a misstatement of bodily harm rather than mental harm. Id. In fact, the State's entire closing argument related to the child abuse centered around the mental harm J.T. suffered. 14AA3020-27. Aside from the last sentence wherein the State mistakenly said that Appellant is guilty of child abuse, neglect or endangerment with

substantial bodily harm the State never mentioned bodily harm. 10AA3027. The State discussed J.T.'s lack of concern for her family after returning from Appellant's, J.T.'s desire to return to Appellant, her threat of suicide, her time at the long-term treatment facility, and her difficulties with school that arose after being kidnapped, all while discussing the concept of substantial mental harm. 10AA3024-27. However, the State never mentioned the STD or any other bodily harm suffered by J.T. and the fact that the State mistakenly said "bodily" rather than "mental," without mentioning the STD, does not show that the State relied on the evidence in charging Appellant.

Moreover, to the extent Appellant complains because the State broached the issue of the STD, the State explained to the district court that it did so in order to explain why J.T. had a change of heart in talking to the State about this matter. 11AA2448-49. Indeed, the messages from Appellant after J.T. returned from Willow Springs showed that J.T. was upset about the STD and it was shortly after those messages that J.T. truly opened up by informing her mother and the police that Appellant was contacting her. 10AA2307-11. Because the court was ruling evidence about the STD was not relevant, the State explained why it believed the evidence was relevant at the time it was brought up. 11AA2448-49. It was important for the jury to understand J.T.'s change in attitude from protecting Appellant at the preliminary hearing to being cooperative at trial and was relevant for that purpose,

however, it was not relevant to show whether or not Appellant actually gave the STD to J.T. In order to handle the situation, the district court decided to give a limiting instruction to the jury. Id.; 5AA1154. Because the State had a relevant reason for discussing the evidence and Appellant did not, the district court did not err in preventing Appellant from questioning J.T. regarding who gave her the STD.

Finally, Appellant claims that he was prevented from asking J.T.'s doctor if she ever disclosed harm by anyone else. AOB, 28. Appellant began this line of questioning by asking the doctor if J.T. had talked to her "about any other situation, or anyone else that was involved in her past about – that may have influenced…some kind of –" 12AA2695. It was at that point the State asked to approach, in order to find out where Appellant was going with the questioning. Id. at 2696. The parties and the court then discussed exactly what information Appellant was trying to get in and how best to do so. Id. at 2696-2700. Appellant asked if he could ask whether there was a previous incident, and the State's position was that he could not. Id. at 2699. The court stated that J.T.'s prior mental health treatment was relevant, and Appellant asked if he could ask if she had previously received mental health treatment because "that's all [he wanted] to ask." Id. at 2699-70. The State did not object and the court permitted him to continue. Appellant was properly permitted to question J.T.'s doctor regarding her previous mental health treatment. Any discussion of specific instances of harm by someone else would have been irrelevant

as to the crimes Appellant was charged with. J.T.'s mental state and the extent to which Appellant harmed her were relevant, but the events leading to her mental state prior to meeting Appellant were irrelevant and properly excluded.

Appellant claims that preventing him from discussing specific instances of past abuse J.T. suffered was improper and it cannot be harmless error. Assuming, *arguendo*, that the evidence excluded was relevant and was improperly excluded, it was harmless. There was overwhelming evidence in this case that Appellant prevented J.T. from leaving by forbidding her from using her phone, keeping her from going to school, not allowing her to go outside, not allowing her to have friends over, and having her dress in disguise the few times she was allowed to leave the house. These actions caused her substantial mental harm. After leaving Appellant's house, J.T. threatened to kill herself, and required a significant amount of therapy. This included learning how to reintegrate into society because she had been in isolation for so long. 10AA2299-2300. None of Appellant's proposed evidence would have overcome that. There was, without doubt, evidence that J.T. had previously suffered mental harm, however, the jury was privy to that information. The jury knew she had mental problems before meeting Appellant; explaining exactly ***how*** she was previously mentally harmed would not change the fact that the jury found she suffered further mental harm due to Appellant's actions.

Accordingly, the outcome would not have been different and any error, to the extent it exists, was harmless.

III. THE PHOTOGRAPHS FROM THIS CASE DEPICTED SEXUAL CONDUCT AND/OR SEXUAL PORTRAYAL AND NRS 200.700(4) IS NOT UNCONSTITUTIONAL

Appellant begins by claiming that the photographs discussed in Counts 3 and 5 did not portray sexual conduct and therefore his convictions on those counts must be reversed. AOB, 30-31. What Appellant fails to acknowledge in this section is that for those counts he was charged with using, encouraging, enticing, or permitting a minor to simulate or engage in sexual conduct ***and/or to be the subject of a sexual portrayal***. 2AA252-53. Accordingly, even if the pictures did not depict sexual conduct, he could have still been properly convicted on the basis of the photographs depicting sexual portrayal. Nonetheless, the photographs did contain sexual conduct and therefore he could have been properly convicted under either theory.

NRS 200.700(4) defines sexual portrayal as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." The photographs shown to the jury included J.T. in her underwear and bra, a photo of her in her underwear as she was bent over a chair exposing her buttocks, a photo of her vaginal area with her legs spread, J.T.'s bare breasts, and J.T.'s bare buttocks. 14AA3030-31. Moreover, Appellant asked J.T. to send him "sexy" pictures, and directed her on how to pose

to make them sexier for his viewing pleasure, and there was no evidence that these pictures had a serious literary, artistic, political or scientific value. 10AA2219-20. Thus, the evidence showed that Appellant directed J.T. to take the photos in order to appeal to his prurient interest in sex, and the convictions are therefore proper under a theory of sexual portrayal.

Additionally, NRS 200.700(3) defines sexual conduct as: sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another. The photographs complained of by Appellant are ones of J.T.'s vaginal area. She spread her thighs and took a photo of just her crotch at the direction of Appellant. It should be noted that she is wearing underwear, however, her thighs are spread and her pubic hair can be seen. This is absolutely a lewd exhibition of the genitals and meets the statutory requirement. It is completely lewd for a child to spread her legs and take a photo of her vagina, clothed or not.

Therefore, under a theory of either sexual portrayal or sexual conduct these photographs meet the definition of Unlawful Use of a Minor in the Production of Pornography and the convictions should stand.

Appellant next argues that NRS 200.700(4), which defines sexual portrayal, is unconstitutional and therefore his convictions on Counts 3-6 should be reversed. AOB, 32-47. This Court recently addressed this issue in Shue v. State, 407 P.3d 332 (2017), and found that NRS 200.700(4) is not unconstitutional.

This Court reviews the constitutionality of a statute de novo. Berry v. State, 125 Nev. 265, 279, 212 P.3d 1085, 1095 (2009) (*citing* Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)). However, this Court starts with the presumption that a statute is constitutional. Id. This Court will not invalidate it unless the party challenging the statute makes a "clear showing of invalidity." State v. Castaneda, 126 Nev. __, __, 245 P.3d 550, 552 (2010). Further, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Id. (quoting Hooper v. California, 155 U.S. 648, 657, 15 S.Ct. 207, 211 (1895)).

However, Appellant failed to raise two of his three claims below.[3] That failure waives all but plain error. Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012). This Court reviews unpreserved constitutional errors for plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (Nev. 2015). Plain error is "so

[3] Appellant states that he challenged the constitutionality of NRS 200.700(4) in his pretrial Petition for Writ of Habeas Corpus. AOB, 30. However, he only challenged the constitutionality of NRS 200.700(4) as being vague; he did not raise a facial challenge or argue that it is overbroad. 2AA290-92.

unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). A defendant has the burden to demonstrate that the error affected his substantial rights, by causing actual prejudice or a miscarriage of justice. Martinorellan, 131 Nev. at __, 343 P.3d at 591. Thus, reversal for plain error is only warranted if the error is readily apparent and defendant demonstrates that the error is prejudicial to his substantial rights. Id.

Here, there is no plain error because a casual inspection of NRS 200.700(4) does not reveal the statute unconstitutional. To the contrary, as is apparent from Appellant's ten pages of argument as to his two unpreserved claims, any claim that NRS 200.700(4) is unconstitutional requires detailed and thorough analysis of case law and legislative history. Furthermore, Appellant fails to demonstrate actual prejudice because NRS 200.700(4) is constitutional.

1. NRS 200.700(4) is not facially invalid under the First Amendment

Appellant argues that prohibiting creating or possessing images of minors as the subject of a sexual portrayal in a performance is an unconstitutional content-based restriction upon speech. AOB, 34-41. To support his argument Appellant cites to R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992) for the proposition that the First Amendment prohibits the government from criminalizing speech or expressive conduct because it disapproves of the ideas expressed.. However, Appellant fails to acknowledge that some areas of speech, consistent with the First

Amendment, can be regulated because of their constitutionally proscribable content. Id. at 379, 112 S. Ct at 2541. Although First Amendment speech protections are far reaching, it has been long recognized that free speech is not an absolute right devoid of limitations and restrictions. Chalpinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 769 (1942). There are well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. Id.

There are two types of pornography that receive no First Amendment protection; obscenity and child pornography. See, N.Y. v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957). In Roth, the U.S. Supreme Court determined that obscenity is not within the area of constitutionally protected speech or press. 354 U.S. at 485, 77 S.Ct. at 1309. The U.S. Supreme Court reexamined the obscenity standard in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15 (1973) and ruled obscenity is limited to works that, when taken as whole, appeal to the prurient interest in sex, portray sexual conduct in a patently offensive way and have no serious literary, artistic, political or scientific value.

In Ferber, the U.S. Supreme Court, in a unanimous decision, held that child pornography was far outside the First Amendment protection. 458 U.S. at 749 102 S.Ct. at 3350. Ferber upheld a statute proscribing the dissemination of child

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

Appellant erroneously argues that sexual portrayal of a minor falls inside the protection of the First Amendment because sexual portrayal is not limited to works that visually depict sexual conduct involving children. AOB, 35-37. Appellant contends that United States v. Stevens, 559 U.S. 460, 130 S.Ct. 1577 (2010), requires that a photograph must be an integral part of conduct in violation of a valid criminal statute in order to be considered pornography. However, Stevens did not hold that each case must be evaluated to see if the photograph is related to an underlying criminal statute. Instead, Stevens explained that:

> Ferber presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the

> production of such materials, an activity illegal throughout the Nation."

Stevens, 559 U.S. at 471, 130 S.Ct. at 1587 (internal citations omitted).[4] Thus, the Stevens Court did not state that each photograph must be evaluated, but rather explained its reasoning for removing child pornography from First Amendment protection.

Additionally, the U.S. Supreme Court in Ferber specifically ruled that states are entitled to greater leeway in regulating pornographic depictions of children than images of adults, emphasizing the state's compelling interest in protecting children who may be exploited or abused in the production of child pornography. Id. at 756, 102 S. Ct at 3354. The language defining sexual portrayal states that the image must appeal to the prurient interest in sex. NRS 200.700(4). The intent of the language was to target those images that might not explicitly portray a minor engaging in sexual conduct but are nonetheless pornographic depictions of minors because of the obscene nature of the image.[5] See, Hearing on A.B. 405 Before the Senate Comm.

[4] The State notes that consensual intercourse and using a minor to produce pornography are not mutually exclusive as Appellant would like this Court to believe. J.T. was a minor when these photographs were taken, and is entitled to the same protections as other minor children.

[5] Nevada's obscenity statute, NRS 201.235, uses the words "prurient interest" and the phrase "lacks serious literary, artistic, political or scientific value" when defining obscenity and this same language is found in the definition of "sexual portrayal" in the child pornography statutes. NRS 200.700(4).

on Judiciary, 68th Leg. (Nev., June 14, 1995). Therefore, sexual portrayal of minors as defined by NRS 200.700(4) is a proper regulation of pornographic depictions of children as it achieves the States' compelling interest of protecting children. Furthermore, sexual portrayal of children is outside the protection of the First Amendment because the language includes the element of obscenity, which the U.S. Supreme Court has held to be an unprotected class of speech. Miller, 413 U.S. at 16, 93 S.Ct. at 2610.

Moreover, the discussion from Stevens is nothing more than judicial dictum analyzing various concerns and is not essential to the holding of that case. Indeed, the Stevens Court was merely explaining previous examples of speech which are outside the protection of the First Amendment. As dictum, this "test" is not binding on this Court. 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))).

Finally, similar statutes have been found constitutional. In Commonwealth v. Provost, 418 Mass. 416, 420, 636 N.E.2d 1312, 1315 (1994) the defense argued that a statute that made it illegal to take photographs of partially nude children with lascivious intent was unconstitutional in that it criminalized the depiction of pure nudity. The Court held that even though the pictures were not child pornography under Ferber, the statute was still constitutional and did not violate the First

amendment. Id. The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. Id. at 420-21, 636 N.E. 2d at 1315. When "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.'" Id., *citing* Texas v. Johnson, 491 U.S. 397, 406, 105 L. Ed. 2d 342, 109 S.Ct. 2533 (1989). Provost concluded that the compelling interest in protecting children from exploitation was both unrelated to the suppression of expression and sufficiently compelling. Id. at 421, 636 N.E. at 1315.

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. Farber, 458 U.S. at 757, 102 S.Ct. at 3055. Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained and this Court should not overrule its holding in Shue. Cote H. v. Eighth Judicial Dist. Court, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008).

2. NRS 200.700(4) is not unconstitutionally overbroad

Appellant argues that NRS 200.700(4) is overbroad because it allegedly makes any legitimate image of minors child pornography, if the images appeal to a pedophile, and therefore urges this Court to overrule its holding in Shue. AOB, 41-44.

The U.S. Supreme Court has held that a statute may be overbroad if in its reach it prohibits constitutionally protected conduct. Grayned v. Rockford, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302 (1972). In considering an overbreadth challenge, a court must decide, "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115, 92 S.Ct. at 2302. However, when a law regulates arguably expressive conduct, "the scope of the [law] does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908 (1973). A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." Id. The First Amendment overbreadth doctrine is "strong medicine"; it has been invoked by the courts with hesitation and "only as a last resort". Ferber, 458 U.S. at 769, 102 S.Ct. 3350. Even if a portion of the law proscribes protected expression, an overbreadth challenge will fail if the "'remainder of the statute... covers a whole range of easily identifiable and constitutionally proscribable... conduct.'" Id. at 770 n. 25, 102 S.Ct. at 3351. States have a wider latitude in regulating child pornography than depictions of adults, and that the possible danger

of infringing on serious literary, scientific, or educational works does not make a statute unconstitutionally overbroad. Id. at 773, 102 S.Ct. at 3363.

In this case, sexual portrayal is specifically defined as depictions of minors that appeal to prurient interest in sex. NRS 200.700(4). Furthermore, the statue explicitly includes language that exempts material that have serious literary, artistic, political or scientific value. Id. That language narrows the statute's reach to exclude protected conduct. Although some protected expression could possibly be reached by the statute, this tiny fraction of material could be protected by a case-by-case analysis. Ferber, 485 U.S.at 773-74, 102 S.Ct. at 3363 (whatever overbreadth may exist should be cured through case-by-case analysis). The legitimate reach of the statute outweighs its arguably impermissible applications. Therefore, the statute is not substantially overbroad and this claim should be denied.

3. NRS 200.700(4) is not unconstitutionally vague

"[T]he Due Process Clause of the Fourteenth Amendment prohibits the states from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Sheriff v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 636 (1983) (quoting United States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808 (1954)). A statute is void for vagueness, and therefore facially unconstitutional, if the statute both: (1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and (2) authorizes or encourages arbitrary

and discriminatory enforcement." City of Las Vegas v. Dist. Ct., 118 Nev. 859, 862, 59 P.3d 477, 480 (2002). However, a statute gives sufficient notice of proscribed conduct when, viewing the context of the entire statute, the words used have a well-settled and ordinarily understood meaning. Nelson v. State, 123 Nev. 534, 540-41, 170 P.3d 517, 522 (2007). When a term or offense has not been defined by the Legislature, courts will generally look to the common law definitions of the related term or offense. Ranson v. State, 99 Nev. 766, 767, 670 P.2d 574, 575 (1983).

Appellant argues that Nevada's definition of sexual portrayal fails to provide adequate notice of prohibited conduct. AOB 45. Appellant does not argue that the statute has a divergent meaning such that it precludes reasonable notice of proscribed conduct. Appellant contends that the average person would not understand what conduct was prohibited by the terms "sexual portrayal" and the definition lacks any objective standards. Id. However, the statute at issue is not so imprecise that vagueness permeates its text. Indeed, the term "prurient" has a common ordinary meaning relating to lust or lascivious desire. Webster's Encyclopedic Unabridged Dictionary (1996) p. 1558. Any person of ordinary intelligence has full and fair warning that portrayals of children that connect children to a sexual desire are prohibited by law. Therefore, Appellant fails to meet his burden that the statute is unconstitutionally vague and this claim should be denied.

Additionally, Appellant's argument that parents who take an innocent, naked, photograph of their child could be prosecuted and convicted if the most sensitive citizen of Nevada believes the image is sexually gratifying is without merit. AOB, 45-46. First, Appellant's various hypotheticals are irrelevant attempts to distract the Court from his conduct. The U.S. Supreme Court held that a facial-vagueness challenge is appropriate only if the statute implicates constitutionally protected conduct or "is impermissibly vague in all of its applications." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S.Ct. 1186, 1191 (1982). However, "[a] challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). Thus, a reviewing court must first, "examine the complainant's conduct before analyzing other hypothetical applications of the law." Hoffman Estates, 455 U.S. at 495, 102 S.Ct. at 1191. Second, the Legislature specially included the language of "appeals to the prurient interest in sex" because it considers a community objective standard and does not encompass within it parents taking innocent pictures of their children. See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12 and June 14, 1995).

IV. THE DISTRICT COURT DID NOT ERR IN REQUIRING APPELLANT TO PAY TRAVEL FEES FOR HIS WITNESS

NRS 50.225 entitles a witness to be paid a $25 fee for testifying, as well as travel expenses for traveling to the court. Moreover, NRS 174.234 states:

> 1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:
>
> (a) If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:
>
> (1) The defendant shall file and serve upon the prosecuting attorney a written notice containing the names and last known addresses of all witnesses the defendant intends to call during the case in chief of the defendant; and
>
> (2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.

Appellant now claims that because he was indigent, the district court should have *sua sponte* paid the required expenses for J.T. to appear as a witness in his case-in-chief after he failed to provide notice of her testimony. AOB, 48-51. This is without merit and this claim should be denied.

On the third day of trial Appellant informed the district court and the State that he wanted J.T. to appear as a witness in his case-in-chief. 10AA2012. At first the court thought he wanted to do so simply so he could engage in a direct examination and not be bound by the rules of cross-examination. Id. at 2011-12. The State agreed to allow Appellant to exceed the scope of its direct examination so long as the information sought was relevant. Id. However, Appellant explained, he

wanted more time to prepare. Id. at 2012. The State objected because he did not provide a list of witnesses, and it argued that Appellant had sufficient time to prepare given the length the trial had been pending. Id. at 2012, 2014. The court then informed Appellant that he was responsible for the financial aspect of getting witnesses to court, and that regardless of his self-representation he was required to follow the rules regarding expenses and subpoenas. Id. at 2012-2014. Rather than make a motion for his expenses to be provided by the court, Appellant chose to complain about how difficult it was to represent himself. Id. at 2015-16. Appellant never requested that the court provide travel expenses for his witness, yet now seems to think the district court should have simply volunteered to do so. He claims that because he was awarded "reasonable costs" associated with his defense, the court should have *sua sponte* volunteered to cover the last-minute travel expenses of a witness who had not been noticed. A reasonable cost related to this witness would have been to prepare for trial, notice her as a witness, subpoena her, and make the necessary travel arrangements. Instead, Appellant simply showed up to court on the third day of trial, stated that he needed more time to prepare for her (after trial had been pending for four years), and that he wanted her there for his case-in-chief. Appellant fulfilled none of the requirements for obtaining a witness, and it was not the responsibility of the district court to volunteer to cover the costs associated with Appellant's lack of diligence.

Moreover, Appellant had an opportunity to conduct meaningful cross-examination of the victim. Indeed, recognizing Appellant's pro se status, the State agreed to not object to Appellant exceeding the scope of its direct examination in order to allow him as much access to the witness as possible. In light of the fact that Appellant failed to prepare in any way to present J.T. as a witness in his case in chief, the opportunity to not be bound by the rules of evidence and examination and to be allowed to go outside the scope of direct in order to fully engage with J.T. was eminently reasonable.

Although the State and the district court attempted to make modifications in light of the fact that Appellant was representing himself, he was nonetheless required to follow the necessary law and procedures. That he failed to do so, and the district court did not *sua sponte* fix his mistakes, is not error on behalf of the court and this claim should be denied.

V. THERE WAS NO PROSECUTORIAL MISCONDUCT

Claims of prosecutorial misconduct are analyzed under a two-step analysis. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, this Court determines if the conduct was improper. Id. Second, the Court determines whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct unless "the remarks … were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859

P.2d 1050, 1054 (1993)). Notably, "statements by a prosecutor, in argument, … made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting, Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

With respect to the second step, reversal is not warranted if the misconduct was harmless error, which depends on whether it was of constitutional dimension. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Error of a constitutional dimension requires impermissible comment on the exercise of a specific constitutional right, or if in light of the proceedings as a whole, the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d at 477. If the error is not of a constitutional dimension, reversal will only occur if the error substantially affected the jury's verdict. Id.

Importantly, a defendant is entitled to a fair trial, not a perfect one, and therefore "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone[.]" United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Accord, Leonard, 117 Nev. at 81, 17 P.3d at 414. "[W]here evidence of guilt is overwhelming, even aggravated prosecutorial

misconduct may constitute harmless error." Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004) (*citing* King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000)). In determining prejudice, this Court considers whether a comment had: (1) a prejudicial impact on the verdict when considered in the context of the trial as a whole; or (2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208-209, 163 P.3d at 418.

Here, Appellant claims the State engaged in prosecutorial misconduct due to statements made during voir dire, allegedly using a juror to educate the jury, and allegedly commenting on Appellant's constitutional rights. Each of these claims is without merit.

Regarding voir dire, Appellant complains because the State gave the jury an introduction to the case before jury selection began, as requested by the judge. AOB, 53-55. As an initial matter, Appellant did not object to the State's introduction and therefore this matter is not preserved for appellate review. This Court has consistently reaffirmed that "[t]he failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below." Pantano v. State, 122 Nev. 782, 795 n. 28, 138 P.3d 477, 486 n. 28 (2006) (quotation omitted). Moreover, appellate review requires that the district court be given a chance to rule on the legal and constitutional questions involved. Lizotte v. State, 102 Nev. 238, 239-40, 720 P.2d 1212, 1214 (1986). Where an appellant fails

to preserve an issue on appeal, this Court reviews the issue for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). In order to demonstrate plain error, Appellant must show that: (1) there was an error; (2) that the error was plain; and (3) that the error affected his substantial rights. Id.; see also NRS 178.602. To show that an error affected his substantial rights, a defendant must demonstrate "actual prejudice or a miscarriage of justice." Id. Appellant has failed to do so here.

When the State objected to Appellant's introduction and the district court sustained the objection, Appellant argued with the court regarding its ruling. 8AA1780. He now claims this Court should construe that as an objection to the State's introduction. AOB, 55. However, the record is clear that he did not see anything wrong with the State's introduction, he was instead unhappy that he could not exceed the bounds of introduction and engage in argument. Because of that, this claim should be reviewed only for plain error.

Appellant has included verbatim the section of the State's introduction to which he now objects. A plain reading of the State's introduction shows no "highly inflammatory language," other than describing what is a highly inflammatory act. The State did not present any argument, but rather told the jury what the case was about. Specifically, that Appellant and the victim met online, they entered a dating relationship, Appellant caused J.T. to take and send nude and sexually explicit photos, Appellant picked J.T. up from the family home one night and took her to

live at his house for about nine weeks while her family searched for her, and that while there she was not able to contact anyone or go to school, and that she was caused to perform sexual acts while there. The State was asked to tell the jury what the case was about, presumably to help them have an overall understanding of the proceedings. The introduction also serves to inform the jury about the charges, including a limited amount of facts related to those charges, so that both sides may gauge if a juror is appropriate for this type of case. Appellant did not object while the State was presenting its introduction. When Appellant was given an opportunity to introduce himself to the jury, he did not tell the jury what the case was about, but rather tried to discuss specific pieces of evidence which would be presented and disparage the State's case. Appellant argued:

> A lot of things the State has stated is designed to create an image in your mind to look at me as a person who has done horrible things. Now, keep in mind, when they say pictures of a nude person, the picture's not – or actually exhibits –

8AA1779. It was at that point the State objected, because Appellant was no longer giving an introduction or even an overview of the case, but rather was delving into specific pieces of evidence and arguing about the State's portrayal of him. Because Appellant had ceased introducing himself and had begun arguing, the court did not err in sustaining the State's objection. Likewise, because the State presented a

proper introduction as to the nature of the case, it did not engage in prosecutorial misconduct.

Appellant next claims that during voir dire the State used its introduction to choose a jury with a predisposition. AOB, 55. This is again unpreserved for appeal and should only be examined for plain error. It is furthermore without merit.

As the State explained to the jurors, the point of voir dire is to ensure each side receives a fair jury. The State and the jurors knew the nature of the case, and ensuring that there were no jurors seated who would not be able to overlook such facts was paramount. Rather than going through each charge, the State asked if any juror had a "strong reaction or a gut reaction right away" to its introduction of the case. 9AA1907. This is a question that is asked in almost every jury trial. It is an important question because if a juror is so affected by the charge that they feel they cannot be fair and impartial both sides need to know that information upfront. Appellant argues this was the State impermissibly seeking a commitment from the jurors, however, it is clear from the record that the State did not seek a commitment from the jurors. Instead, the State wished to find out if any of the jurors could not overcome their bias regarding the facts of the case. This was not prosecutorial misconduct, but was instead proper voir dire in order to guarantee a fair jury. Accordingly, this claim is without merit and should be denied.

Appellant also, in a footnote, discusses some comments the jurors made regarding their initial reaction. AOB, 56. To the extent Appellant intends to imply that he did not receive an unbiased jury, this is without merit. Juror 607, Ms. Rafferty, said she had a gut reaction, but also said that despite that gut reaction it would not be fair if she did not hear both sides. 9AA1908-09. Juror 756, Ms. Jensen, stated that she had an initial reaction but that she would be able to base her opinion on the evidence presented in court and make a finding of not guilty if the evidence did not support a finding of guilt. 9AA1910-12. Juror 646, Ms. Cisneros, stated that she had an initial reaction because she is a teacher. 9AA1912. However, she stated that she does not hold teachers to a higher standard. 9AA1913-14. Juror 709, Ms. Silvasy, initially stated that she had heard of the case on the news and was concerned about whether she could be "true to the system." 9AA1917. However, she also said she understood that the media often gets the facts wrong and that she could rely only on what she heard in court. 9AA1917-18. She further stated that if the State did not prove the charges beyond a reasonable doubt, and if she had doubts, she would raise her concerns. 9AA1918-19. Juror 721, Ms. Peete, stated that she had an "eerie feeling," and did not know if she could be fair to Appellant. 9AA1922. The State acknowledged this type of case could be difficult to listen to, but that Appellant had a right to a fair jury. 9AA1922-23. Ms. Peete stated again that it would be difficult for her to hear the evidence, but that "[she] would try to be [inaudible] to be right is

right and wrong is wrong." 9AA1923. Because she was willing to listen to the evidence presented and decide what was right and what was wrong, she was fit to sit on the jury. Juror 740, Ms. Thomas, stated that she hoped the charges were not true, but that she would not have a problem being fair to both sides. 9AA1924. Based on the jurors' follow-up comments, they were all appropriate members of the jury and, to the extent Appellant argues such, he did not have a biased jury.

Appellant next complains about the State allegedly "indoctrinating" the jury by asking a juror about grooming. AOB, 56-59. Again, this claim was not preserved for appellate review and should be reviewed only for plain error. The State asked the entire prospective jury panel if any of them had heard of grooming. One, in particular, indicated that she had and the State asked her what she knew. 9AA1986-88. The State was permitted to inquire as to the jury's knowledge and topics related to the case, including what they knew about grooming. Appellant claims this was indoctrination or persuasion, AOB, 57, but the State did not engage in any argument, ask the jury to made any findings, or present improper evidence. The State asked a juror about knowledge she had regarding a topic that might come up. It was not improper, and certainly not plainly so.

Appellant further complains that the State engaged in prosecutorial misconduct by using the juror's definition of grooming during closing. AOB, 58. The State did mention in closing that a juror had given a definition of grooming.

14AA3001. However, the juror's definition was essentially an example of grooming whereas the State's closing focused on the big picture idea of grooming. Compare 9AA1987 ("For example, a teacher might ask a student to stay after and maybe ask leading questions…then maybe compliment them") with 14AA3001 ("one of the school teachers actually gave us sort of a definition of grooming, of sort of getting someone and complimenting them, isolating them, sort of pushing, pushing the envelope a bit was kind of the discussion of it"). The State then asked if there was grooming in this case and made argument supported by the evidence presented in the case to show that Appellant enticed and led away the victim. 14AA3001. This was not improper, and this claim should be denied.[6] To the extent this was improper, any error was harmless given the overwhelming amount of evidence.

Finally, Appellant argues that the State improperly commented on Appellant's constitutional rights. AOB, 59-62. Again, each of these complaints were not raised below and were therefore not preserved for appellate review. Further, they are each without merit.

[6] Appellant also claims that the State used the juror's statement that school teachers are "required to watch sexual harassment videos and in it it mentions being groomed or grooming," to impeach Appellant during closing. The State did point out that Appellant was a school teacher and yet claimed to not know what grooming was, but did not refer to the juror's comment from voir dire and therefore did not impeach Appellant using the juror's comment. 14AA3001.

Appellant first complains because the State asked J.T.'s therapist if J.T. had fears or anxieties about the court case, and because J.T. was nervous about cross-examination. 13AA2818-19. Appellant claims this was evidence that J.T. was anxious because he pleaded not guilty and represented himself and was therefore a "direct comment on [his] exercise of his constitutional rights." AOB, 61. Next, Appellant complains because the State pointed out that J.T. was upset when Appellant approached her during trial. Not only did the jury see J.T.'s reaction for itself, but the State's comments had nothing to do with Appellant's constitutional rights, and everything to do with the impact his crimes had on J.T.'s mental state. 14AA3097, 3105. Finally, he complains because the State urged the jury to find him responsible at trial. AOB, 61-62.

To argue this conduct was comment on Appellant's constitutional rights is a complete stretch of the imagination. The State was charged with showing that Appellant's actions had caused J.T. significant mental harm. That she was still dealing with the fallout of his choices years later by suffering anxiety and being unable to look at him or be comfortable near him was evidence of her mental state. Such evidence had nothing to do with whether or not Appellant pleaded not guilty but was rather directly related to J.T.'s anxieties related to her abuse. As to asking the jury to hold Appellant responsible, that is the jury's responsibility if the State meets its burden. Asking them to hold him responsible for his crimes based upon

the evidence presented at trial does not equate to commentary on his decision to plead not guilty – if that were the case, every trial would be such a commentary. Moreover, it was Appellant who brought up the concept of taking responsibility when he began his testimonial narrative by stating that he was willing to take full responsibility for what happened. 13AA2832. However, as his testimony continued, he blamed J.T. for wanting to meet in person, for spending the initial night at his house, for him changing his phone number, and for staying at his house for nine weeks. 13AA2832, 2839-40, 2847-49. It was with this basis that the State commented that the jury should hold him responsible, as he claimed to be willing to do. The State did not impermissibly comment on Appellant's constitutional rights and therefore did not engage in prosecutorial misconduct. Accordingly, this claim should be denied.

VI. THERE WAS NOT CUMULATIVE ERROR SUCH THAT APPELLANT'S CONVICTION MUST BE OVERTURNED.

Appellant lastly alleges that the cumulative effect of error deprived him of his right to a fair trial. However, Appellant has not asserted any meritorious claims of error and thus there is no error to cumulate.

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)).

Here, the issue of guilt was never a close question. The jury heard testimony from J.T. that she felt she could not leave Appellant's house, and from J.T.'s mother regarding the lengths she went to in an attempt to find her daughter. The jury further heard testimony that Appellant requested that J.T. send him the pornographic photos, and that she took them at his direction, and the jury saw the photos. There was also significant testimony regarding J.T.'s mental health, both before and after the incident, and how she was harmed by Appellant's actions. Regarding the quantity and quality of error issue, Appellant fails to demonstrate any error, let alone cumulative error sufficient to warrant relief. Last, regarding the gravity of the crimes charged, Appellant kidnapped and held a young woman for two months, used her to produce pornography, and committed child abuse which resulted in substantial mental harm to her. Those actions are extremely grave. Thus, the third cumulative error factor does not weigh in his favor. Therefore, Appellant's claim of cumulative has no merit and his Judgment of Conviction should be affirmed.

CONCLUSION

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

Dated this 31st 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 13,970 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 31st day of July, 2018.

Respectfully submitted

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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 31, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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