IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE AZUCENA, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 74071

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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JOSE AZUCENA,	)	NO. 74071
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Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The appellant, Jose Azucena, appeals from his judgment of conviction pursuant to **NRAP 4(b)** and **NRS 177.015**. Mr. Azucena's judgment of conviction was filed on August 24, 2017. (Appellant's Appendix Vol. III:596-600).[1] This Court has jurisdiction over Mr. Azucena's appeal, which was timely filed on September 18, 2017. (III:602). See **NRS 177.015(1)(a).**

ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals; Azucena was convicted of 14 "A" felonies and 11 "B" felonies. See **NRAP 17(b)(2).**

[1] Hereinafter, Appellant's Appendix citations will start with volume number, followed by page.

ISSUES PRESENTED FOR REVIEW

I. **Azucena's constitutional rights were violated when the judge verbally abused a juror during voir dire and refused to replace the venire.**

II. **Azucena's constitutional rights were violated when the district court singled out the lone holdout juror and directed an Allen charge to him.**

III. **Azucena was illegally convicted and sentenced on lewdness and sexual assault counts that were pled "in the alternative".**

IV. **The State failed to prove essential elements of counts 1, 3, 10, 15, 19 and 30 beyond a reasonable doubt.**

V. **The court abused its discretion by allowing the State to present cumulative hearsay testimony from five witnesses pursuant to NRS 51.385.**

VI. **The court abused its discretion by giving a flight instruction.**

VII. **Prosecutorial misconduct violated Azucena's constitutional rights.**

VIII. **Judicial misconduct violated Azucena's constitutional rights.**

IX. **Cumulative error violated Azucena's constitutional rights.**

STATEMENT OF THE CASE

Azucena was indicted 2/2/2017 on 40 felony counts, including: sexual assault with a minor under 14, first degree kidnapping, lewdness with a child under 14, attempt lewdness with a child under 14, child abuse, neglect or endangerment, and indecent exposure. (I:3-14). The charges involved six children who lived in Azucena's apartment complex: J.M., M.M.1, M.M.2,

Y.E., N.E. and S.R. (I:3-14). On 2/14/2017, Azucena pled not guilty and invoked speedy trial. (IV:660-62).

Trial began 4/24/2017 and prosecutors filed an Amended Indictment dismissing Count 9. (III:500-10;VIII:1405).

On 5/10/2017, Azucena was acquitted of nine counts and convicted as follows:

- Lewdness (12 counts);
- Sexual Assault: (one);
- Kidnapping (one);
- Child abuse/neglect/endangerment (seven);
- Attempt lewdness (four);
- Indecent exposure (five).

(XV:2902-06).

On 8/17/2017, the court sentenced Azucena to 85-years-to-life. (III:647). J.O.C. was filed 8/24/2017 and Azucena timely appealed 9/18/17. (III:596-604).

STATEMENT OF FACTS

Amanda Moiza lived in the Charleston Gardens Apartments with her husband and daughters, eight-year-old twins M.M.1 and M.M.2, and ten-year-old J.M. (IX:1571-73,1574-75). Maria Barajas also lived in the

complex with her husband and children, eight-year-old Y.E. and two-year-old N.E.. (X:1707-08,1715). Moiza and Barajas were friends and their children regularly played together. (X:1707;IX:1594). At the time, Moiza, Barajas and their husbands were all undocumented immigrants. (IX:1633,1681;X:1739,1775).

Ricardo Rangel also lived at the complex. (IX:1672). Rangel knew Moiza because she sometimes watched his seven-year-old daughter, S.R., who lived with him part-time. (IX:1672). Rangel was also an undocumented immigrant who had previously been subjected to removal proceedings. (IX:1681).

There is virtually no way for undocumented immigrants like Moiza, Barajas and Rangel to obtain legal status other than the U-visa program. (XIV:2653-54). The U-visa program creates legal status for victims of certain crimes who help law enforcement investigate and prosecute criminal activity. (XII:2172,2197). Undocumented immigrants cannot apply for a U-visa without a police report stating that they are victims of "qualifying crime[s]" like domestic violence, sexual assault or human trafficking. (XII:2217,2223). Undocumented immigrants must cooperate with police investigations before law enforcement will "certify" their applications for further processing. (XII:2184;XIV:2661). As a victim-based system, the U-

visa program is open to abuse because it provides an incentive to invent crimes. (XIV:2664).

On 10/17/2016, Moiza and Barajas brought their children to the Children's Advocacy Center ("CAC") to file sexual misconduct complaints against their neighbor, Jose David Azucena. (XII:2139-40). At trial, Moiza admitted she knew about the U-visa program before they reported Azucena to police. (IX:1633-34).

Moiza and Barajas cooperated fully with local law enforcement. They brought their children to CAC on 10/20/2016 where they underwent sexual assault examinations, all of which came back "normal". (XIII:2129-32). They returned to CAC on 11/4/2016, where the children (M.M.1, M.M.2, J.M., and Y.E.) were interviewed in Spanish by forensic interviewer Elizabeth Espinosa. (XIII:2294;2479).

In their interviews with Espinosa, the girls generally alleged that on various occasions, in a group setting, Azucena would give them candy, show them pornography on his cell phone, expose himself to them, touch them inappropriately, and kiss them on the mouth, both indoors and outdoors and in the presence of multiple witnesses.(XIII:2296-2387).[2] Yet, when Espinosa

[2] The State's "grooming expert," John Paccult, testified grooming is "done in private, it's done in secrecy." (XIII:2255). He admitted that allegations of public sexual acts involving groups of children were highly unusual, and that

interviewed two other children identified as witnesses to the incidents ("Litzi" and "Leo"), they denied seeing anything inappropriate. (XIII:2332-2334,2347-74).

The girls made two other bizarre allegations involving Y.E.:

(1) Y.E. said Azucena grabbed her from outside his apartment, pushed her into his room, taped her mouth, hands and feet, then, *after* her feet were taped together, removed her pants, fondled her breasts, hit her buttocks, and inserted a finger in her vagina. (XII:2112;XIII:2324). Although Y.E. claimed Litzi saw Azucena pull her into his apartment, Litzi never told Espinosa and Litzi testified at trial that she never saw it. (XIII:2355-57;2387;2460).

(2) J.M. told Espinosa that Azucena once put chocolate inside Y.E.'s vagina and that Y.E. removed the chocolate while sitting in the back seat of J.M.'s car and M.M.1 asked her how the candy "smelled". (XIII:2366-67). Neither Y.E. nor M.M.1 ever reported that incident, nor was it charged. (I:35-62,71-84;XIII:2367).

After bringing their children to CAC, Moiza and Barajas continued to cooperate with law enforcement. They interviewed with Detective Campbell on 11/8/2016. (XIII:2479-80). They testified before grand jury on 2/1/2017,

---

in his 20-year career treating over 6,000 sex offenders, he could think of only one other case involving that scenario. (XIII:2248,2255,2288-89).

along with M.M.1, M.M.2, J.M. and Y.E. (I:23-25). After cooperating with law enforcement, Moiza and Barajas applied for U-visas through Hermandad Mexicana Transnational, and their applications were certified by Metro. (XII:2199).

Moiza told Rangel about their complaint against Azucena. (IX:1675). Afterwards, Rangel contacted police, claiming that Azucena touched his daughter's vagina. (XII:2145,2148). However, when Rangel brought S.R. to CAC on 11/22/2017, S.R. told Espinosa Azucena had merely touched her hair, back, cheek and shoulder. (XIII:2310,2319). S.R. also said Azucena exposed himself and offered candy. (XIII:2319-21).

Rangel cooperated with law enforcement, testifying before grand jury and trial. (I:23-25). Rangel admitted Moiza told him about Hermandad Mexicana. (IX:1684). Rangel denied having a pending U-visa application, but admitted he contacted a private lawyer about the U-visa process. (IX:1684).

The children's stories about Azucena evolved over time, from their interviews with Espinosa, to grand jury, to trial. Although Y.E., M.M.1, J.M. and M.M.2 had all originally told Espinosa that Azucena had simply *given* them candy, this innocuous act became twisted in front of grand jury. Y.E. told grand jury Azucena would make them *take* the candy out of his

front pocket. (I:50). M.M.1 told grand jury Azucena would put candies in his pants, "in front of his thing," and make them "go find them." (I:80-81). J.M. told grand jury Azucena would put the candies on his "parts", then take them out and give them to the children. (I:103-04). M.M.2 claimed Azucena would put candy "in his thing" and ask if they wanted it. (I:123-24). Y.E. told grand jury Azucena had once picked up her two-year-old sister, N.E., and rubbed N.E.'s "boobs and neck" against his chest. (I:57-59).

The girls' stories about candy changed, once again, at trial. Although Y.E. told grand jury that the candy would be in Azucena's front pocket (I:49-50), at trial Y.E. claimed that the chocolate would be "going around his penis" and that she had to reach into his clothes to get it. (XIII:2090-91). At trial, J.M. claimed that Azucena would take his "part" out of his pants, put the chocolate on his part and give it to them. (X:1878). And in a bizarre twist, Moiza claimed at trial that J.M. told her Azucena would take watermelon and strawberries, "juice it around his penis," and then tell the children to eat it. (IX:1606;1651-52;XIII:2355,2366).

Despite the testimony at trial, Azucena did not commit any of the crimes alleged. The bizarre allegations were fabricated by the children for attention and then co-opted by the parents so Moiza, Barajas and Rangel could obtain legal immigration status at the expense of an innocent man.

ARGUMENT SUMMARY

A new trial is required because Azucena didn't receive the fair trial by an impartial jury guaranteed by state and federal constitutions. Before defense counsel even had an opportunity to question the venire, the judge used foul language to verbally abuse a juror for disclosing honest bias against defense, discouraging remaining venire-members from making similar, honest disclosures. The judge then denied Azucena's request for a new venire. This was structural error.

The judge's erratic behavior throughout trial further prejudiced the defense. The judge repeatedly chastised defense counsel for making legal arguments, inadvertently left his microphone on, allowing the jury to hear three adverse rulings at the bench, required the parties to argue stipulations in front of the jury, and expressed his personal belief to the jury that a State witness was testifying truthfully. (X:1832).

Prosecutorial misconduct also infected the trial during jury selection and closing argument, and the court made several erroneous rulings with respect to evidence and jury instructions.

These trial errors culminated in the issuance of a coercive Allen charge, over Azucena's objection, in response to the jury foreman's request

that the judge "talk to" the lone holdout juror who wanted to vote "not guilty."

Azucena was also illegally convicted and sentenced on lewdness and sexual assault counts that were *pled alternatively to one another*. In addition, he was convicted and sentenced on four counts of child abuse and two counts of lewdness that the State failed to prove beyond a reasonable doubt. These errors were not harmless. Whether considered alone or in combination, the errors violated Azucena's right to a fair trial and require reversal.

ARGUMENT

I. Azucena's constitutional rights were violated when the judge verbally abused a juror during voir dire and refused to replace the venire.

On day two of voir dire, the judge became extremely angry at a juror who disclosed that she did not believe she could be fair and impartial to Azucena because of her work with child abuse victims. The judge swore at the juror, accused her of lying, and threatened both the juror *and the entire jury panel* with "repercussions" if anyone else tried to "fabricate" similar excuses to get off the jury:

> KOLLINS: Okay. So can you be fair to both sides?
>
> JUROR #177: I think I would be biased. I don't know how --

COURT: So you didn't say that yesterday. All right.

JUROR #177: Well, I said I had other issues.

COURT: No, listen, what -- what we're not going to have in this jury is people coming in overnight and thinking up **shit** and try to make **shit** up now so they can get out of the jury. That's not going to happen. All right. All right. Because if I find that someone said something yesterday under oath and changes it because they're trying to fabricate something to get out of serving on this jury, **there's going to be repercussions**. All right.

JUROR #177: I did say –

COURT: Now, what's going on here?

JUROR #177: I did say.

COURT: Tell me what's going on.

JUROR #177: I said I had other issues yesterday. And you said you'd get back to me.

COURT: All right. So -- so why you got issues? Why can't you – you're – you're saying that you can't be fair and impartial to both sides. **You're going to completely throw out our entire justice system** because you don't want to be fair and impartial.

WESTBROOK: Your Honor, may we approach?

COURT: Is that what you're saying?

WESTBROOK: Your Honor?

COURT: No, you can't approach.

You're not going to be fair and impartial?

JUROR #177: Like I said, with my nursing history and I've been involved with child abuse and I've been involved with incest with young girls that deliver, 13-years-old, it makes me rather, you know, biased.

COURT: Ma'am, you're – you're off this jury. You're off this jury.

JUROR #177: Okay.

COURT: You're removed.

JUROR #177: Okay.

COURT: Go home. All right. **I don't like your attitude.**

(VI:995-96)(emphasis added); **Court Exhibit 3**, JAVS, 4/25/2017 at 1:39:15-1:40:38

The naked transcript does not reflect the judge's tone of voice or demeanor during the encounter, but the JAVS shows he was *exceptionally* angry at the juror. He repeatedly cut her off before she could explain herself and even **threw a book** when he accused her of, "completely throw[ing] out our entire justice system because you don't want to be fair and impartial." See **Court Exhibit 3**, JAVS, 4/25/2017 at 1:39:15-1:40:38. The court's conduct was outrageous.

Defense counsel advised the court he didn't believe the remaining jurors would "be comfortable enough in this courtroom to express that they

feel they have a bias or to express anything they think the court will yell at them about." (VI:1049). Citing the Fifth, Sixth and Fourteenth Amendments, defense counsel argued : "the way they were yelled at and the language that was used by the court . . . will have a chilling effect on the remainder of this voir dire" in violation of Azucena's rights to due process, a fair trial and a fair and impartial jury. (VI:1049). Defense counsel moved to dismiss the panel. (VI:1049). See also, **Court Exhibit 3**, JAVS 4/25/17 at 2:37:09-2:38:22.

The court summarily denied counsel's request as "ludicrous" and made the following record:

> THE COURT: Well, the juror that I excused was obviously lying and making stuff up, and so I had to be stern with her. You know, based upon -- I have notes of what she said yesterday, notes what she said today. She completely changed her story, was twisting things to try to get out of jury service. And I'm not going to allow that. And I had to make that known, that I'm not going to allow jurors to lie. All right.

(VI:1050). See also, **Court Exhibit 3**, JAVS 4/25/17 at 2:38:23-2:38:54.

The judge was not only out-of-line with his reaction, he was also flat wrong: Juror 177 had not "changed her story" at all. (V:868,904-05). On day one of voir dire, when the court asked Juror 177 about her experiences as a "victim of crime", she said she had "other issues" she wanted to discuss. The court told her to wait until the parties questioned her about them.

(V:904-05). Juror 177 did exactly as the court instructed; she waited to discuss her "other issues" until the State questioned her. Apparently, the judge forgot about this.

The judge's attack was erroneous and reprehensible. The judge did not allow Juror 177 to discuss her work-related bias on day one of voir dire, so she couldn't have "changed her story" the next day. Compare (V:904-05) with (VI:1050). The judge attacked this soft-spoken, children's trauma nurse in front of an entire courtroom—shouting obscenities at her, accusing her of lying, and tainting the entire jury venire—all because he couldn't remember *his own words* the day before.

As set forth herein, the court's hostile outburst was structural error requiring reversal.

A. The court violated Azucena's rights to due process, a fair trial and a fair and impartial jury, and unreasonably restricted voir dire.

"A fair trial in a fair tribunal is a basic requirement of due process." **In re Murchison**, 349 U.S. 133, 136 (1955). Nevada's Constitution and the United States Constitution guarantee criminal defendants the right to a fair and impartial jury. See **Sanders v. Sears-Page**, 131 Nev. Adv. Op. 50, 354 P.3d 201, 205 (Nev. App. 2015); **McNally v. Walkowski**, 85 Nev. 696, 700 (1969) ("The right to trial by jury, if it is to mean anything, must mean the

right to a fair and impartial jury"); **Whitlock v. Salmon**, 104 Nev. 24, 27 (1988) ("The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country."); **U.S.C.A. VI**; **Nev. Const. art 1, § 3.**

To secure these rights, **NRS 175.031** guarantees defendants the right to examine jurors during voir dire:

> The court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. **Any supplemental examination must not be unreasonably restricted.**

NRS 175.031 (emphasis added); see also **NRS 16.030(6)** ("The judge shall conduct initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations **which must not be unreasonably restricted**") (emphasis added).

Although the court has discretion to determine the scope and method of voir dire for the parties, it is reversible error for the court to unreasonably restrict defense counsel's voir dire. **Salazar v. State**, 107 Nev. 982, 985 (1991).

Here, the judge's verbal assault on Juror 177 (and his refusal to replace the venire thereafter) unreasonably restricted Azucena's ability to ferret out possible bias on the part of prospective jurors. (VI:1049).

First, the judge's behavior violated Code of Judicial Conduct, Rule 2.8 (B), which provides:

> A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

Nev. Sup. Ct. R. CJC 2.8. If this rule means anything at all, it certainly prohibits judges from threatening and cursing at jurors for honestly disclosing bias during voir dire.

As this Court explained in **Parodi v. Washoe Med. Ctr., Inc.**, 111 Nev. 365, 367 (1995), "[a] trial judge is charged with providing order and decorum in trial proceedings. What may be innocuous conduct in some circumstances may constitute prejudicial conduct in a trial setting, and we have earlier urged judges to be mindful of the influence they wield." In **Parodi**, 111 Nev. at 367, this Court found that a trial judge's joking behavior during voir dire "may have adversely influenced the venire's perceptions of the significance of the trial". Based on the mere *possibility* that the judge's behavior had "a prejudicial effect on the jury's view of the

seriousness or importance of the issues", this Court reversed the judgment, remanding for a new trial in front of a different judge. **Parodi**, 111 Nev. at 369, 371. In the instant case, the judge was certainly not joking.

To obtain relief, Azucena is not required to show that the resulting jury panel was, in fact, biased or prejudiced against him. The mere *possibility* of a prejudicial effect is sufficient for reversal. See **id**. Nevertheless, there is evidence that the court's outburst had a chilling effect on the jury's willingness to answer truthfully when asked about potential bias towards the defense. Right after the court angrily ejected Juror 177, the juror who replaced her (Juror 333) disclosed that she had been sexually assaulted when she was "real young". (VI:997). But when the court tersely asked if this was going to affect her ability to be fair, she quickly said "no." (VI:997). See also, **Court Exhibit 3**, JAVS, 4/25/17 at 1:41:36-1:41:50. Where the court had just berated Juror 177 for "mak[ing] shit up" to get out of jury service and even threw the proverbial and *literal* book at her, it is very likely Juror 333 felt pressured to deny her own bias. Azucena could not be assured that any of the jurors would answer voir dire questions truthfully after the judge threatened them with "repercussions" for trying to "get out of serving" on the jury. (VI:1049).

B. The court's error was structural, requiring automatic reversal.

Whether the court's actions in this case constituted structural error is a question of law reviewed *de novo*. **Barral v. State**, 131 Nev. Adv. Op. 52, 353 P.3d 1197, 1198 (2015).

The U.S. and Nevada Supreme Courts have repeatedly held that trial errors violating a defendant's right to an impartial jury are "structural errors" warranting automatic reversal without a showing of prejudice. See, e.g., **Barral**, 353 P.3d at 1198-99 (citing, *inter alia*, **Peters v. Kiff**, 407 U.S. 493, 502 (1972); **Estes v. Texas**, 381 U.S. 532, 545 (1965); and **Mayberry v. Pennsylvania**, 400 U.S. 455, 465–66 (1971)); **Brass v. State**, 128 Nev. 748, 752 (2012).

In **Barral**, 353 P.3d at 1200, this Court found structural error when a judge failed administer the oath to the jury venire before voir dire, as required by **NRS 16.030(5)**. This Court explained why the error required automatic reversal:

> [A] defendant in a criminal case is denied due process whenever jury selection procedures do not strictly comport with the laws intended to preserve the integrity of the judicial process. An indictment or a conviction resulting from an improperly selected jury must be reversed. A fair tribunal is an elementary prerequisite to due process, so we will not condone any deviation from constitutionally or statutorily prescribed procedures for jury selection.

Barral, 353 P.3d at 1200.

Here, as in **Barral**, the court failed to "strictly comport with the laws intended to preserve the integrity of the judicial process" during jury selection. The court violated Code of Judicial Conduct, Rule 2.8 (B) by behaving in an undignified and discourteous manor to the entire jury panel, violated **NRS 175.031** and **NRS 16.030(6)** with conduct that unreasonably restricted defense counsel's ability to ferret out bias in the jury venire, and violated both the state and federal constitutions by forcing Azucena to proceed to trial with a jury panel that had been irretrievably tainted by the court's outburst. **U.S.C.A. V, VI, XIV; Nev. Const. art 1, § 3**; see also **Barral**, 353 P.3d at 1198.

Automatic reversal is required.

II. Azucena's constitutional rights were violated when the district court singled out the lone hold-out juror and directed an Allen charge to him.

A. Factual Background

The court dismissed the jury at 6:22 p.m. on 5/8/2017 and ordered their return the following day to begin deliberations. (XV:2882). On May 9, 2017, the jury deliberated from 10:00 a.m. until 3:20 p.m., when it sent a note to the court stating the following:

> We have one jury (sic) that believes not guilty on all counts. What is our next step? Can you talk to him?"

(XV:2887,2955-56) (emphasis added).

The court called the parties at 3:44 p.m. and the State requested an Allen charge. The defense objected. (XV:2887). The court asked the parties to appear in court and make a record. (XV:2887).

When the parties convened at 4:03 p.m., the court advised that, after six hours of deliberations, it was "premature to declare a hung jury" and "premature for me to exercise my right to inquire of the individual jurors yet, as to whether there's a problem with the deliberations". (XV:2887-88). The court stated that it believed an Allen charge was appropriate and asked the defense to explain why it was opposed to the charge. (XV:2888).

Defense counsel explained that an Allen charge would be unduly coercive in this case where "we know it's 11 to 1" and it "would essentially be the power of the court backing up the majority versus the minority." (XV:2888). Defense counsel explained that giving an Allen charge under these circumstances would violate Azucena's right to due process under the Fifth and Fourteenth Amendments and the Nevada Constitution, and would violate his Sixth Amendment right to a trial by a fair and impartial jury, constituting structural error. (XV:2889).

The jury reconvened at 4:17 p.m. (XV:2897). The Court read the note to the jury and gave the Allen charge in response:

COURT: The court had received I think around 2:50 or so, a note from the jurors. And the note says: "We have one juror that believes not guilty on all counts. What is our next step? Can you talk to him?" It appears to be signed by I think it's Juror No. 11, Rhonda Gonzalez; is that correct?

JUROR #11: Correct.

COURT: Ms. Gonzalez, did you sign this because you're the foreperson?

JUROR #11: Yes.

COURT: Okay. So I have a question. So we received this and the court has an official response. And I have that. All right. The court's response is as follows:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans. You are judges. Judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

So that concludes the -- the written response.

> What I'm going to do now is to excuse you back to the deliberation room. You will continue deliberating, as long as you determine it's appropriate.
>
> And I'll -- you can go until -- you can go another half an hour, and then, unfortunately, given the lateness of the hour, we need to excuse you. And I need you back here at 9:00 a.m. to continue with – with your duties. All right.
>
> With that, I will go ahead and respectfully excuse you.
>
> Marshal, please take them back to the deliberation room.

(XV:2897-98). See also, **Court Exhibit 12**, JAVS, 5/9/17 at 4:18:06-4:20:48.

Both the State and the defense agreed that Juror 6 appeared visibly angry during the reading of the Allen charge. (V:2909-15). The State could not tell if Juror 6 "was potentially the one juror" or if he was merely frustrated by the holdout. (XV:2912-13). Defense counsel made a record that, as they exited the courtroom, both Juror #6 and the foreman, Juror #11, were "loudly talking back and forth angrily about the fact that there was one juror who -- who wouldn't get on board with the guilty verdicts." (XV:2909-10).

The following morning, the jury returned and found Azucena guilty of 30 counts. (XV:2914).

B. Legal Analysis

Azucena's state and federal constitutional rights to due process and a fair trial by an impartial jury were violated when the district court singled out the lone hold-out juror and directed an Allen charge to him. See, e.g., **U.S.C.A. V, VI, XIV; Nev. Const. art 1, § 3.**

This Court examines the totality of the circumstances to determine if a court's interactions with the jury during deliberations are improperly coercive. See, e.g., **Lowenfield v. Phelps**, 484 U.S. 231, 237 (1988) (citation omitted); **Saletta v. State**, 127 Nev. 416, 420, (2011); **White v. State**, 95 Nev. 881, 883-84 (1979).

In **White v. State,** 95 Nev. 881, 884 (1979), this Court recognized that it would be coercive for a judge to "urge the jury to reach a verdict" or "in any other manner apply pressure to minority jurors."

In **State v. Clark**, 38 Nev. 304, 308-10 (1915), this Court found reversible judicial coercion in a case where the jury was "brought into court upon the order of the judge and interrogated as to how they stood numerically, they were informed by the judge that the situation, as presented by the answer of the foreman that the jury stood 11 to 1, "looks easy, if it is in that condition'", and then reminded of the amount of time and money consumed in the trial.

In **Ransey v. State**, 95 Nev. 364 (1979), this Court found coercion and reversible error when it inquired into the numerical division of the jury and then gave a non-approved version of the Allen charge. In doing so, this Court observed that, "Allen charges have been condemned because they . . . coerce the minority juror or jurors to acquiesce to the will of the majority by encouraging the minority to reconsider their position in light of the fact that the majority disagrees with them". **Ransey**, 95 Nev. at 366. The Court further stated that it had only "reluctantly approved" the giving of an Allen charge "if it clearly informs the jury that each member has a duty to conscientiously adhere to his own honest opinion *and* the charge avoids creating the impression that there is anything improper, questionable or contrary to good conscience for a juror to create a mistrial." **Id**. (emphasis added).

The "totality of the circumstances" illustrates the coercive nature of the court's Allen charge in this case, most notably:

1) The court's attack on Juror #177, which tainted the entire jury panel from the start;
2) The court's knowledge that the jury was deadlocked at 11-1 in favor of conviction;

3) The note where 11 united jurors asked the court to pressure the single holdout;

4) The holdout juror's quick capitulation the following morning.

Before the court issued the Allen charge, the jury foreman delivered a note that self-disclosed the jury's numerical split, stating there was "one jur[or] who believes not guilty", and expressly asking the court, "can you talk **to him**." (XV:2887;2955-56) (emphasis added). The court then read that note aloud to the jury *before* delivering the Allen charge. By reading the note to the jury, the court was effectively calling out the holdout juror and issuing the Allen charge directly to him. The note said "talk to him," and the judge made it clear he was talking to him.

The judge even *recognized* that he was being asked to direct his message to the holdout: "I've never had a case where the jurors collectively have said, 'Go talk to this holdout.' That's – that's kind of unusual for me." (XV:2893). So, the judge knew what he was doing, but he did it anyway.

Giving an Allen charge under these circumstances undeniably "coerce[d] the minority juror . . . to acquiesce to the will of the majority by encouraging the minority to reconsider their position in light of the fact that the majority disagrees with them". **Ransey**, 95 Nev. at 366.

The facts of this case are similar to those of **U.S. v. Sae-Chua**, 725 F.2d 530 (9th Cir. 1984), where the Ninth Circuit also found coercion and reversible error. In **Sae-Chua**, 725 F.2d at 532, the jury foreman advised the court that a majority of jurors favored conviction and that only one person continued to vote not guilty. The dissenting juror was aware that the judge knew the numerical division. Under such circumstances, the giving of an approved Allen charge was deemed coercive. See also **Smith v. United States**, 542 A.2d 823 (D.C. 1988) ("When a jury reveals its numerical division and the judge then gives [the approved Allen charge], the potential for coercion is great. It is as if the judge were to say, 'I know a few of you are holding up a verdict; you should stop being so stubborn and fall in line.'").

In considering the "totality of circumstances," the Court should also note that the parties agreed Juror 6 was visibly angry during the reading of the Allen charge. (V:2909-15). If Juror 6 was the holdout, as prosecutors suggested (XV:2912-13), that juror's anger would indicate the court's message infuriated him. If Juror 6 was in the majority, as defendant believed, then the effect of the Allen charge was to galvanize an already angry and frustrated majority against the lone holdout. Either way, circumstances show the instruction's coercive effect.

The swiftness with which the jury returned its verdict the very next morning is also notable. After deliberating for six (6) hours prior to receiving the Allen charge, it took the majority barely two hours to pressure the lone holdout to convict. (XV:2914). See, e.g., **Redeford v. State**, 93 Nev. 649 (1977) (finding coercion where jury deliberated less than 2 hours after receiving coercive Allen charge); **Sae-Chua**, 725 F.2d at 531 (finding coercion where court deliberated for "several hours" after receiving Allen charge).

Also, following the coercive Allen charge, the jury *illegally* convicted Azucena of lewdness and sexual assault charges that were pled alternatively to one another, and found him guilty of two counts of lewdness and four counts of child abuse that had not been proven beyond a reasonable doubt. See Sections III-IV, infra.

Finally, this Court cannot forget the judge's intimidation of Juror 177 during voir dire, which certainly contributed to the coercive effect of the Allen charge. This outburst set the tone for the entire trial—which is exactly why the defense called for a new venire. The lone holdout could have reasonably believed that, if he failed to reach an agreement as instructed, he might suffer the "repercussions" the court had earlier threatened.

Under the totality of the circumstances, the Allen charge given in this case was unduly coercive and requires reversal.

III. Azucena was illegally convicted and sentenced on lewdness and sexual assault counts that were pled "in the alternative".

This Court has held that "the crimes of lewdness with a child under the age of fourteen and sexual assault are mutually exclusive." **Townsend v. State**, 103 Nev. 113, 120-121 (1987). By statute, the State is prevented "from obtaining convictions for both lewdness and sexual assault based on the same act, but not from charging both offenses in the alternative." **State v. Koseck**, 113 Nev. 477, 480 (1997).

Here, the State charged Azucena with several "alternative" counts, including Counts 25 and 26. (XV:2770-71;2773). Count 25 alleged that Azucena committed sexual assault by "inserting his finger(s) into the vaginal opening of Y.E." (III:549). Count 26 alleged that Azucena committed lewdness with a child by "using his hand(s) and/or finger(s) to touch and/or rub and/or fondle the genital area of Y.E." (II:549).

In closing, the State repeatedly told the jury it could not convict Azucena of both Counts 25 and 26 because they were pled alternatively. (XV:2770-73). If the jury believed there was penetration, the State instructed the jury to find Azucena guilty of Count 25 (sexual assault). (XV:2770-71). However, if the jury believed there was no penetration, only fondling of

Y.E.'s genitals, the State instructed the jury to find Azucena guilty of Count 26 (lewdness). (XV:2770-71).

After the State's closing, both the court and the State acknowledged that Counts 25 and 26 were alternative counts. (XV:2794). The court agreed that if the jury were to convict Azucena of both alternative counts, it would have to eliminate one of them. (XV:2796).

After the court gave its coercive Allen charge, the jury improperly convicted Azucena of both Counts 25 and 26. (III:592). Then, although the court promised to eliminate one of the counts, it found him guilty of both crimes and sentenced him to consecutive time. (III:597,599).

Azucena's "multiple convictions for lewdness and sexual assault based on the same act [do] not comport with legislative intent and [are] unlawful." **Koseck**, 113 Nev. at 479. Reversal is required.

IV. The State failed to prove essential elements of counts 1, 3, 10, 15, 19 and 30 beyond a reasonable doubt.

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **Carl v. State,** 100 Nev. 164, 165 (1984). This Court will reverse a conviction when the state fails to present evidence to prove an element of the offense beyond a reasonable doubt. **In re Winship,** 397 U.S. 358 (1970); **Martinez**

v. State, 114 Nev. 746 (1998). The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" **McNair v. State**, 108 Nev. 53, 56 (1992) (internal quotation omitted).

A. The State failed to prove beyond a reasonable doubt that Azucena was guilty of child abuse in counts 3,10,19 and 30.

Nevada law "criminalizes five different kinds of [child] abuse or neglect: (1) nonaccidental physical injury, (2) nonaccidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment." **Clay v. Eighth Jud. Dist. Ct.**, 129 Nev. 445, 452 (2013).

The State charged Azucena with child abuse by "negligent treatment or maltreatment or sexual exploitation, by Defendant exposing his penis" to five children: J.M. (in Count 3),[3] M.M.1 (in Count 10),[4] M.M.2 (in Count 19),[5] Y.E. (in Count 30),[6] and S.R. (in Count 38).[7]

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[3] (III:544).

[4] (III:545).

[5] (III:547-48).

[6] (III:550).

[7] (III:552). Azucena was acquitted of this count. (III:594).

Although the State charged Azucena with child abuse for exposing his penis to the children under these two legal theories, it only argued a single theory in closing: maltreatment.[8] (See XV:2777-78,2781-82,2789-90,2790-92;2970). Azucena cannot be liable for "maltreatment" of any of the children under Nevada's child abuse statute because – as a mere neighbor – he was not responsible for their welfare. See **NRS 432B.130**.

By law, "maltreatment" only occurs "if a child has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic. . . because of the faults or habits of *the person responsible for the welfare of the child* . . ." **NRS 432B.140** (emphasis added). A person is "responsible for a child's welfare" within the meaning of the statute,

> if the person is the child's parent, guardian, a stepparent with whom the child lives, an adult person continually or regularly found in the same household as the child, or a person directly responsible or serving as a volunteer for or employed in a public or private home, institution or facility where the child actually resides or is receiving child care outside of the home for a portion of the day.

NRS 432B.130.

[8] Azucena could not have been liable for child abuse under a theory of "sexual exploitation" because exposing one's penis does not fall under that statutory definition. See **NRS 432B.110**. The State did not charge Azucena under a theory of sexual abuse. (III:544-52).

The jury was never instructed on what it meant to be "responsible for a child's welfare" and the State never even argued that Azucena was "responsible" for the children's welfare as that term is defined in **NRS 432B.130**. (See XV:2777-78,2781-82,2789-90,2790-92,2970)

Instead, prosecutors argued Azucena was guilty of child abuse by maltreatment based on the "[e]xposure of adult male genitalia coupled with telling the child not to tell." (XV:2970). As a result, the jury likely found Azucena guilty of Counts 3, 10, 19, and 30, because they deemed him "responsible" for the children's welfare when he told them not to tell.

The jury should have been instructed on the statutory meaning of "responsible for a child's welfare". See **Rosanna v. State**, 113 Nev. 375, 382 (1997) (quoting **Dougherty v. State**, 86 Nev. 507, 509 (1970)) ("An accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error."); see also **Clay**, 129 Nev. at 456–57 (where a statutory definition is "technical and does not reflect a layperson's common understanding of the term", the jury should be instructed on the statutory definition). The failure to so instruct was reversible plain error.

Regardless of whether this Court finds plain instructional error, Counts 3, 10, 19 and 30 must still be reversed because the State presented no

evidence that Azucena was a parent, stepparent, guardian, adult person regularly found in their household, or a volunteer or employee of a home or facility where the children resided, that would make him liable for child abuse by maltreatment.

B. The State failed to prove beyond a reasonable doubt that Azucena was guilty of lewdness in Counts 1 and 15.

Under **NRS 201.230(1)(a)**, a person is guilty of lewdness with a child under 14 if he or she:

> [i]s 18 years of age or older and willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of [14] years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child . . .

To be convicted of this crime, the State must prove that the defendant committed a "lewd or lascivious act."

In **Shue v. State**, this Court considered the ordinary, well-established definition of "lewd" and determined that it meant the following: "(1) 'pertaining to sexual conduct that is obscene or indecent; tending to moral impurity or wantonness,' (2) 'evil, wicked or sexually unchaste or licentious,' and (3) 'preoccupied with sex and sexual desire; lustful.'" **Shue**,

407 P.3d 332, 340 (Nev. 2017) (quoting **Berry v. State**, 125 Nev. 265, 281 (2009)).[9]

In light of this definition, **Shue** reversed a defendant's conviction for open and gross lewdness, holding that "[a] kiss on the mouth, without more, does not constitute lewd conduct because it is not lustful or sexually obscene." 407 P.3d at 340. The court explained its ruling as follows:

> Although the circumstances surrounding the kiss may be inappropriate, there is simply insufficient testimony about the nature of the kiss. In addition, the State's indictment alleged that the kiss itself was the lewd act. Thus, in light of the evidence, we hold a rational fact-finder could not conclude beyond a reasonable doubt that Shue's kiss constituted a lewd act. Therefore, we reverse Shue's conviction of open or gross lewdness.

407 P.3d at 340.

Here, as in **Shue**, the Indictment alleged that the kiss, itself, was the lewd or lascivious act in Counts 1 and 15. (III:512;515). And just like the "kiss" in **Shue**, there was insufficient testimony about the nature of the kisses in Counts 1 and 15 for a jury to convict on those counts.

(1) Insufficient Evidence of Count 1

With respect to Count 1, the jury heard testimony from Elizabeth Espinosa that J.M. told her he kissed her on the mouth. (XIII:2318). The

[9] The synonymous term "lascivious" is defined as "tending to excite lust; lewd; indecent; obscene." **Black's Law Dictionary (Third Edition)**p. 1013.

jury heard testimony from J.M.'s mother, Amanda Moiza, that she asked J.M., "What else does he do to you honey?" and that J.M. replied, "He kisses me on my mouth." (IX:1599). The jury heard testimony that Moiza told Detective Campbell that, two days after the girls' initial disclosure, J.M. told her that Azucena would kiss her on the mouth. (IX:1651). Finally, the jury heard from J.M. herself that she remembered one time where Azucena kissed her on the mouth. (X:1873). There was no testimony whatsoever about the nature or circumstances of the kiss.

With respect to Count 1, the State argued in closing, "she remembers one time at trial. She had previously said two times. She told Mom about it. But she did remember one time here where David kissed her on the mouth and she didn't like it." (XV:2786). Under **Shue**, the evidence was insufficient to support a finding of lewdness with a child. Count 1 must be dismissed.

(2) Insufficient Evidence of Count 15

There was even less evidence with respect to Count 15. The jury heard testimony from M.M.2 that Azucena kissed her on the mouth once in the presence of M.M.1. (XI:2006). M.M.2 admitted she did not tell Espinosa about the kiss on the mouth. (XIII:2351). M.M.2's mother, Moiza, did not

mention M.M.2 being kissed. (IX:1571-1670). Again, there was no evidence about the nature or even the circumstances of the kiss.

The State argued in closing that the evidence supported a lewdness conviction on Count 15 because "she was clear that she got kissed on the mouth. And I submit to you, again, grown men don't kiss eight-year-olds on the mouth for a nonsexual purpose." (XV:2783).

Regardless of Azucena's "purpose," the kisses in Count 1 and Count 15 did not constitute "lewd or lascivious" acts under Nevada law. Those convictions must be reversed.

V. The court abused its discretion by allowing the State to present cumulative hearsay testimony from five witnesses pursuant to NRS 51.385.

NRS 51.385 sets forth the procedure for admitting, at trial, a minor's otherwise inadmissible hearsay statements describing their own physical or sexual abuse.[10] On 4/12/2017, just five days before trial was set to begin, the State notified Azucena of its intent to introduce hearsay from five minor witnesses pursuant to **NRS 51.385** without identifying the statements it intended to introduce. (III:524).

On 4/25/2017, the State submitted a bench memorandum regarding **NRS 51.385**, again failing to identify the specific hearsay statements at

[10] The full text of **NRS 51.385** is attached as **Exhibit A.**

issue. (III:497-98). Azucena submitted a responsive bench memorandum advising the court that it would violate statutory rules of evidence and discovery, along with Azucena's right to notice and a fair trial, to hold a 51.385 hearing on the third day of trial where the State had never identified the statements it intended to introduce. (XV:2983-87).

Over Azucena's objection, on 4/26/2017, the court postponed the trial to hold a full-day 51.385 hearing to determine the admissibility of hearsay statements made by the five children to a neighbor (Yusnay Rodriguez), three parents (Amanda Moiza, Maria Barajas and Ricardo Rangel) and a forensic interviewer (Elizabeth Espinosa). (VII:1155-1402).

Over Azucena's objections (III:522-36;VII:1158,1374-93), the court made a blanket ruling that all of the children's inculpatory hearsay statements to all five witnesses were admissible at trial. (VII:1394-99).

After the jury spent two days listening to cumulative hearsay testimony that served only to bolster the State's child witnesses, Azucena moved for a mistrial on 4/28/2017, pursuant to **Felix v. State**, 109 Nev. 51, 199-203 (1993)[11]. (IX:1614-21). The court denied the motion. (IX:1621).

On 5/1/2017, Azucena twice moved for mistrials after Maria Barajas gave prejudicial hearsay testimony that exceeded the scope of the 51.385

[11] **Felix** was superseded on other grounds by statute, as stated in **Evans v. State**, 117 Nev. 609, 625 (2001).

hearing. (X:1742-51,1778,1783). The court denied those motions as well. (X:1744,1786). The court then refused to give the full curative instruction requested by the defense. (X:1786-96).

Azucena challenges each of the court's rulings herein.

A. Standard(s) of Review

This Court reviews rulings on evidence for abuse of discretion. See **Jones v. State**, 113 Nev. 454, 471 (1997). A court abuses its discretion by admitting evidence when the probative value of that evidence is "substantially outweighed by the danger of unfair prejudice." **Edwards v. State**, 122 Nev. 378, 384 (2006). A court also abuses its discretion by admitting evidence in violation of a defendant's constitutional rights. See **Sherman v. State**, 114 Nev. 998, 1008 (1998).

When "prejudice occurs that prevents the defendant from receiving a fair trial", the trial court may grant a mistrial at the defendant's request. **Rudin v. State**, 120 Nev. 121, 144 (2004). This Court reviews the denial of a motion for mistrial for an abuse of discretion. **Rose v. State**, 123 Nev. 194, 206 (2007).

B. The State's request for a 51.385 hearing was untimely and insufficiently noticed.

Defense counsel objected to the State's untimely request to hold a mid-trial 51.385 hearing, citing statutory rules of evidence and discovery,

and his constitutional rights to notice and a fair trial. (VII:1158;XV:2983-87).

Pursuant to **NRS 174.125(1)**, all motions "which by their nature, if granted, delay or postpone the time of trial must be made before trial . . ." Such motions "must be made in writing not less than 15 days before the date set for trial" unless good cause is shown. **NRS 174.125(3)(b)**.

Here, the State's request for a mid-trial 51.385 hearing was untimely because, when granted, it resulted in the delay of trial for a full day to allow the State to put on testimony of five different witnesses, four of whom required a Spanish translator. The State did not establish good cause to delay the trial in this manner, particularly where it had identified all five witnesses months earlier, and presumably knew what it wanted from those witnesses at trial. (I:14;I:197;VII:1363). The State should have requested the 51.385 hearing in writing 15 days before trial and the court abused its discretion by granting it without good cause.

Defense counsel was placed at a severe disadvantage by the mid-trial hearing. As defense counsel argued, Azucena's Sixth Amendment right to effective assistance of counsel was violated because the State did not seek admission of the testimony in a timely manner, nor did it notify the defense

which statements it sought to admit beforehand so the defense could adequately prepare. (VII:1362-63).

*C. The court abused its discretion under **NRS 51.385**.*

NRS 51.385 only permits the introduction of hearsay statements about sexual and physical abuse that the child declarant has personally experienced. See **NRS 51.385(1)** (permitting introduction of "a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child or any act of physical abuse of the child"). It does not permit hearsay statements describing sexual or physical abuse upon children other than the declarant. Id.

Before a hearsay statement may be admitted pursuant to **NRS 51.385**, the court must find "that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness". **NRS 51.385(1)(a)**. The court must find the statement "so trustworthy that adversarial questioning would add little to its reliability." **Felix**, 109 Nev. at 181.

In making this determination, the court "shall consider" whether "(a) The statement was spontaneous; (b) The child was subjected to repetitive questioning; (c) The child had a motive to fabricate; (d) The child used

terminology unexpected of a child of similar age; and (e) The child was in a stable mental state." **NRS 51.385(2)**.

Additionally, "courts should examine the earliest statements made by a child-declarant and look for continuity in subsequent statements." **Felix**, 109 Nev. at 182. Courts should also look for "contamination errors" that might diminish the reliability of children's statements. **Id**.

Finally, "the court must affirmatively determine the reliability of each hearsay statement, or series of statements regarding one transaction or event, prior to its admission." **Id**. at 180-81 (emphasis added). It's an abuse of discretion for the court to make "blanket findings of reliability" that do "not include a determination of the affirmative reliability of each hearsay statement made by each child." **Id**. at 204 (emphasis added).

Here, the court abused its discretion by making a blanket ruling on admissibility that allowed the State to present unreliable and highly prejudicial hearsay at trial, including hearsay that exceeded the scope of **NRS 51.385.**

1. Court's blanket ruling was inappropriate.

At the end of the hearing, the State argued that "all of these witnesses should be able to testify with respect to the things that they testified today to." (VII:1373). Defense counsel objected that the State was asking the court

to make a blanket determination on admissibility which was not permitted under **Felix**. (VII:1374). Over this objection, the court found that all of the children's statements were reliable, and would be admitted pursuant to **NRS 51.385**. (VII:1394-99).

The court found that the State intended to introduce "every single statement . . . that was inculpatory, which was a statement out of court by the minors." (VII:1389). The court advised Azucena that "any time there's one of these witnesses on the stand and the question is, you know, what did the minor say, you know, to me, that's a clue that that's the product of what we discussed today." (VII:1391). Because the court's findings of fact did not address the reliability of any particular statement or series of allegations, its blanket ruling on admissibility was an abuse of discretion. (VII:1394-99). See **Felix**, 109 Nev. at 204.

2. Court's blanket ruling exceeded the scope of **NRS 51.385**.

By ruling that every single inculpatory statement presented at the hearing would be admissible at trial, the court admitted prejudicial hearsay that did not even meet the requirements of **NRS 51.385**. At the 51.385 hearing, Yusnay Rodriguez testified that J.M. told her about the abuse of *other* children:

- J.M. told her Azucena had been touching her sisters and the other girls. (VII:1267), introduced at trial (VIII:1470).

- J.M. told her that her sisters were also getting touched along with another girl Y.E.. (VII:1268), introduced at trial (VIII:1475).

- J.M. told her "this man used to put tape on their hands, took away their clothes, and pushed them on the bed" (referencing the incident involving Y.E.). (VII:1269), introduced at trial (VIII:1476).

Maria Barajas offered similar improper testimony:

- Y.E. told her she saw Azucena "getting [N.E.] and rubbing her against his body and then he put her down." (VII:1355), introduced at trial (VIII:1803-06).

Because hearsay statements by declarants describing physical and sexual abuse of children *other than the declarants themselves* did not fall under NRS 51.385, the court's blanket ruling admitting those statements was an abuse of discretion.

3. The hearsay statements were unreliable.

The court's blanket ruling was also an abuse of discretion because the children's statements and the adults' recollections were inherently unreliable.

Initially, there was little "continuity" between the children's "earliest statements" and their "subsequent statements." Cf. **Felix**, 109 Nev. at 182. As defense counsel pointed out, the children's stories had changed over time, such that the facts they reported to Espinosa were entirely different

from the facts they allegedly reported to their parents and their neighbor, Rodriguez. (VII:1276,1382).

Rodriguez was the first person that J.M., M.M.1, M.M.2 and Y.E. collectively disclosed to in October of 2016. (VII:1268). Rodriguez claimed that the children told her Azucena would "pass the candy around his private part and then he told the girls that they have to eat from there." (VII:1269). Yet, Rodriguez never mentioned this allegation to the police (VII:1284), and the girls never mentioned it to Espinosa. (VII:1255). Instead, the girls simply told Espinosa that Azucena *offered* them candy. (VII:1170,1180,1191,1197).

According to Rodriguez, both J.M. *and* M.M.1[12] initially disclosed that Azucena took the girls to McDonalds or another food place and fondled their "parts" as he was getting them out of the car. (VII:1270;1276). Yet, Rodriguez did not mention the incident when she went to the police (VII:1292), and none of the children mentioned the incident to Espinosa. (VII:1159-1261;XIII:1905, 2350-51,2354-55,2363-64).

[12] Curiously, M.M.1 testified that she never told Rodriguez anything and had merely sat on the floor listening to the other girls speak. (XI:1987). Rodriguez had only been the children's neighbor for four months at the time and was not close to J.M. (VIII:1469). Rodriguez admitted that she "recognized" M.M.1 and MM2 as twins, but did not know which was which. (VIII:1482). It is hard to imagine that she could remember who was saying what when all four girls were admittedly "talking at the same time" and going back and forth giving different stories. (VII:1287-88).

The parents' stories about the disclosures also changed over time. At the 51.385 hearing, Maria Barajas claimed that her daughter Y.E. had initially told her that she saw Azucena molesting her other daughter, NE, by "rubbing her against his body". (VII:1355). Yet, she never reported to police that her two-year-old daughter had been molested. (VII:1377).

Amanda Moiza's testimony was similarly suspect. Moiza claimed that her daughter J.M. initially disclosed that Azucena would pull his sweatpants down and rub cut-up watermelon or strawberries on his penis and then give it to them. (VII:1330). Yet, she never reported this striking allegation to police (IX:1651-52), and the children never mentioned it to Espinosa. (VII:1159-1261).

Moiza further claimed that the children told her Azucena would "caress" them on the chest and buttocks. (VII:1340-41). But when defense counsel asked her why she never reported that claim to police, Moiza admitted that "day after day my girls were coming up with new things, and then more things, and then more things" that allegedly happened to them. (VII:1341).

As defense counsel argued below, Moiza's remarkable admission about the girls "coming up with new things, and then more things, and then more things" proved that the parents' and neighbor's testimony could never

be found reliable. (VII:1377). As in **Felix**, 109 Nev. at 182, "contamination errors" were very much at issue in this case. (VII:1377). The various witnesses admitted that they discussed the allegations with one another, so there was no way to be sure exactly where the information came from or when it was first disclosed. Rodriguez admitted to discussing the allegations with Moiza and Barajas, then talking to police, then speaking with Moiza again. (VII:1280-81). The girls had clearly discussed the allegations with one another prior to disclosing to adults, *e.g.*, J.M. couldn't have told Rodriguez that Y.E. had been taped up and pushed down on Azucena's bed unless Y.E. had told her about the incident. (VII:1269). Due to the rampant cross-contamination of witnesses in the case, none of the testimony was reliable. See **Felix**, 109 Nev. at 182.

Espinosa's testimony was also unreliable. Espinosa was not "neutral"; she was a state forensic examiner whose job was "advocacy". (VII:1383). The children's statements to Espinosa were not spontaneous; they were the product of an interview set up by police where everyone was told exactly what was going to happen so the State could build a case against Azucena. (VII:1386).

When defense counsel cross-examined Espinosa to elicit contradictions between the stories told by the various children, the court

interrupted her and suggested that counsel limit her questioning because "pointing out these inconsistencies by themselves is not going to be persuasive to me." (VII:1240-48). Yet, it was error for the court to ignore the inconsistencies when it was *required* to find each statement "so trustworthy that adversarial questioning would add little to its reliability." **Felix**, 109 Nev. at 181. The court conceded that there was, "obviously a lot of good cross-examination and impeachment material" within the 51.385 hearing testimony (VII:1399). So, by definition, the testimony was unreliable and admitting it was error.

*D. The hearsay was cumulative under **Felix** and a mistrial should have been granted.*

In **Felix**, 109 Nev. at 200, this Court acknowledged that "the unlimited admission of repetitive hearsay testimony can jeopardize the fundamental fairness of the entire trial proceeding." As a result, even if a child's hearsay accusations are found to be reliable under **NRS 51.385**, such testimony should be "judiciously limited" once sufficient testimony is received to fully assert the child's allegations:

> When a CSA victim testifies, the State should be able to elicit additional testimony recounting the child-victim's hearsay accusations of CSA *if the child has not fully and accurately described the crime and its surrounding facts and circumstances*. There are numerous instances in which a child witness cannot remember the specifics of an incident, such as when an assault took place or the sequence of events, but may

> have clearly recited them at a prior time. This hearsay should be admissible if it meets the requirements of NRS 51.385. However, *once sufficient testimony is received to fully assert the child's allegations, additional hearsay testimony should be judiciously limited for the reasons previously stated.*

Felix, 109 Nev. at 201 (emphasis added).

In this case, instead of introducing the child witnesses first to determine whether they could "fully and accurately describe[] the crime and its surrounding facts and circumstances", the State strategically chose to present the hearsay testimony first, from five different witnesses who repeated the children's salacious claims over and over again to the jury. (VII:1365). Defense counsel objected to this strategy and asked the State to present the child witnesses first, but the court refused. (VII:1365-66). This ruling violated **Felix** which permitted the State "to elicit *additional* testimony recounting the child-victim's hearsay accusations of CSA *if the child has not fully and accurately described the crime and its surrounding facts and circumstances.*" **Felix**, 109 Nev. at 201 (emphasis added). **Felix** required the children to testify first.

Throughout the trial, defense counsel repeatedly objected to the cumulative, bolstering nature of the State's case and even moved for a mistrial based on the State's presentation of cumulative hearsay. (VII:1365,1387-88, IX:1614-21). The court denied Azucena's requests,

ruling that the testimony was not cumulative because it went to the children's "credibility." (IX:1620-21).

Yet, "even when the credibility of the victim is challenged, there is a limit to the prior consistent statements that should be received." **Felix**, 109 Nev. at 200. By placing no limits on the State's presentation of repetitive hearsay testimony, the court "jeopardize[d]the fundamental fairness of the entire trial proceeding." **Id.** The court erred in failing to grant a mistrial based on the cumulative presentation of hearsay. See **Rudin**, 120 Nev. at 144.

*E. Barajas' testimony exceeded the scope of **NRS 51.385** and the court should have either granted a mistrial or given the full curative instruction requested by the defense.*

At trial, prosecutors deliberately elicited prejudicial testimony from Maria Barajas that had not been presented at the 51.385 hearing. To elicit that testimony, the court allowed the State to ask the following, leading question over defense counsel's objection: "Did [Y.E.] tell you the way he touched her vaginal area reminded her of something?" (X:1731). When that question did not elicit the desired response, the State asked, "Do you recall talking about cream?" (X:1732). Her memory now "refreshed", Barajas testified that "the child is prone to infections and it gets red in there. So I put

some cream in it, on her. And one day when I was doing that with my finger, she said, That's how Grandpa touches me." (X:1732).

Barajas continued giving testimony that exceeded the scope of the 51.385 hearing. She testified her daughter said, "Also, Mom, he pulls down his pants and he shows us his part, you know, his -- and -- and he moves it like this. *Even two days ago* we went to the store and she – I was looking for some things. And she even grabbed a chorizo, a sausage. And she said, Mommy, come here. You see this chorizo? This is how Don David has his – his thing. That's the way it is." (X:1733) (emphasis added).

Defense counsel asked to approach, and objected that the State was now presenting untested, unapproved hearsay that had not been introduced at the 51.385 hearing. (X:1733-34). Defense counsel again pointed out the contamination problem raised by the testimony, arguing that it was "proof that [Barajas had] apparently been talking to her daughter about this case continually up until at least two days ago, and this is all brand new." (X:1734).

Despite the new testimony, the court refused to voir dire Barajas outside of the jury's presence to vet the testimony, as required by **NRS 51.385.** (X:1736). The court allowed the State to continue questioning Barajas about how Azucena allegedly moved his penis until Barajas

admitted the information came from a different conversation with Y.E. that had never been discussed at the 51.385 hearing. (X:1736-37). Only *then* did the court grant Azucena's motion to strike this limited part of her testimony, after the damage was already done. (X:1737).

At two subsequent breaks in proceedings, defense counsel moved for mistrials based on the new, prejudicial, testimony that had not been presented at the 51.385 hearing and the state's bad faith in eliciting that testimony. (X:1742-51;1778-79). The court erred in denying the motions. (X:1744-45;1786).

As defense counsel explained, there was no way to "unring the bell" regarding the prejudicial chorizo comment without drawing the jury's attention to it. (X:1742,1790). The court agreed that a curative instruction would only tend to "emphasize" that testimony so it did not recommend that. (X:1743). Likewise, it was bad faith for the State to ask Barajas questions about vaginal cream that had not been vetted at the 51.385 hearing. (X:1778-79). As defense counsel argued, Barajas' discussion of Y.E.'s vaginal infections was prejudicial because it implied that Y.E. developed a problem with her vagina as a result of Azucena touching her there. (X:1783).

Yet, rather than grant a mistrial, the court offered a "curative" jury instruction that did not fully address Azucena's concerns. (X:1786-87,1796). The instruction read as follows:

> You have heard from Maria Barajas that [Y.E.] is prone to vaginal infections. You are instructed that these infections have nothing to do with the allegations of contact with the defendant. You are not to draw any inference that the defendant caused these infections.

(X:1796;XV:2988). Defense counsel wanted to additionally instruct the jury that the vaginal infections "were not evidence in this case and must be disregarded." (X:1793;XV:2988). That distinction was important because the infections were not timely disclosed by the State and, therefore, should not have been admitted as evidence. (X:1784,1793). Because the instruction given did not cure the damage from the prejudicial testimony admitted at trial, a mistrial should have been granted. See **Rudin**, 120 Nev. at 144.

VI. The court abused its discretion in giving a flight instruction.

Azucena was arrested 11/12/2016 at his workplace in Henderson. (XII:2153). At the time, there was no warrant for his arrest. (XII:2160). Ricardo Rangel informed police Azucena would be there. (XII:2153). When Officer Tschirgi arrived, he found Azucena in the back of the building working, just as expected. (XII:2155). When Officer Tschirgi asked him his name, Azucena gave his legally correct name. (XII:2160). Azucena did not

try to run and, instead, voluntarily followed Officer Tschirgi to his police vehicle. (XII:2160). Azucena waited patiently for half-an-hour as Officer Tschirgi attempted to reach Detective Campbell. (XII:2160). Azucena was fully cooperative and taken into custody without incident. (XII:2156).

Although there was no evidence whatsoever that Azucena had attempted to avoid arrest, the State requested a flight instruction. (XIV:2725). The State claimed Azucena had been away from the apartment complex "approximately one month" after the Barajas and Moiza families reported him to the police on 10/17/2016. (XIV:2725). While the court recognized that "it's not a - - powerful argument the State has", it nevertheless allowed the State to submit the issue to the jury. (XIV:2732). A flight instruction was given, over Azucena's objection. (XV:2742).

This Court reviews a district court's decision settling jury instructions for abuse of discretion. **Funderburk v. State**, 125 Nev. 260, 263 (2009) (citation omitted). "Flight is more than merely leaving the scene of the crime. It embodies the idea of going away with a consciousness of guilt *and for the purpose of avoiding arrest.*" **Potter v. State**, 96 Nev. 875, 876 (1980) (emphasis added). "Flight instructions are valid only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." **Jackson**

v. State, 117 Nev. 116, 121 (2001). "Because of the possibility of undue influence by [a flight] instruction, this court carefully scrutinizes the record to determine if the evidence actually warranted the instruction." **Weber v. State**, 121 Nev. 554, 582 (2005).

The evidence did not warrant a flight instruction.

There was no evidence to suggest Azucena was gone for a month. To the contrary, Detective Campbell's handwritten notes indicated M.M.1 and Y.E. had interacted with Azucena as recently as 10/28/16, eleven days after they first reported to police. (XIV:2533-34). If Azucena was hiding from his neighbors after they reported, why were they still interacting with him almost two weeks later?

To suggest Azucena had left the premises, prosecutors used a hearsay statement from Azucena's wife, Elena, who told Detective Campbell "he'd been gone for a couple of weeks". (XIV:2492,2728-29). However, as defense counsel pointed out, that statement had not been admitted for the truth of the matter asserted; it was only admitted "for the purpose of [his] investigation" to show the effect on the listener. Compare (XIV:2492) with

(XIV:2728). Thus, it was improper to use that testimony as substantive evidence of Azucena's absence prior to his arrest.[13]

In addition, the State never established how often Azucena was around before 10/17/2016. (XIV:2729). Therefore, the State could not show that his absence from the apartment complex after 10/17/2016 was so unusual that it would warrant an inference of "flight". (XIV:2727).

Moiza admitted she did not see Azucena much during the first few years she lived in the apartment complex. (IX:1639). Moiza knew he had a shop where he upholstered furniture and even sold cars. (IX:1640). Moiza knew Azucena worked and was not around a lot. (IX:1640).

Rodriguez testified she had only seen Azucena twice in the four months she lived at the property, and one of those times was after the children had reported Azucena to her. (IX:1517-18;XIV:2730).

The defense presented evidence that Azucena sometimes slept at his place of work. (XIV:2570-79,2730).

Finally, Azucena's neighbors all knew he was at work and even alerted the police to his presence there. (XII:2153-54,XIV:2732). If he were truly "hiding" and seeking to evade arrest, Azucena would have picked a

[13] Defense counsel repeatedly objected to the State's improper use of this evidence in closing; yet, the court denied all those objections and even admonished the defense for objecting. (XIV:2859-60,2875,2877-78).

location that his neighbors did not know about, and he would have run when confronted by police. He did neither of these things.

Because the State could not show, in an unbroken inference, that Azucena changed his behavior to be away from the apartment, a flight instruction was improper and unduly prejudicial. (XIV:2731).

VII. Prosecutorial misconduct violated Azucena's constitutional rights.

Prosecutorial misconduct violated Azucena's state and federal constitutional rights to a fair trial and due process of law. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.** "When considering claims of prosecutorial misconduct, this [C]ourt engages in a two-step analysis. First, [it] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [it] must determine whether the improper conduct warrants reversal." **Valdez v. State**, 124 Nev. 1172, 1188 (2008).

When an appellant objects to prosecutorial misconduct at trial, this Court applies a harmless error standard of review on appeal. **Id**. If the error is of constitutional dimension, this Court applies **Chapman v. California**, 386 U.S. 18, 24 (1967), and reverses unless the State shows beyond a reasonable doubt that the error did not contribute to the verdict. **Valdez**, 124 Nev. at 1189. Prosecutorial misconduct can reach a constitutional dimension

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.'" **Valdez**, 124 Nev. at 1189 (quoting **Darden v. Wainwright**, 477 U.S. 168, 181 (1986)).

If the error is not of constitutional dimension, this Court applies **Kotteakos v. United States**, 328 U.S. 750, 776 (1946), and will reverse only if the error "substantially affects the jury's verdict." **Valdez**, 124 Nev. at 1189.

A. The State indoctrinated the jury during voir dire.

The district court is afforded "considerable deference" regarding the scope of voir dire. **Witter v. State**, 112 Nev. 908, 914 (1996), overruled on other grounds by **Nunnery v. State**, 127 Nev. 749, 776 (2011). The purpose of voir dire is "to discover whether a juror 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court.'" **Witter**, 112 Nev. at 914 (quoting **Adams v. Texas**, 448 U.S. 38, 45 (1980)). The parties may question potential jurors to evaluate bias, but may not "indoctrinate or persuade the jurors." **Khoury v. Seastrand**, 132 Nev. Adv. Op. 52, --, 377 P.3d 81, 86 (2016) (internal quotation omitted). In this regard, EDCR 7.70(b)-(d) prohibits voir dire questioning regarding

anticipated legal instructions, a potential verdict based on hypothetical facts, and questions that are, in substance, arguments of the case.

Throughout voir dire, the State asked improper questions designed to elicit sympathy for the alleged child victims using "hypotheticals" taken directly from the Azucena case:

- "What do you think about the notion that these crimes occurred in secret?" (V:927).
- "Do you think they could feel threatened?" (V:928).
- "Maybe by their perpetrator, by their molester, that they could feel threatened?" (V:928)
- If Mom and Dad and everybody's friends with this person, do you think it's scarier for a kid to come forward?" (V:928).

The State went on to indoctrinate the jury about the concept of grooming, with several questions directed at Juror #159 who had just disclosed molestation by her own father. (V:930-31).

Initially, the State asked Juror #159, "Do you think offenders do – and when I say offenders, I mean sexual offenders – do you think they do things specifically to get close to kids or ingratiate themselves into kids lives?" (V:932). When Juror #159 said, "I don't know", the State asked, "Have you ever heard of the term grooming before? . . . As it relates to sex offenders? What do you – what do you think that means?" (V:932). Juror #159 replied, "Well, my dad was good at that." (V:932). The State then provided examples

of grooming: buying them things, befriending them, taking them places. (V:933). Juror #159 chimed in, "Yeah. Yeah. Get on their good side." (V:933). And the State replied, "Okay. And stay on the good side of the kids and stay on the good side of the adults that are watching the kids that are victims too, right? Does that make sense?" (V:933). Juror #159 said "It does." (V:933). This questioning was prejudicial as it conditioned the jurors to accept the testimony of the "grooming expert" the State would eventually put on the witness stand. Although Defense counsel did not contemporaneously object to these grooming questions, they made a record shortly thereafter that Azucena's Spanish interpreter was so loud that they were unable to hear the questions being asked. (V:940-41).

After the audio problem was resolved, the State questioned a UMC employee, Juror #230, about her experience interacting with "sexual abuse victims" and whether she knew about the need to investigate "acute" abuse within 72 hours. (V:945-46). The questioning related directly to an issue in the case, namely SANE nurse's failure to find physical evidence of rape when she examined the children. (XIII:2129-32). Defense counsel objected that the State was "trying their case in front of the jury in voir dire" and advised the court of the SANE nurse issue in the case. (V:946-47). The court reminded the State not to discuss the facts of the case in voir dire.

(V:948-49). The court disclosed that it had also been concerned when the State previously referred to "crimes" occurring "in secret". (V:948).

A little while later, the State asked jurors to speculate about "why a kid would delay telling about sex abuse" and then suggested to the jurors that they might be scared of getting in "trouble", or "scared of some kind of retaliation by the perpetrator" or "the person is in the family circle", or they "don't want to piss off mom or dad." (V:960). Notably, these "hypotheticals" were all actual excuses offered by the children in this case as to why they delayed reporting. (IX:1609;X:1726,1880-82;XI:1976).

By exposing the jury to hypotheticals related to the facts of the case, the State was able to sway the prospective jury panel before any evidence was presented. Indeed, the very next day, Juror #159 stated that she began having doubts about her ability to sit on the jury when the "deputy DA described how children would have trouble admitting to – things. *And I pictured myself in that situation. So I could not do it.*" (VI:983) (emphasis added). As a result of the State's indoctrination, the prospective jurors began identifying with the alleged victims before they ever testified.

The State elicited additional sympathy for the child victims by discussing the difficulty they faced having to testify in a big scary courtroom. (V:959) ("some kids might be visibly shaken and distraught to

come up here and talk to you about this kind of stuff – would you agree?"); (V:961) ("What other things do you think contribute to the difficulty of a kid coming in here, sitting up here, and promising to tell the truth to this court and to the 14 people over here that they don't know; what things do you think contribute to their anxiety?"). These comments also had a direct impact on the jury. Juror #237 said it "hurts" to hear these allegations. (VI:1075). When defense counsel asked what he meant by that, he replied, "Like we were talking about yesterday, just for [the child witnesses] to go up on – you know behind the counter back there, courage. . . big time courage you know." (VI:1075). Juror #228 also mentioned how "difficult" it was for the children "to even be able to go up there to speak about it." (VI:1076). Where these concepts had originally been elicited by the State, it was clear that the indoctrination influenced the prospective panel.

In a case where Azucena's entire defense hinged on the credibility of the State's witnesses, the State's misconduct so infected Azucena's trial with unfairness that it denied his constitutional right to a fair trial. See **Valdez**, 124 Nev. at 1189; see also **Garner v. State**, 78 Nev. 366, 374 (1962) (stressing "the importance of avoiding the misleading of the jury and of avoiding undue appeals to sympathy, passion and prejudice" when the State's evidence is questionable); **Biondi v. State**, 101 Nev. 252, 257 (1985)

("[a] verdict may never be influenced by sympathy, prejudice or public opinion"). The State cannot show that these errors were harmless beyond a reasonable doubt.

B. The state created an artificial concept called the "kid's standard" and used it throughout trial to lower its burden of proof.

During voir dire, the State invented an artificial concept called the "kid's standard" and then improperly instructed the jury, both in voir dire and in closing, that it needed to apply that reduced standard when assessing the children's credibility. By lowering the State's burden of proof, the State's misconduct was constitutional in nature and not harmless. See **Valdez**, 124 Nev. at 1189.

The State first introduced the "kid's standard" concept during voir dire when it asked Juror #305, "[a]re you comfortable, then, kind of judging a kid by a kid's standard?" (V:922). Defense counsel objected the State was "preemptively lower[ing] the standard" for assessing credibility to make up for contradictory witness testimony. (V:922-23). Defense counsel argued there was no different credibility standard for kids, and the "kid standard" lowered the State's burden of proof. (V:923). The court overruled these objections. (V:923).

The State discussed the "kid standard" four more times during voir dire, with four different jurors. (V:963;VI:993-94;VI:1001). After the fourth time, the court finally sustained defense counsel's original objection:

> So I want you to stop using the term kids' standard. There is no such thing as a kids standard. Alright. I know you defined it yesterday on what you want the jury to think kids' standard is. There is no kids' standard. Alright. Find a different way of trying to communicate what you're trying to say.

(VI:1001).

Despite the court's order, the State again asked jurors to consider the "kid standard" during closing. (XV:2760). When defense counsel objected, the court briefly noted: "Well, I'll just sustain it. There's no particular standard of care that applies to children, but you are allowed to argue the different aspects of determining credibility with respect to children. That's all I need to say." (XV:2761).

Azucena proposed the following curative instruction to address the State's repeated references to the "kid standard":

> There is no special or lower standard for determining the credibility or believability of a child witness.

(XV:2798).

The court refused to give the instruction, claiming "I already covered it" orally. (XV:2799). Defense counsel explained that the jury would be

confused and would hold the kids to a lower standard. (XV:2799). Again, the court refused. (XV:2800).

The State's misconduct requires reversal. Citing a made-up "kid standard", the State asked jurors to judge the children's credibility by a lower standard simply because they were children. These were not isolated comments; they were a central theme of the State's case. The State repeatedly referenced the "kid standard", both at the beginning and end of trial, against the express instructions of the court. See **Valdez**, 124 Nev. at 1194 (prosecutorial misconduct to violate a district court ruling). The State's recurring "kid standard" argument amplified its other improper comments during voir dire, urging jurors to identify with and have sympathy for the children. The State persisted in arguing the "kid standard" even after the court ordered them to stop. This willful disregard for a direct court order elevated the misconduct to bad faith.

These comments effectively lowered the State's burden of proof, and so infected Azucena's trial with unfairness that reversal is required. See **Valdez**, 124 Nev. at 1189.

VIII. Judicial misconduct violated Azucena's constitutional rights.

Judicial misconduct violated Azucena's state and federal constitutional rights to a fair trial and due process of law. **U.S. Const.**

amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8. "Firmly embedded in our tradition of even-handed justice -- and indeed its very cornerstone -- is the concept that the trial judge must, at all times, be and remain impartial. So deeply ingrained is this tradition that it is now well settled that the trial judge must not only be totally indifferent as between the parties, *but he must also give the appearance of being so.*" **Kinna v. State**, 84 Nev. 642, 647 (1968) (emphasis added). As this Court explained in **Kinna**, a trial court "may not hamper or embarrass counsel in the conduct of the case by remarks or rulings which prevent counsel from presenting his case effectively or from obtaining full and fair consideration from the jury." **Id**.

Here, the court openly displayed animosity toward defense counsel as early as the discovery phase and that hostility continued throughout trial. Initially, during the hearing on Azucena's motion to compel discovery, the court became frustrated with defense counsel and ordered his Marshal to "escort them out" of the courtroom. (XV:2952-54). See also, **Court Exhibit 14**, JAVS 3/23/17 at 10:26:18-10:27:31.

Then, the court interrupted Azucena's opening statement by sternly rebuking defense counsel, ordering a recess, and excusing the jurors for 15 minutes before allowing him to resume. (VII:1445-54). See also, **Court**

Exhibit 4, JAVS 4/27/17 at 2:59:06-3:02:00. When defense counsel moved for a mistrial due to the court's interruption of his opening statement and its hostile tone, and when he pointed out that the jury could hear the parties' discussions at the bench (VIII:1451-52), the court denied the motion and angrily complained, "you take too much of the court's time just making long-winded statements without asking for any particular relief. You're wasting time, I don't like it. Please sit down now. Please sit down." (VIII:1454). See also **Court Exhibit 4**, JAVS 4/27/17 at 3:24:30-3:28:20.

The very next day, the parties discovered that the court had been leaving its microphone on at the bench, allowing the jury to hear the discussions and rulings at bench conferences. (IX:1500-08). As a result of the court's mistake, the jury heard three adverse rulings at the bench on Azucena's objections to the State's opening statement. (VIII:1424-25,1432-33). See also **Court Exhibit 4**, JAVS 4/27/17 at 1:31:34-1:35:20, at 2:23:20-2:24:37, and at 2:37:05-2:38:17.

Not only did the court openly display hostility toward defense counsel in front of the jury, the court improperly vouched for the credibility of complaining witness, S.R.

Nev. Const. Art. 6, § 12 states, "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law."

Although a judge may question the witnesses who appear before him, "in doing so he must not become an advocate for either party, nor conduct himself in such a manner as to give the jury an impression of his feelings." **Azbill v. State**, 88 Nev. 240, 249 (1972). The court must not vouch for the credibility of testifying witnesses. See **Ramirez v. State**, 114 Nev. 550, 562–63 (1998).

During the 51.385 hearing, the judge found that all the child witnesses were "likely telling the truth." (VII:1398). The judge subsequently conveyed his opinion to the jury.

S.R. was the first child witness who appeared in court. While administering the oath to S.R., the judge stated:

> THE COURT: Okay. So I think we can bypass the oath. The court is convinced that this witness will testify truthfully based on her responses and demeanor. And so I'll allow the questions to be asked.

(X:1832)(emphasis added). See also **Court Exhibit 6**, JAVS 5/1/17 at 2:33:40-2:36:28. Defense counsel immediately asked to approach and objected that the court had improperly endorsed that S.R. would testify truthfully. (X:1832-33).

The judge initially didn't see any problem with his statement to the jury, but when he finally realized the significance of his error, he tried to limit the damage with an admonishment. See (X:1834). Unfortunately,

immediately after admonishing the jury, the judge *again* vouched for S.R., not just with words, but with his tone of voice:

> COURT: Thank you, [S.R.]. Thank you very much. So you're – you're a very pretty girl. And thank you for being here in court. Have you ever been in court before?
>
> S.R.: Not here.
>
> COURT: No? Okay. Are you -- are you nervous?
>
> S.R.: A little bit.
>
> COURT: Okay. No reason to be nervous. We're all going to be nice to you. Okay? Okay.

(X:1834). See also, **Court Exhibit 6**, JAVS 5/1/17 at 2:38:05-2:38:27.

At the conclusion of S.R.'s testimony, the judge commended S.R. for her testimony, saying, "You're a very brave girl." (X:1849). See also **Court Exhibit 6**, JAVS 5/1/17 at 3:05:50-3:06:15. Outside the presence, defense counsel again objected that it was prejudicial for the court to say things like "you're pretty" or "you're very brave." (X:1850-51). See also **Court Exhibit 6**, JAVS 5/1/17 at 3:16:47-3:17:37.

The judge's comments lent credibility to S.R.'s testimony and improperly suggested to the jury that "The Court" believed her testimony was true. See **Azbill**, 88 Nev. at 249; **Ramirez**, 114 Nev. at 562–63. In a case where witness credibility was the central issue in the case, the court's error could not be considered harmless. See **Gordon v. Hurtado**, 91 Nev.

641, 645 (1975). Azucena's convictions must be reversed because the district court's conduct violated his constitutional right to a fair trial. **Id.** at 645 (a "full and fair jury trial could not occur" after judge referred to one party's testimony as "particularly appropriate and particularly probative").

IX. Cumulative error violated Azucena's constitutional rights.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." **Valdez v. State**, 124 Nev. 1172, 1195 (2008) (quotation omitted); see also **Parle v. Runnels**, 505 F.3d 922, 927 (9th Cir. 2007) (citing **Chambers v. Mississippi**, 410 U.S. 284, 298, 302-03 (1973)) ("the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair.")

This Court considers the following factors when evaluating a cumulative error claim: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." **Valdez**, 124 Nev. at 1195 (quotation omitted).

Without any doubt, the charges in this case were grave, resulting in a sentence of 85-years-to-life. The State admitted during sentencing that for a man in his sixties "a minimum of thirty-five years to life is essentially a death sentence for him." (XV:2927).

Although the State presented testimony from five child witnesses (and five adults to bolster their credibility), the evidence against Azucena was far from overwhelming. When talking to Espinosa, the children contradicted each other's stories at every turn. (XIII:2330-74). Every day, the children "were coming up with new things, and then more things, and then more things" to report. (VII:1341). The children's stories grew more bizarre over time, to include claims that Azucena rubbed cut-up fruit on his penis and gave it to them. (VII:1330). Even the State's "grooming expert" acknowledged that the children's claims of group molestation were so unusual he could only think of one remotely similar case out of the 6,000 he had handled over his 20-year career. (XIII:2248,2255,2288-89). Although the children claimed their neighbors Litzi and Leo had witnessed Azucena's sexual misconduct, Litzi and Leo testified that they saw nothing inappropriate. (XIII:2437;XIV:2629-32).

Azucena showed that the State's witnesses had a strong motive to fabricate their claims in order to obtain U-visas. (XV:2805). All parents were undocumented immigrants, and a U-visa was their only path to citizenship. (IX:1633,1681;X:1739,1775;XIV:2653-54). Although the State claimed there was no evidence of parental manipulation (XV:2765), the children testified that whatever their parents told them was the "truth".

(XI:1981;XI:2021;XII:2110). J.M. testified that she does what her parents tell her to do. (X:1901-02). Under the circumstances, a jury could reasonably have found that the children's claims were fabricated.

Indeed, one juror believed strongly enough that Azucena was not guilty that his fellow jurors had to enlist the court's help to convince him to change his verdict. Only after a coercive Allen charge was given did that juror fall into line and vote to convict Azucena of 30 counts, including two counts that had been pled alternatively, and six counts the State failed to prove beyond a reasonable doubt.

In addition to the coercive Allen charge, there were numerous serious trial errors. The court yelled at a juror during voir dire after she dared to admit she was biased against Azucena. Throughout trial, the court berated defense counsel in front of the jury and made the jury aware that he believed the State's child witnesses were telling the truth. The court made an improper blanket ruling permitting the State to present repetitive and unreliable hearsay testimony from five different witnesses to bolster the children's claims. And the court refused to counteract the State's rampant prosecutorial misconduct.

Because Azucena did not receive the fair trial by an impartial jury that was guaranteed to him by the state and federal constitutions, his 30

convictions must be reversed. See **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.**

CONCLUSION

Based upon the foregoing points and authorities, Azucena respectfully asks this Court to reverse his convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

2. I further certify that this brief does not comply with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

Proportionately spaced, has a typeface of 14 points or more and contains 14,838 words which exceeds the 14,000 word limit, however the appropriate motion for leave has been filed.

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 16 day of May, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16 day of May, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JOSE AZUCENA
NDOC No. 1183653
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office

EXHIBIT A

Statement of Child Describing Sexual Conduct or Physical Abuse

NRS 51.385 Admissibility; notice of unavailability or inability of child to testify.

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child or any act of physical abuse of the child is admissible in a criminal proceeding regarding that act of sexual conduct or physical abuse if:

(a) The court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) The child testifies at the proceeding or is unavailable or unable to testify.

2. In determining the trustworthiness of a statement, the court shall consider, without limitation, whether:

(a) The statement was spontaneous;

(b) The child was subjected to repetitive questioning;

(c) The child had a motive to fabricate;

(d) The child used terminology unexpected of a child of similar age; and

(e) The child was in a stable mental state.

3. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

(Added to NRS by 1985, 2132; A 2001, 702)