IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVYN PERRY SPROWSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 73674

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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Appellant,	)	
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vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVYN SPROWSON,	)	NO. 73674
	)	
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APPELLANT'S REPLY BRIEF

ARGUMENT

Throughout its Answering Brief, the State asks this Court to disregard various arguments because it claims Sprowson failed to adequately preserve the errors at issue. Respondent's Answering Brief ("RAB") at 13,14,15,23,31,46,49,51,52. Yet, courts have a "duty to ensure that *pro se* litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." **Balistreri v. Pacifica Police Dep't**, 901 F.2d 696, 699 (9th Cir. 1988). To these ends, appellate courts liberally construe objections by *pro se* defendants to avoid a finding of forfeiture and to permit appellate review. See, e.g., **Haines v. Kerner**, 404 U.S. 519, 520 (1972) (holding pro se complaints "to less stringent standards than formal pleadings by lawyers"); **United States v. Gray**, 581

F.3d 749, 752–53 (8th Cir. 2009) ("We liberally construe pro se objections to determine whether the defendant objected"); **United States v. Ben-Shimon**, 249 F.3d 98, 103-04 (2d Cir. 2001) (general objection of *pro se* defendant at sentencing should have been construed liberally for preservation purposes); **State v. England**, 45 Kan. App. 2d 33, 37, 245 P.3d 1076, 1080 (Kan. App. 2010) ("because England was a pro se litigant, we will liberally construe his objection to criminal history as a motion to correct an illegal sentence"); **Hudson v. Gammon**, 46 F.3d 785,786 (8th Cir. 1995) ("liberally construed, [the defendants'] pro se objection sufficiently directed the district court to the alleged errors"). Wherever possible, this Court should construe Sprowson's objections liberally to avoid finding forfeiture.

I. STRUCTURAL ERROR DURING VOIR DIRE

To ensure a fair tribunal, Nevada law requires that two things happen at the beginning of jury selection: (1) the judge "shall conduct the initial examination of prospective jurors"; and (2) before the jurors are "examined as to their qualifications", they "shall" be administered the oath. **NRS 16.030 (5) & (6)** (emphasis added). These are mandatory requirements under Nevada law and the court's failure to adhere to them violates due process and constitutes reversible structural error. **Barral v. State**, 131 Nev. Adv. Op. 52, -- 353 P.3d 1197, 1200 (2015) (structural error "whenever jury

selection procedures do not strictly comport with the laws intended to preserve the integrity of the judicial process.").

In this case, the court committed structural error by sending a marshal into the hallway to obtain information from jurors about their qualifications to serve and then striking eight jurors from the venire based on their unsworn out-of-court statements. See Appellant's Opening Brief ("AOB") at 10-18.[1]

The State argues that no "structural error" occurred because the marshal's actions "did not amount to examining the jurors as to their qualifications" and was not "voir dire". See RAB at 11. The State further argues that there is just one qualification to serve on a jury (being a "qualified elector"), implying that the marshal could legitimately discuss any other excuses that jurors might have. RAB at 11-12 (citing **NRS 6.010**). These arguments fail.

Being a "qualified elector" is not the only qualification for jury service. **NRS 6.010** identifies three additional qualifications, including the sufficiency of jurors' knowledge of English, their lack of felony convictions, and the absence of any "physical or mental infirmity" that renders them

[1] Sprowson's Opening Brief incorrectly stated that the court discussed the unsworn responses of eleven prospective jurors; there were actually twelve jurors discussed. Compare AOB at 12 with (VIII:1747-57).

"incapable" of serving. Likewise, **NRS 16.050** establishes six additional grounds to strike a juror for "cause", including certain relationships with the parties, a personal interest in the outcome of the case, prejudgment of the issues, and bias. To the extent the marshal discussed any of these topics with jurors outside of the courtroom, it would constitute impermissible unsworn *voir dire* regarding the jurors' qualifications to serve.

Although the State contends that the marshal was not "examining" the prospective jurors about their qualifications, the record demonstrates otherwise. These jurors were not simply *volunteering* unsolicited information to the marshal. The marshal was pre-screening prospective jurors regarding their conflicts and qualifications in order to save the court time during *voir dire*, in violation of **NRS 16.030 (5)** and **(6)**. The court explained its practice of having the marshal "give[] a run down just generally to the group as a whole as far as what will and will not get you out of jury service." (VIII:1746-47). In response to the marshal's "general speech", the jurors shared their potential conflicts with the marshal who, in turn, shared that information with the court. (VIII:1747). The court admitted it was using the jurors' unsworn, out-of-court statements to the marshal to "streamline the process" of jury selection – a phrase the court used twice. (VIII:1748,1749). Then, after dismissing eight jurors during the improper

process, the court told the remaining jurors, "I know that Jason went out and talked to you guys a little bit before you came into court and I think that some people have some type of physical limitations I probably need to be aware of." (VIII:1772). Without a doubt, the marshal was improperly "examining" the jurors about their qualifications to serve at the direction of the court.

The State suggests that the marshal could permissibly ask jurors about any "hardships" that would allow them to be excused by a "court administrator" pursuant to Eighth Judicial District Court Rule 6.50.[2] RAB at 15-16. Yet, the marshal's discussion with the jurors went beyond discussing mere "hardships" and addressed the jurors' qualifications to serve pursuant to **NRS 6.010** and **NRS 16.050(1)**. In response to the marshal's "general speech", Juror 631 indicated she may have a "conflict" because she had previously worked for the presiding judge. (VIII:1747). In response to the marshal's "general speech", Juror 644 indicated that she had a "hearing disease" and "can't hear". (VIII:1751). In response to the marshal's "general speech", Juror 768 indicated that he was "blind". (VIII:1754). And in response to the marshal's "general speech", Juror 788 stated that she was not

[2] Pursuant to **EDCR 6.50**, a "court administrator" may excuse jurors "because of major continuing health problems, full-time student status, child care problems or severe economic hardship."

a U.S. citizen. (VIII:1755). Regardless of whether other jurors disclosed "hardships" that could have been excused by an "administrator", the court violated both **NRS 16.030(5)** and **(6)** by having the marshal obtain this unsworn information from the panel about their qualifications.[3] Cf. RAB at 12-16. The court exceeded its jurisdiction by having a marshal obtain unsworn information from prospective jurors about their qualifications to serve. See **Gomez v. United States**, 490 U.S. 858 (1989) (structural error for magistrate to exceed jurisdiction and select jury).

Contrary to the State's claim, harmless error analysis does not apply. Cf. RAB at 12-16. As explained above, the court's improper jury selection procedure was structural error requiring reversal. See **Barral**, 353 P.3d at 1200; **Brass v. State**, 128 Nev. 748, 752 (2012). Because a "fair tribunal is an elementary prerequisite to due process" this Court "will not condone any deviation from constitutionally or statutorily prescribed procedures for jury selection." **Barral**, 353 P.3d at 1200 (emphasis added). **Barral** recognized that a court's failure to comply with Nevada's mandatory jury selection requirements violates a defendant's due process rights. Such errors are -- *in and of themselves* -- inherently harmful.

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[3] **EDCR 7.70** confirms that "[t]he judge must conduct the voir dire examination of the jurors" – not a marshal.

Sprowson did not "forfeit" this structural error, either. Cf. **Jeremias v. State**, 134 Nev. Adv. Op. 8, 412 P.3d 43, 48-49 (2018). When the court was deciding whether to dismiss jurors based on their unsworn statements to the marshal, Sprowson invoked his right to question several of the jurors under oath during *voir dire*. Sprowson indicated that he wanted to question Juror No. 631, who had previously worked for the judge. (VIII:1748) ("I'd probably have to ask her a few questions."). Sprowson also indicated that he wanted to question Juror No. 768, who was blind. (VIII:1754-55) ("I'd kind of like to keep this one, to be honest"). Although the court granted these two requests (VIII:1748,1754-55), the court prevented Sprowson from questioning Juror Nos. 725, 809 and 788. See Opening Brief at 13-14.

The State is wrong to suggest that Sprowson "stipulated" to removing Juror 725 and 809 and "failed to object" to the removal of Juror 788. Cf. RAB at 15. As to Juror 725, the court asked Sprowson if he had an objection to dismissing Juror 725, and, in response, Sprowson expressly told the court he wanted to "keep" that juror. (VIII:1754). This preserved Sprowson's objection to the release of Juror 725. It was only after the Court made it clear that "we do let them go if they've provided proof that they're traveling", that Sprowson said, "[a]ll right". (VIII:1754). This was not a

withdrawal of Sprowson's prior objection, but an acknowledgement of the court's ruling as to that individual.

Sprowson did not "stipulate" to dismissing Juror 809 either. Sprowson told the court twice that he wanted to "keep" Juror 809 before the court ruled that she would be dismissed based on her out-of-court representations to the marshal. (VIII:1756-58). Sprowson's subsequent statement that he "agree[d]" with the court's ruling does not nullify his prior, timely objection to the juror's dismissal.

As to Juror 788, Sprowson questioned the court's ruling that she was not a "citizen" and therefore not "qualified" to serve. (VIII:1755). When Sprowson attempted to confirm whether Juror 788 was "qualified" to serve, the court told him "no" and ruled that she would be sent "back down to Jury Services" based her unsworn out-of-court statement to the marshal. (VIII:1755). By questioning the court's decision to strike Juror 788, and by having the court address her reason for striking Juror 788 on the record, Sprowson preserved for appeal the argument that the court's decision was erroneous. Again, Sprowson's *pro se* objections should be liberally construed to avoid a finding of forfeiture. See pp. 1-2, supra.

Finally, even if this Court deems the structural error "forfeited", reversal is still required because the error was plain and it affected

Sprowson's substantial rights. Although this Court recently held in **Jeremias**, 412 P.3d at 49, that a partial courtroom closure did not violate an appellant's substantial rights, it did so in reliance upon **Weaver v. Massachusetts**, 582 U.S. __, __, 137 S.Ct. 1899 (2017). In **Weaver**, the U.S. Supreme Court recognized *three* types of structural error: those that always result in fundamental unfairness, those that are too hard to measure, and those that protect "some other interest". **Id**. at 1908. **Weaver** explained that courtroom closures are a type of structural error that do not always lead to fundamental unfairness because there are circumstances when courtroom closures are "justified", and because the public trial right furthers interests other than protecting a defendant. **Id**. at 1908. Relying on this language, **Jeremias** held that a partial courtroom closure was not plain error because it was not "inherently prejudicial" and because the defendant failed to establish prejudice. 412 P.3d at 49.

Unlike the structural errors at issue in **Weaver** and **Jeremias**, the court's error in this case was inherently prejudicial. **Barral** held -- *as a matter of law* -- that a defendant's due process rights are violated "whenever jury selection procedures do not strictly comport with the laws intended to preserve the integrity of the judicial process." 353 P.3d at 1200. A court's failure to administer the oath to jurors prior to *voir dire* undermines the

integrity of the trial itself because the oath ensures that the jurors selected have told the truth about their qualifications to serve. There are no circumstances when it would ever be "justified" to skip the oath. Cf. **Weaver**, 137 S.Ct. at 1909 (recognizing circumstances when courtroom closures are necessary).

Likewise, it is inherently prejudicial for a judge to delegate aspects of *voir dire* to a marshal without jurisdiction to do so. See **Gomez**, 490 U.S. at 876 ("defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside" is a "basic fair trial right" that "can never be treated as harmless"). Because the structural error in this case was the type that "always results in fundamental unfairness", it is reversible even under a plain error standard. A new trial is required.

II. THE ERRONEOUS RAPE SHIELD RULING

In its Answering Brief, the State all but concedes that the court could not use Nevada's rape shield statutes to prevent the jury from learning that that J.T.'s severe, preexisting mental issues were related to an incident where she ran away with 39-year-old David Schlomann, who she met on the internet, who sexually assaulted her at the age of 14, and who caused her to create and disseminate topless and underwear-clad photos of herself. See RAB at 16-18.

To avoid reversal, the State claims that the court's *real* reason for excluding this evidence was because of "relevancy and not rape shield laws". RAB at 18. Yet, the court's ruling on relevancy was inextricably entwined with its improper application of the rape shield statutes in a non-rape case, which amounted to reversible error. AOB at 18-30.

Although the State claims that it merely "discuss[ed] the rape shield statutes in its motion in limine", RAB at 17, the State asked the court to exclude the evidence on that basis. (III:502-03). At the hearing on the State's motion *in limine*, the State asserted: "Just because this isn't a sex assault case doesn't mean rape shield doesn't apply. Rape shield applies in every case no matter what." (VI:1337). Following this argument, the court ruled that Sprowson could not tell the jury why J.T. had sought mental health treatment nor could she get into any details of J.T.'s prior relationship history, including the incident with Schlomann. (VI:1333-41).

Subsequently, the State filed a motion seeking clarification of the court's ruling. (IV:671-99). In open court, the State again argued that "rape shield" precluded the admission of the evidence. (VIII:1420). The court agreed, telling Sprowson that the rape shield statutes governed what he could and could not get into at trial:

- "You better look at that statute closely because there's very limited circumstances when you can bring up the victim's prior sexual history." (VIII:1424).

- "I would probably look at the rape shield statute because it is going to become relevant it sounds like during the course of the trial." (VII:1415).

The court even memorialized this ruling in its minutes: "Argument by the State regarding Rape Shield. Additional argument by Deft. *Court directed Deft. to review the statute as he is limited as to what he can get into.*" (VI:1211) (emphasis added). If the court's ruling was not based on the rape shield statutes, then it wouldn't have instructed Sprowson to review those statutes at trial.

Although the court also stated that J.T.'s prior sexual history with Schlomann and others was "irrelevant", it did so because it believed there was no exception to the rape shield statutes where that evidence could come in:

- "What I did not find relevant is the fact that she may have had other cases in the system. I just don't see any exception where that would come in". (VII:1417) (emphasis added).

- "I don't think there's any of those cases that would be an exception to bringing in a prior act." (VII:1424) (emphasis added).

Where the court instructed the defendant that the rape shield statutes controlled what evidence could be presented at trial and excluded all evidence of the Schlomann incident as irrelevant because it did not fall

under an "exception" to those statutes, the State cannot credibly claim that the court's ruling was because of "relevancy and not rape shield laws".[4] Cf. RAB at 18.

Yet, even if the court *had* excluded the evidence solely based on "relevancy", the court's ruling would *still* be an abuse of discretion because the evidence was relevant and its probative value was not "substantially outweighed by the danger of unfair prejudice". See **NRS 48.025** and **NRS 48.035**.

Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." **NRS 48.015**. When evidence directly relates to an element of a criminal offense, that evidence is, by definition, relevant. See **Hubbard v. State**, 134 Nev. Adv. Op. 54, *2, __ P.3d __ (2018) ("defense need not place intent or absence of mistake at issue before the State may seek admission of prior act evidence if the evidence is relevant to prove an element of the offense such as intent for the specific intent crime of burglary.").

Even under Nevada's rape shield laws (*which do not apply here*), evidence of a victim's past sexual history is admissible when relevant, as

[4] Tellingly, at trial, when the State objected to Sprowson's questioning on grounds of "rape shield", the court sustained the objection. (XI:2316-17).

long as it is not being used for an improper purpose. See **Guitron v. State**, 131 Nev. Adv. Op. 27, 350 P.3d 93, 100 (Nev. App. 2015) ("where the defense uses such evidence *not to advance a theory of the victim's general lack of chastity*, but to show knowledge or motive, it may be admissible") (emphasis in original).

Here, Sprowson was not seeking to introduce the evidence of J.T.'s prior sexual history to "impeach the credibility of the complaining witness by a general allegation of chastity." **Summitt v. State**, 101 Nev. 159, 163-64 (1985). Rather, Sprowson had specific, legally permissible reasons to introduce this evidence which outweighed any potential prejudice. AOB at 20-30.

1. To refute the element of "enticement".

The State charged Sprowson with kidnapping under several different legal theories, including a theory of enticement. (V:1132) (Sprowson "did unlawfully, feloniously, and without authority of law, lead, take, entice, carry away or detain [J.T.]"). In closing, the State argued extensively that Sprowson was guilty of kidnapping because he enticed J.T. to leave her family. (XIV:2997-3002;XVI:3294-3309). Where enticement was an element of kidnapping, J.T.'s history of running away to be with older men

was relevant because it showed that J.T. had both motive and intent to leave her family regardless of his actions.[5]

Contrary to the State's claim, the reason J.T. ran away was directly relevant to the question of enticement. Cf. RAB at 22. As Sprowson argued to the court in response to the State's motion *in limine*:

> It was the prior incident with Schlomann that caused K. Smith, JT's mom, to take away and severely limit her access to a computer and cellular phone for a period of almost two years. [PHT, p. 196]. K. Smith only returned those items to JT, on her 16th birthday, in June of 2013. However, because of the prior incident with Schlomann, K. Smith continued to supervise and monitor JT's use of the computer and cellular phone. [PHT, p. 196]. Then on the evening of August 28, 2013, everything came to a head when on suspicion of JT's behavior K. Smith once again confiscated JT's computer, cell phone, and a promise ring she received from Mr. Sprowson. [PHT, p. 175]. JT reacted to this punishment by contacting Mr. Sprowson and begging him to come and get her. JT insisted and forced the issue by telling him that if he did not come and pick her up she would kill herself; that either he came to pick her up or she would die that night. [PHT, p. 156]. Mr. Sprowson capitulated and picked her up, after she snuck out, in the early morning of August 29, 2013 [PHT, p. 32].
>
> It is the prior incident with Schlomann that precipitated the ongoing conflicts between JT and her mother. The Schlomann incident prompted K. Smith to act the way that she did and to treat JT the way that she did. K. Smith's reaction and treatment of JT following the Schlomann incident is why JT

[5] To defeat Sprowson's relevance argument, the State promised it would not present an enticement theory of kidnapping. (XI:2323,2353-55). But, the State broke its promise, devoting five-and-a-half pages of its closing argument (along with 16 PowerPoint slides) to the theory that Sprowson "enticed" J.T. to leave with him. (XIV:2997-3002;XVI:3294-3309).

> decided to run away from K. Smith yet again on the evening of August 28, 2013. It is because of the prior incident with Schlomann and the impact it had on JT's intellectual or psychological capacity or the emotional condition that she reacted by contacting Mr. Sprowson. The Schlomann incident fueled JT's motive, intent, plan, knowledge, and/or absence of mistake or accident when she contacted Mr. Sprowson and sought to escape K. Smith control.

(III:511-12). Not only did the court prevent Sprowson from testifying about these matters directly, but it prevented cross-examination on these matters as well. AOB at 24. Sprowson does not need to "show that the jury convicted him based on enticement" to demonstrate that it was constitutional error to exclude evidence directly relevant to a charged offense. Cf. RAB at 18. See **Summitt**, 101 Nev. at 162-64 (Sixth Amendment violated when defendant was precluded from introducing evidence of victim's prior sexual history to show that she had "the experience and the ability to contrive a statutory rape charge against him").

2. To refute element of "substantial mental harm".

The State charged Sprowson with child abuse with "substantial mental harm." (V:1132). To prove the element of "substantial mental harm", the State had to show that Sprowson's actions caused "an *observable* and substantial impairment of the ability of the child to function within *his or her normal range of performance or behavior.*" **NRS 200.508(4)(e)** (emphasis added). Although the court allowed the jury to learn that J.T. had been in

"therapy" and had vague "psychological issues" when she met Sprowson, see RAB at 19-20, this highly sanitized description of J.T.'s prior mental state was inadequate.[6]

Consistent with **NRS 200.508(4)(e)**, Sprowson was entitled to present evidence of J.T.'s observable behavior prior to meeting him, because that behavior was a manifestation of J.T.'s then-existing mental state. As Sprowson explained to the court in response to the State's motion *in limine*,

> The Schlomann incident is relevant and probative because it reflects the intellectual or psychological capacity or emotional condition of the parties, as well as the normal range of performance or behavior or the parties, especially as it pertains to JT.

(III:513). Indeed, one of J.T.'s medical providers noted that she had "a history of promiscuous behavior dating much older men, some of them in their 40s and others in their 30s", and that she was "extremely impulsive" and had "mood swings." (XVI:2358-59).

J.T.'s behavior, culminating in the Schlomann incident, affected her relationship with her mother and led to parent-child conflicts that existed years before Sprowson ever entered the picture. (III:511-12). Yet, at trial J.T.'s mother broadly testified that she and J.T. had a "typical" teenage mom-and-daughter relationship before J.T. met Sprowson, subject to a few

[6] As presented, the evidence undermined Sprowson's defense by making it appear that he had targeted a vulnerable victim.

"bumps" (XI:2475), and that J.T. was completely "different" when she came back from Sprowson's house. (XII:2510-11) ("She didn't want me to touch her. She said she hated me, she didn't want to be there. She was just – she was, like – like the daughter that left didn't come home."). In closing, the State relied on these vague statements about J.T.'s changed behavior to argue that Sprowson caused "substantial mental harm" to J.T. (XIV:3024).

In the context of this case, Sprowson was entitled to present evidence that J.T. had been sexually assaulted two years before they met, and that the circumstances surrounding that traumatic incident were connected with specific diagnoses and behaviors that existed long before Sprowson met her. Where the jury was required to consider J.T.'s "normal range of performance or behavior" before finding Sprowson guilty of causing "substantial mental harm", and where the jury heard vague testimony about how J.T.'s behavior and relationship with her mother changed as a result of Sprowson's actions, it was constitutional error to exclude this evidence at trial. See **Summitt**, 101 Nev. at 162-64.

3. To tell the complete story (*res gestae*).

Although kidnapping is a specific intent crime, and although Sprowson's specific intent was placed directly in issue by the State's decision to charge him with that crime, the State inexplicably claims that

Sprowson had no right to tell the jury why he acted the way he did vis-à-vis J.T. if it meant disclosing his knowledge of J.T.'s traumatic past. RAB at 20-21. The State's argument is meritless.

Under Nevada's *res gestae* statute, evidence that is "so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded" at trial. **NRS 48.035(3)**. Sprowson was aware of J.T.'s history as a runaway and sexual abuse victim and that information affected both his actions and the actions of J.T. and her mom. (I:137;III:510-513). With the court's rape shield ruling in place, Sprowson could not tell the complete story of what happened, nor could he effectively explain why he did what he did or what he knew about J.T.'s then-existing mental state when he testified. (XIII:2840-42,2844,2846,2865,2779-91). The court's ruling gutted Sprowson's defense and made him appear to be withholding information from the jury, which diminished his credibility. It was constitutional error to exclude that evidence at trial. See **Summitt**, 101 Nev. at 162-64.

4. To refute testimony presented by the State/witnesses.

Even under Nevada's rape shield laws, the defense is permitted to present evidence of a victim's prior sexual conduct when "the prosecutor has

presented evidence or the victim has testified concerning such conduct, or the absence of such conduct". **NRS 50.090**. In other words, when the State or a victim opens the door to prior sexual conduct, the prior conduct becomes relevant to the defense.

In this case, the State "opened the door" by presenting evidence that when J.T. was communicating with Sprowson, he asked her if she was a "virgin" and "liked sex". (X:2143,2213). Under **NRS 50.090**, J.T.'s responses to those questions were relevant.

The State also "opened the door" by introducing evidence that Sprowson gave J.T. an "STD". (X:2168-69,2307-08;XI;2287). Under **NRS 50.090**, the possibility that someone else gave J.T. an STD was relevant.[7]

The State also "opened the door" by introducing evidence that J.T. tried to jump off the balcony of her home because of Sprowson. (XI:2288-

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[7] The State claims it did not "rely on" the STD evidence to establish substantial bodily harm, that it merely misspoke during closing argument, and that it only mentioned "substantial bodily harm" once in closing. RAB at 25-26. While the State may not have explicitly connected the dots between the STD and substantial bodily harm, the connection was not lost on this jury. Jury Instruction No. 3 identified Count 2 as "CHILD ABUSE, NEGLECT, OR ENDANGERMENT WITH SUBSTANTIAL BODILY OR MENTAL HARM." (V:1132) (emphasis added). Though the State claims it only mentioned "substantial bodily harm" once in closing by accident (RAB at 25-26), the State actually referenced "substantial bodily harm" ten times. (XIV:2993,3018,3027,3036). Regardless of the State's purpose for introducing the STD evidence, it was extremely damaging to Sprowson's case and he should have been permitted to refute it.

89;XII:2513). Under **NRS 50.090**, evidence that J.T. actually tried to jump off the balcony of her home because of a 19-year-old male boyfriend was relevant.[8]

And J.T. *herself* "opened the door" when she testified that she had never before taken photographs of her breasts. (XI:2366-67). Under **NRS 50.090**, evidence that J.T. had previously photographed her breasts and sent them to Schlomann was relevant. (I:1137;II:298). The evidence was also relevant because it directly refuted the State's claim that Sprowson caused J.T. to create a photograph of her breasts.[9] See **NRS 200.710**. It was constitutional error to prevent cross-examination on these matters. See **Summitt**, 101 Nev. at 162-64.

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[8] Although the State claims Sprowson never attempted to impeach J.T. or her mother with this evidence (RAB at 23), when Sprowson tried to question J.T. about Dr. Nwapa's report which contained this information, the State objected, asked to approach, and the court denied his request to ask her about the report's contents. (XI:2390-99). For a *pro per* defendant, such an objection is sufficient to preserve a claim of error.

[9] The State claims Sprowson "made the strategic choice" not to impeach J.T. with the evidence he had about Schlomann so as not to "upset[] the victim in front of the jury." RAB at 24. Yet, the court had already ruled that Sprowson could not introduce any evidence related to J.T.'s prior sexual encounters. (VI:1419-25). Where the court repeatedly warned Sprowson against mentioning J.T.'s sexual history at trial, (X:2125-36;XI:2319-24,2392-93,2396,2451,2455-63;XIII:2790), this *pro se* defendant cannot be blamed for following the court's instructions.

5. Not harmless beyond a reasonable doubt.

The court's erroneous ruling was constitutional error because it prevented Sprowson from presenting a defense to the kidnapping, child abuse, and pornography claims, and from meaningfully cross-examining the witnesses against him. AOB at 20-28. The State used the court's ruling *in limine* as both a sword and a shield, presenting the jury with a sanitized version of events that omitted key details about the parties' relationships and motivations to the detriment of Sprowson's case. The State's Answering Brief has not shown, beyond a reasonable doubt, that the court's error did not contribute to the guilty verdicts in this case. **Valdez v. State**, 124 Nev. 1172, 1188–89 (2008); **Chapman v. California**, 386 U.S. 18, 24 (1967).

The State makes much of the fact that it had other theories of kidnapping, besides enticement, that the jury could have relied on to convict Sprowson. RAB at 18, 28. Yet, the State fails to explain how it could ever be harmless for the court to prevent Sprowson from fully testifying about his own intentions and motivations in a case where his specific intent was directly in issue. Sprowson was entitled to refute the State's circumstantial evidence of intent with direct evidence, *from his own lips*, as to why he did not intend to keep J.T. from her mother or perpetrate a crime upon her. See **State v. Maynard**, 19 Nev. 284, 9 P. 514, 516 (1886) ("The defendant had a

right to testify as to his intent, and make any explanation of what he did and said at the time of the [crime]."). Without question, the court's gag order contributed to the jury's guilty verdict on the kidnapping charge.

As to the charge of child abuse with substantial bodily harm, the deliberating jury lacked a complete picture of J.T.'s "normal range of performance or behavior" before meeting Sprowson. The State was allowed to present generalized, self-serving testimony that J.T.'s behavior and relationship with her mother changed as a result of Sprowson's actions, and Sprowson was precluded from refuting it with specific examples. The State cannot show that the improperly-omitted evidence did not contribute to the jury's verdict on the child abuse charge.

The pornography charges depended almost entirely on J.T.'s testimony that Sprowson directed her to take the pictures in question. See **NRS 200.710**; see also (XIV:3029-30). Sprowson contended that at least one of the pictures (a breast picture) existed before he ever met J.T. (XIII:2879). Yet, the court prevented Sprowson from presenting evidence that J.T. had previously taken breast pictures and sent them to Schlomann. AOB at 25-26. Had Sprowson been allowed to ask J.T. about the pictures she sent Schlomann, it would have undermined J.T.'s credibility regarding the breast pictures, and called into question whether Sprowson truly "directed" her to

take the remaining photos. The State cannot show that the omission of such evidence did not contribute to the jury's verdict on the pornography charges.

III. SPROWSON DID NOT PRODUCE IMAGES DEPICTING "SEXUAL CONDUCT" AND COULD NOT LAWFULLY BE CONVICTED OF PRODUCING IMAGES DEPICTING A "SEXUAL PORTRAYAL"

Sprowson's convictions for unlawful use of a minor in production of pornography must be reversed because they did not involve any "sexual conduct". AOB at 30-31. Without authority, the State claims that the photographs at issue in Counts 3 and 5 were a lewd exhibition of the genitals (and therefore "sexual conduct") despite the fact that J.T.'s genitals were covered in the photographs. The State fails to explain how this Court can disregard **State v. Castaneda**, 126 Nev. 478, 487 (2010), which held that genitals must be exposed to constitute lewdness. See also **Com v. Arthur**, 650 N.E.2d 787, 790-91 (Mass. 1995) (common law gives "fair warning" that "exposure of [one's] genitalia [is] a crime" and holding that exposing pubic hair but not genitals does not violate the law).

Sprowson's pornography-related convictions must also be reversed because Nevada's law defining "sexual portrayal" is facially invalid, overbroad and vague. AOB at 33-47. Although the State asks this Court to review for plain error, this Court will conduct *de novo* review when it chooses to address, for the first time on appeal, the constitutionality of a

statute. See **Shue v. State**, 133 Nev. Adv. Op. 99, 407 P.3d 332, 337 n.7 (2017) (exercising discretion to address appellant's constitutional challenges to sexual portrayal statute for the first time on appeal, and undertaking *de novo* review). In any case, Sprowson did challenge the constitutionality of **NRS 200.700(4)** in the district court (II:289-90), and as a *pro se* defendant, his challenge should be broadly construed to avoid forfeiture. See pp. 1-2, supra.

This Court erred as a matter of law in **Shue** when it held that "Nevada's statutes barring the sexual portrayal of minors are not overbroad because the type of conduct proscribed . . . does not implicate the First Amendment's protection." **Shue**, 407 P.3d at 338 (emphasis added). In actuality, **NRS 200.700(4)** bars far more expressive conduct than the "child pornography" deemed unprotected in **Ferber**[10] and the "obscenity" deemed unprotected in **Miller**.[11] See **Ashcroft v. Free Speech Coalition**, 535 U.S. 234, 251 (2002) ("where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

Nevada's law prohibits any depiction of a child "which appeals to the prurient interest in sex and which does not have serious literary, artistic,

[10] **New York v. Ferber**, 458 U.S. 747 (1982).
[11] **Miller v. California**, 413 U.S. 15 (1973).

political or scientific value." **NRS 200.700(4)**. Yet crucially, the statute contains no requirement that the depiction include any "sexual conduct" whatsoever. This fatal flaw renders **Shue**'s holding untenable, and the statute unconstitutional.

While the State is correct that the government has a "compelling interest" in protecting children from sexual exploitation, RAB at 36, it cannot use an overly broad law to accomplish that purpose. See **Ashcroft**, 535 U.S. at 244-45. In order for a restriction on "child pornography" to satisfy the First Amendment, "the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age." **Ferber**, 458 U.S. at 764-65 (emphasis added). Further, the "category of 'sexual conduct' proscribed must also be suitably limited and described." **Id**. Likewise, in order for a restriction on "obscenity" to satisfy the First Amendment, the restriction must be limited to works, which "depict or describe sexual conduct". **Miller**, 413 U.S. at 23-24 (emphasis added).

NRS 200.700(4) fails both the "child pornography" and "obscenity" tests because its restrictions are not limited to works involving "sexual conduct". Cf. **Ferber**, 458 U.S. at 765-66 (child pornography statute upheld where "the forbidden acts to be depicted are listed with sufficient precision

and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene"); cf. **Osborne v. Ohio**, 495 U.S. 103, 107 (1990) (child pornography statute sufficiently limited "to depictions of nudity involving a lewd exhibition or graphic focus on a minor's genitals", *i.e.*, sexual conduct).

Contrary to the State's suggestion, the phrase "appeals to the prurient interest in sex" does not suitably limit or describe a class of sexual conduct. RAB at 35. An innocent photograph of a child's foot could arguably appeal to a foot fetishist's "prurient interest", but no one would ever claim it involved "sexual conduct". Because Nevada's restriction on images that appeal to a "prurient interest in sex" is not limited to works involving sexual conduct, it violates **Ferber**, **Miller**, and **Ashcroft**.

Despite the State's arguments, Nevada's sexual portrayal statute is facially invalid because it is not *narrowly tailored* to prevent sexual exploitation of children. Cf. RAB at 36-37. The statute is overbroad because it prohibits a *substantial amount of conduct* that is protected under the First Amendment. See AOB at 34-44 (sharing selfies on Facebook, Instagram, Snapchat); see also **Packingham v. North Carolina**, 137 S. Ct. 1730, 1735–36 (2017) (sharing "vacation photos" with neighbors on social media is protected activity under First Amendment). The statute is vague because it

fails to provide adequate notice as to the conduct, activity or imagery that is prohibited. AOB at 45-47. Sprowson's convictions under that statute cannot stand and must be reversed.

IV. THE COURT IMPROPERLY CONDITIONED SPROWSON'S RIGHT TO CALL A KEY WITNESS ON HIS ABILITY TO PAY

Knowing that Sprowson was indigent, the court ruled that if he could not afford to fly J.T. back to Las Vegas to testify in his case-in-chief, then he could not question her in his case-in-chief. (X:2017-18). By conditioning Sprowson's right to call a witness upon his ability to pay for her appearance, the district court violated Sprowson's constitutional rights to due process and equal protection under state and federal law. See **Griffin v. Illinois**, 351 U.S. 12 (1956).

To avoid reversal on this basis, the State tries to recast Sprowson's argument as a claim that "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." RAB at 42. But that is not Sprowson's argument. Instead, Sprowson takes issue with the court's express ruling that he could call J.T. in his case-in-chief *only if he could pay for her appearance*. Where the court knew Sprowson to be indigent, this ruling was patently unconstitutional.

The State claims that Sprowson should have made a motion for expenses to be provided by the court. RAB at 43. Yet, where the court had already conditioned Sprowson's ability to call J.T. in his case-in-chief on his personal ability to pay, such a request would have been futile. See X:2013 ("If you want to call her in your case in chief, just be prepared to get her back down here at your expense, sir.").

Although the State claims Sprowson was not prejudiced by the court's ruling, it fails to address Sprowson's argument that the timing of J.T.'s testimony (as the State's first witness) precluded him from cross-examining her about testimony offered by later witnesses including her physician, therapist and mother. Compare AOB at 50 with RAB at 44. A new trial is required.

V. PROSECUTORIAL MISCONDUCT

The State claims its introduction to *voir dire* contained "no highly inflammatory language,' other than describing what is a highly inflammatory act." RAB at 47. Yet, that was not an introduction -- it was indoctrination. See **Khoury v. Seastrand**, 132 Nev. Adv. Op. 52, 377 P.3d 81, 87–88 (2016).

The State did not simply identify the charges and the witnesses in the case as it was supposed to do. (VIII:1777-78). The State used rhetorical

techniques, pontificating that Sprowson picked J.T. up "from her home, the home she shared with her mother, her sister and her grandmother in the middle of the night while her family slept." (VIII:1777). The State repeatedly called J.T. a "child", emphasized the sexual nature of their relationship, and argued that Sprowson "caused [her] to perform sexual acts" upon him during the "nine weeks"[12] they lived together. This introduction exceeded the bounds of permissible *voir dire*, allowing the State to empanel jurors with "a strong reaction" to the dirty details it disclosed. (IX:1907-24).

The State claims that "the record is clear that [Sprowson] did not see anything wrong with the State's introduction". RAB at 47. Yet, the State admits that Sprowson responded to its introduction by telling the jury: "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." RAB at 48. Obviously, Sprowson found the State's introduction objectionable because he said so in open court. Sprowson's request for the "same opportunity" as the State to argue his case in *voir dire* preserved this issue for appellate review. AOB at 55.

The State claims it was not seeking a commitment from jurors, but merely "wished to find out if any of the jurors could not overcome their bias

[12] The State's repeated references to "nine weeks" were evocative of the erotic movie, "9 ½ Weeks".

regarding the facts of the case." RAB at 49. Yet, the jurors should never have heard the "facts" as improperly relayed by the State during *voir dire*. Sprowson deserves a new trial because the jury was predisposed to find him guilty.

Reversal is also required because the State used Sprowson's exercise of his constitutional right of cross-examination as substantive evidence of his guilt. See **Griffin v. California**, 380 U.S. 609, 614 (1965). The State concedes that it presented evidence and argument that J.T. suffered "anxiety" related to Sprowson's cross-examination at trial. RAB at 53. The State further concedes that it relied on this evidence to establish substantial mental harm. RAB at 53 ("that she was still . . . suffering anxiety and being unable to look at him or be comfortable near him was evidence of her mental state"). Sprowson's substantial rights were violated by these plainly erroneous unconstitutional arguments.

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CONCLUSION

Whether considered alone or cumulatively, the egregious errors in this case require reversal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27 day of September, 2018.

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