IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE AZUCENA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 74071

RESPONDENT'S ANSWERING BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE AZUCENA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 74071

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from a Judgment of Conviction based on a jury verdict that involves Category A felonies.

STATEMENT OF THE ISSUES

1. Whether the district court erred regarding jury selection.
2. Whether the district court erred regarding an Allen instruction.
3. Whether the sentences for Counts 25 and 26 were proper.
4. Whether the evidence was insufficient.
5. Whether the district court erred admitted statements under NRS 51.385.
6. Whether the district court erred regarding a flight instruction.
7. Whether the State committed prosecutorial misconduct.
8. Whether there was judicial misconduct.
9. Whether there was cumulative error.

STATEMENT OF THE CASE

On February 2, 2017, Appellant Jose Azucena ("Appellant") was charged by way of Indictment with 40 counts, including the following: LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony - NRS 201.230 - NOC 50975), CHILD ABUSE, NEGLECT OR ENDANGERMENT (Category B Felony - NRS 200.508(1) - NOC 55226), INDECENT EXPOSURE (Gross Misdemeanor - NRS 201.220 - NOC 50973), SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony - NRS 200.364, 200.366 - NOC 50105), ATTEMPT LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category B Felony - NRS 201.230, 193.330 - NOC 50983) and FIRST DEGREE KIDNAPPING (Category A Felony - NRS 200.310, 200.320 - NOC 50053). 1 AA 3-14.

On February 14, 2017, Appellant was arraigned, pleaded not guilty to all counts and invoked his right to a speedy trial. 4 AA 659-62.

Appellant's jury trial started on April 24, 2017, and the State filed an Amended Indictment dismissing Count 9. 4 AA 719, 8 AA 1405.

On May 10, 2017, the jury returned a guilty verdict on all counts except counts 5, 7, 13, 21, 23, 28, 33, 37, and 38. 15 AA 2902-06.

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STATEMENT OF THE FACTS

Yusnai Rodrigues, an adult, lived in an apartment complex. 8 AA 1463-64. One of her neighbors had daughters named J.M. (DOB 12/03/2006) and twins M.M. and M.M. (09/27/2008). 8 AA 1463-64, 9 AA 1572. Her other neighbor had daughters Y.E. (DOB 05/09/08) and N.E. (DOB 05/30/15). 8 AA 1464, 9 AA 1572, 10 AA 1708.

Appellant's crimes first came to light on October 15, 2016, when J.M. came to Yusnai's apartment. 8 AA 1466, 1468. J.M. asked Yusnai if she was alone and Yusnai let her in. 8 AA 1467. J.M. said that she wanted to talk to her about something. 8 AA 1468. This was unusual because Yusnai was not close with J.M., she had only known her for four months, and J.M. had never asked to talk to her before. 8 AA 1469. J.M. warned Yusnai that she could not share what she was about to tell her with her husband or J.M.'s mother because if her parents found "they were going to be killed." 8 AA 1469.

J.M. told Yusnai that Appellant was touching her and her sisters (twins M.M. and M.M.). 8 AA 1470-71. J.M. said that Appellant had touched her vagina and this happened in his house. 8 AA 1473. J.M. said that while they were at his house, Appellant showed them his penis, asked them if they wanted candy, and, when they replied "yes," Appellant would rub the candy against his penis. 8 AA 1474. J.M. said that on at least on one occasion, Appellant took them (her and her twin sisters) out

to eat at McDonalds or Chuck E. Cheese and, when they got out of the car, he touched their private parts. 8 AA 1475-76.

J.M. left and then returned with Y.E. and her twin sisters so that Yusnai could talk to them individually. 8 AA 1477. When the girls shared what happened to them, they were was anxious, nervous, and fearful. 8 AA 1476-78, 1492.

Y.E. told Yusnai that Appellant tied her hands with tape, removed her clothes, threw her on the bed, and touched her. 8 AA 1478-79. Y.E. said that she was afraid to talk to her parents because she thought Appellant would kill them. 8 AA 1480.

M.M., the first twin sister, told Yusnai that when Appellant took them out to eat, he touched their vaginas. 8 AA 1483-85. She said that Appellant called her his "girlfriend." 8 AA 1489.

M.M., the second twin sister, told Yusnai that Appellant asked her if she wanted candy and then touched his penis with it, and that he touched her vagina. 8 AA 1490.

1. <u>Victim J.M.</u>

J.M. testified that Appellant touched her vagina with his hand. 10 AA 1862-63. Appellant touched her in the presence of her twin sisters (M.M. and M.M.) and Y.E. 10 AA 1870-71.

J.M. did not want Appellant to touch her, and she was only nine years old when Appellant began molesting her. 10 AA 1872-73.

J.M. testified that Appellant called her "princess" and his "little girlfriend." 10 AA 1873.

Appellant exposed his penis to her on numerous occasions – in Appellant's house, on the sidewalk in the apartment complex, and inside the power box located near Appellant's apartment. 10 AA 1874-76. When Appellant exposed his penis to J.M. in the power box, her twin sisters were present. 10 AA 1877. Appellant also showed J.M., her twin sisters, and Y.E. videos on his phone of people kissing on a bed. 10 AA 1882.

Once, J.M. and her twin sisters went to Appellant's house to get chocolate and, when inside, Appellant rubbed the chocolate on his penis and then handed it to them. 10 AA 1876. They had to use the sleeve of their sweaters to cover their hands to take the chocolate. 10 AA 1878-79. It was KitKat and Kisess. 10 AA 1879.

Appellant told J.M. that if she told her parents what he did to her, he would kill them. 10 AA1880. J.M. was scared to tell her parents about Appellant touching her and rubbing chocolate on his penis because she was afraid that something would happen to them. 10 AA1881.

J.M. testified that they decided to tell Yusnai about what Appellant was doing because Appellant said nothing about killing her. 10 AA 1883. J.M. was afraid to tell Yusnai about what Appellant did to her. 10 AA 1888. The day after the girls told Yusnai about the molestation, Appellant wanted to take J.M., her twin sisters,

and Y.E. to Chuck E. Cheese, which scared them. 10 AA 1890. After talking to her mother, J.M. told Appellant they could only go if their mother joined them; this made Appellant angry. 10 AA 1892-93. After that, despite being afraid, J.M. told her mother that Appellant had molested them.10 AA 1895-96.

2. <u>Victim M.M. (first twin)</u>

M.M. testified that Appellant touched her vagina with his hands and his penis on numerous occasions, including outside his apartment and near the power box in the apartment complex. 11 AA 1951-52. Her sisters (J.M. and M.M.) and Y.E. were present when Appellant touched her. 11 AA 1953.

Appellant also exposed his penis to her while her sisters (J.M. and M.M.) and Y.E. were present on numerous occasions inside and outside of his house. 11 AA 1953-54.

M.M. testified that Appellant would touch his penis with KitKat chocolates and then offer it to her, her sisters (J.M. and M.M.), and Y.E. 11 AA 1955-57.

M.M. testified that Appellant showed her, her sisters (J.M. and M.M.), and Y.E. a video on his phone depicting a naked couple on a bed. 11 AA 1957-58.

Appellant used to call them his "girlfriends," "princesses," and "queens." 11 AA 1974.

Appellant gave them gifts and took them out to eat. 11 AA 1975.

Appellant told her that if she told her mother that he touched them, he would kill her family. 11 AA 1975.

3. <u>Victim M.M. (second twin)</u>

M.M. testified that Appellant touched her vagina and breasts on numerous occasions, including one time near the power box. 11 AA 2002. Her sisters and Y.E. were present when Appellant touched her. 11 AA 2004.

On at least one occasion, Appellant kissed her on the mouth. 11 AA 2005-06.

On numerous occasions, Appellant exposed his penis to her while her sisters and Y.E. were present. 11 AA 2007.

Appellant touched his penis with KitKat chocolate and then offered it to them. 11 AA 2007.

Appellant told her that if she told her parents that he was touching her he would kill them. 11 AA 2012.

M.M. also testified that Appellant bought them gifts and took them out to eat. 11 AA 2017.

4. <u>Victim Y.E.</u>

Y.E. testified that once Appellant tied her feet, hands, and mouth with tape, pushed her onto the bed in his bedroom, and touched her vagina. 12 AA 2084-87. The door of the apartment and bedroom stayed open. 12 AA 2088.

Y.E. testified that Appellant gave her candies in a red wrapper outside his apartment and near the power box outside of his apartment. 12 AA 2089-90. Appellant would touch his penis with the candy before offering it to her. 12 AA 2090.

Appellant exposed his penis to Y.E. on numerous occasions while J.M., M.M., and M.M. were present, including one time when they were next to his car. 12 AA 2091-92.

Appellant kissed her on the mouth and touched her breasts. 12 AA 2096, 2103.

Appellant showed her a pornographic video on his phone while J.M., M.M., and M.M. were present. 12 AA 2099.

5. **Victim N.E.**

Y.E. testified she witnessed Appellant touching her sister N.E.'s breasts (when N.E. was approximately one year old). 12 AA 2108.

6. **Victim S.R.**

S.R. testified that Appellant exposed his penis to her once. 10 AA 1842-44.

SUMMARY OF THE ARGUMENT

Appellant's claims fail and should be denied. First, the district court did not abuse its discretion during jury selection by admonishing a disingenuous juror. Moreover, this did not "chill" the panel. Further, even assuming arguendo that any error occurred, it was harmless.

Second, the district court did not abuse its discretion regarding an Allen instruction.

Third, Counts 25 and 26 were pled in the alternative. As such, Appellant's sentence for Count 26 should be vacated; Appellant's sentence for Count 25 stands.

Fourth, the evidence was not insufficient evidence for counts 1, 3, 10, 15, 19, and 30.

Fifth, the district court did not abuse its discretion in admitting statements under NRS 51.385. The court held an extensive evidentiary hearing and found each statement trustworthy and admissible considering the factors of NRS 51.385.

Sixth, the district court did not abuse its discretion regarding a flight instruction because there was a sufficient factual basis for it.

Seventh, the State did not commit prosecutorial misconduct. Moreover, even assuming arguendo that there was, it was harmless.

Eighth, Appellant's allegations of judicial misconduct fail. Moreover, even assuming arguendo that there was, it was harmless.

Finally, Appellant's claim of cumulative error fails because he has not asserted even one meritorious claim of error, much less multiple claims, and, as such, there is "nothing to cumulate."

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ARGUMENT

I. THE DISTIRCT COURT DID NOT ERR REGARDING JURY SELECTION

Appellant alleges that the district court committed structural error by allegedly improperly warning Prospective Juror No. 177 not to use illegitimate excuses to get out of jury duty. AOB 10. Appellant claims that the court was abusive to the juror and that this impacted the panel as a whole. This fails.

First, the record shows that Prospective Juror No. 177 used numerous excuses in an attempt to be excused from jury duty – she first indicated that she was a victim of two crimes: identity theft and that she had a "gun pulled on me." 5 AA 904. She then expressed dissatisfaction with the investigation that was done in one of these instances. Id. The district court noted that those crimes occurred in Missouri and that she was satisfied with the investigation of the incident involving the gun. 5 AA 904-05.

Prospective Juror No. 177 then attempted to claim that she cannot read her own handwriting sometimes and this would be a reason she could not serve. 6 AA 994.

When that excuse also did not work, she then stated "[w]ell, with my nursing history, I've been involved with working in the ER, seeing child abuse. I've worked in the labor and delivery where incest was involved and delivering 13-year-olds that had incest. So those are issues that I think would make me biased." 6 AA 995. The

State explained to her that this case was distinct, and she acknowledged that she understood. 6 AA 995.

Seeing that her new excuse was also not getting her out of jury duty, she then stated that she was biased. 6 AA 995. Only after this fifth excuse, did the district court admonish Prospective Juror No. 177 to stop making up reasons to be excused. 6 AA 994-95.

Second, Appellant claims that the court's statement restricted his ability to ferret out possible bias because it had a "chilling effect" on the panel. AOB 16-17. This is belied by the record. In fact, the record shows that the court excused jurors with legitimate excuses and those who were potentially biased. For example, the court excused Prospective Juror No. 162 who indicated she would be biased because she was a victim of sexual assault. 5 AA 886. Similarly, Prospective Juror No. 159 was also the victim of sexual assault and was excused. 6 AA 983-84. Another prospective juror (Prospective Juror No. 157), was also excused when he indicated that he was biased because a family member had been abused. 5 AA 896-900. As such, the record shows that after Prospective Juror No. 177 was admonished and excused, other prospective jurors did, in fact, express potential biases. See e.g. 6 AA 1074-76, 1084-86.

Despite this, Appellant contends that Prospective Juror No. 333, despite being sexually abused, was afraid to tell the court that she was biased. AOB 17. However,

the record shows that this prospective juror was not biased and was willing to serve on the jury – she indicated that the incident occurred a long time ago when she was "really young" and that she would be able to set her experience aside. 6 AA 997-99. Prospective Juror No. 333 also indicated that she worked long hours, but had already made arrangements at work to serve on the jury. 6 AA 999. Thus, she understood the importance of jury service and was willing to serve. Id. Further, Appellant's allegation that Prospective Juror No. 333 and the panel as a whole could have been affected by the court's admonishment of Prospective Juror No. 177 is conclusory, and Appellant fails to provide any facts supporting it.

Moreover, the district court and the parties extensively canvassed jurors on their personal experiences to reveal any potential biases. The record reflects that the parties had a pleasant interaction with prospective jurors, even exchanging jokes. 6 AA 1026. In fact, Appellant's counsel stated that the court had done an outstanding job and commended the jury that was ultimately selected:

> First of all, I want to preface it by saying I think you've done an excellent job with the cause challenges so far. I think you're right, you've gotten to a lot of them. I also want to say that I like this jury panel. It's one of the best I've ever had. Rarely have I ever had a jury panel that has been as racially diverse and as universe with gender as this panel is. I like this panel a lot.

6 AA 1049 (emphasis added).

Finally, Appellant argues that the district court's admonishment of

Prospective Juror No. 177 is judicial misconduct and structural error. AOB 14-16. A harmless error analysis is used when a trial error is involved. A trial error is an error that occurred "during the presentation of the case to the jury [that] may therefore be quantitatively assessed. . .to determine whether its admission was harmless beyond a reasonable doubt." Arizona v. Fulminante, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 1264 (1991). In contrast, "structural error doctrine [exists] to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affects the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself." Weaver v. Massachusetts 137 S. Ct. 1899, 1907 (2017) (quotation omitted). "Structural error results from a constitutional deprivation that so infects the entire framework that the result is no longer reliable." Garcia v. State, 117 Nev. 124, 129, 17 P.3d 994, 997 (2001) (citation omitted). The United States Supreme Court explained that the violation of a defendant's right to self-representation is subject to a structural error analysis, because the right at issue "is not designed to protect the defendant from erroneous conviction but. . .protects some other interest." Weaver, 137 S. Ct. at 1908. For structural error, the defendant is generally entitled to automatic reversal regardless of the error's actual effect on the outcome. Id. at 1910.

Here, as discussed supra, by admonishing a juror who, at all costs, was trying

to get out of jury duty did not "chill" the rest of the panel and did not violate Appellant's constitutional right to a fair trial. Appellant's reliance on Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 591 (1995) is misplaced. In Parodi, there was a pattern of misconduct – the judge led the jury in a standing ovation when the defendant's counsel returned late from recess, informed a tardy juror during voir dire that "she was eligible for this fun too," and endorsed a prospective jurors business. Parodi, 111 Nev. at 367, P .2d at 589. The trial judge also directed light-hearted comments regarding the judge's fitness to serve on the bench to a prospective juror, whom he knew from college. Id. The Court held that these actions were egregious. Id. Here, the court's comment did not improperly trivialize the proceedings or degrade a particular party. In fact, the record shows that the court informed the jury how important serving on a jury is and how essential it is for them to disclose potential biases. 4 AA 787. As such, this case is in stark contrast to Barral and Parodi. AOB 16-18.

For all these reasons, this claim fails. Therefore, the Judgment of Conviction should be affirmed.

II. THE DISTRICT COURT DID NOT ERR REGARDING AN *ALLEN* INSTRUCTION

Appellant claims the district court erred in giving an Allen instruction upon receiving a note from the jury stating that they were deadlocked. AOB 19. Appellant argues that the instruction should not have been given because the note also stated

the division of the jury was eleven to one and this rendered the otherwise non-objectionable Allen instruction "coercive." AOB 26. This fails.

NRS 175.481 states: "[t]he verdict shall be unanimous. It shall be returned by the jury to the judge in open court." NRS 175.531 states:

> When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

(emphasis added); see also Allen v. United States, 164 U.S. 492, 501 (1896).

This Court "review[s] a claim that a district court improperly coerced the jury in context and under all the circumstances." Lowenfield v. Phelps, 484 U.S. 231, 237, 108 S. Ct. 546 (1988).

Here, the district court had the discretion to instruct the jury, as it did, to continue deliberating to reach a unanimous verdict. The Ninth Circuit Court of Appeals emphasized the "importance of deferring to the trial judge's discretion in cases involving deadlocked juries." Harrison v. Gillespie, 640 F.3d 888, 902 (9th Cir. 2011). "An Allen or 'dynamite' charge is an instruction to a deadlocked jury which contains an admonition that the case must at some time be decided or that minority jurors should reconsider their positions in light of the majority view." Farmer v. State, 95 Nev. 849, 853, 603 P.2d 700, 703 (1979) (quotation omitted).

This Court has approved Allen instructions where they "reminded the individual jurors not to surrender conscientiously held opinions for the sake of judicial economy." Redeford v. State, 93 Nev. 649, 652, 572 P.2d 219, 220 (1977). The purpose of the instruction is to avoid the societal costs of a retrial. See Lowenfield v. Phelps, 484 U.S. 231, 238, 108 S. Ct. 546, 551 (1988). Moreover, this Court expressly approved the Allen instruction given in this case. 5 AA 1050; Wilkins v. State, 96 Nev. 367, 373 & n.2, 609 P.2d 309, 313 & n.2 (1980); see also Staude v. State, 112 Nev. 1, 6, 908 P.2d 1373, 1377 (1996), overruled on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002). As such, the district court did not abuse its discretion in giving an Allen instruction and this claim fails.

In fact, Appellant does not challenge the content of the instruction or the appropriateness of an Allen instruction generally. Rather, Appellant claims that the instruction was "coercive" because the note indicated that the division was eleven to one. AOB 20. However, as the district court recognized, the substance of this division was not known – in other words, eleven could have been for finding Appellant not-guilty or for finding him guilty. 15 AA 2888-89.

In reviewing the propriety of an Allen instruction, "the court must examine the instruction in its context and under all the circumstances to determine whether it

had a coercive effect." United States v. Foster, 711 F.2d 871, 884 (9th Cir. 1983).[1] Foster "evaluate[d] coerciveness on the basis of (1) the form of the instruction; (2) the period of deliberation following the Allen charge; (3) the total time of jury deliberations; and (4) the indicia of coerciveness or pressure upon the jury." Id. (quotation omitted).

First, the Allen instruction in this case is identical to the instruction expressly adopted by this Court in Staude. 15 AA 2893-94. Second, after the Allen instruction, the jury deliberated for approximately three and a half hours over the course of two days: half an hour the same day until they were excused because it was almost 5 p.m. (15 AA 2899) and three hours the next day (15 AA 2902). Third, the jury deliberated for six hours before the Allen charge was given and three and a half hours after, so the total time of deliberations were over nine hours. 15 AA 2887-2889, 2992. Fourth, there was no indicia of coerciveness or pressure on the jury—not only did the jurors deliberate for over three hours after the Allen instruction, but they had an opportunity to go home and reassess their understanding of the case

[1] Appellant argues that Foster emphasized that the court's awareness of the numerical division of the jurors was crucial to the determination of whether an Allen instruction was coercive. See AOB at 31. However, Foster states that the knowledge of the jury's numerical division is one of several factors to determine whether there indicia of coerciveness existed. Id. Other factors include whether the jury or judge "expressed a 'sense of frustration at the jury's failure to reach a verdict'" or whether the jury in a co-defendant case rendered discriminating verdicts. United States v. Moore, 653 F.2d 384, 390 (9th Cir. 1981).

overnight. Moreover, the jury was not pressured to return a verdict as quickly as possible or to decide the case a certain way. 15 AA 2894. Thus, the Allen instruction did not coerce the jury into returning a quick or unanimous verdict.

Despite this, Appellant contends that the instruction was coercive because the juror who initially disagreed with the other eleven jurors allegedly would have understood the instruction to be directed at him or her. AOB 24. However, although the division was 11:1, the nature of the division was unknown and there was no indication that other 11 jurors wanted to convict Appellant on all the charges. 15 AA 2888-89. Additionally, Appellant was acquitted of nine counts, which shows that the jurors were not coerced or pressured to return a guilty verdict on all charges. 15 AA 2902-06. Moreover, Appellant states that one juror "appeared angry" during the reading of the Allen instruction. AOB 22. However, Appellant concedes that there is no way of knowing whether this person was the one juror or not or if he was simply frustrated by the deadlock. AOB 22; 15 AA 2913. Finally, Appellant's assertion that this juror perceived the instruction as directed to him is simply a bare and naked conclusion without support.

For all these reasons, the district court did not abuse its discretion issuing an Allen instruction. As such, this claim should be denied.

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III. SENTENCES FOR COUNTS 25 AND 26

Appellant was convicted of Count 25 (Sexual Assault of a Minor Under Fourteen Years of Age) and Count 26 (Lewdness With a Child Under the Age of 14) and the district court sentenced Appellant on these counts consecutively. 3 AA 597-99. As the State argued these counts in the alternative, Appellant should not have been adjudicated of, or sentenced on, both Counts 25 and 26. Therefore, Appellant's sentence for Count 26 should be vacated; Appellant's sentence for Count 25 stands.

IV. THE EVIDENCE WAS NOT INSUFFICIENT

When reviewing a sufficiency of the evidence claim, the relevant inquiry is not whether the court is convinced of the defendant's guilt beyond a reasonable doubt, but rather "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (quotation and citation omitted). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quotation omitted) (emphasis removed), overruled on other grounds Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008).

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). Further, it is the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Moreover, a jury is free to rely on circumstantial evidence; indeed, "circumstantial evidence alone may support a conviction." Wilkins, 96 Nev. at 374, 609 P.2d at 313; Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

1. Counts 1 and 15

Appellant argues that the evidence was insufficient to find him guilty of Lewdness With a Child Under the Age of 14 (counts 1 and 15) because, he argues, these counts were based on him kissing the minor victims on the mouth and that is insufficient. AOB 29. This is without merit.

NRS 201.230 provides:

> A person who 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, is guilty of lewdness with a child.

NRS 201.230. While "lewd" is not specifically defined in the statutes, the word conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Summers v. Sheriff, Clark County, 90 Nev. 180, 521 P.2d 1228, 1974 Nev. LEXIS 353 (Nev. 1974).

The testimony of a victim alone is sufficient to meet the beyond a reasonable doubt standard because "it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994); see also, State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996), cert. denied by 520 U.S. 1160, 117 S.Ct. 1344 (1997); Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972), cert. denied 429 U.S. 895, 97 S.Ct. 257 (1976); accord, Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

To support his contention that kissing the minor victims on the mouth is not a lewd act, Appellant relies on Shue v. State, 407 P.3d 332, 335 (Nev. 2017). In Shue, the defendant was convicted of use of a child in the production of pornography, 10 counts of possession of visual presentation depicting the sexual conduct of a child and open or gross lewdness. In Shue defendant used a small digital camera to take a picture underneath minor victim's skirt and, later that night, he kissed her on the mouth without her consent. Id. The Court reversed the conviction for open or gross

lewdness, finding that a kiss on the mouth "without more, does not constitute lewd conduct because it is not lustful or sexually obscene." Id at 340.

First, this decision is unpublished and shall not be regarded as precedent. Second, Shue is distinct from this case in critical ways. Here, J.M. testified that Appellant touched her vagina underneath her clothes, called her his "girlfriend," and kissed her on the mouth. 10 AA 1872-74. She testified that she did not want Appellant to be doing these things to her. Id. Unlike in Shue, where the defendant kissed a minor victim on the mouth without touching her, Appellant called J.M. his "girlfriend," touched her vagina, and kissed her on the mouth. 10 AA 1872-74. Thus, his conduct, unlike in Shue, was lustful and sexually obscene. If measured by common understanding and practices, kissing a minor girl on the mouth, while touching her vagina and calling her his "girlfriend" constitutes lewd act. Summers, at 521 P.2d at 1228. Similarly, M.M. testified that Appellant touched her breast, her vagina, and kissed her on the mouth. 9 AA 2005-06. Thus, because the kiss on the mouth was not an isolated instance, and was coupled with inappropriate touching of other private and sexual areas, it constitutes a lewd act. Accordingly, the evidence was not insufficient.

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2. <u>Counts 3, 10, 19, and 30</u>

Appellant argues that the evidence was insufficient to find him guilty of the Child Abuse counts (counts 3, 10, 19, and 30) because Appellant was not responsible for the minor victims' welfare. AOB 31. This fails.

In this case, Appellant was charged under subsection (1) of NRS 200.508 which reads:

> 1. A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect:
>
> (a) If substantial bodily or mental harm results to the child:
>
> (1) If the child is less than 14 years of age and the harm is the result of sexual abuse or exploitation, is guilty of a category A felony and shall be punished by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served; or
>
> (2) In all other such cases to which subparagraph (1) does not apply, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years; or
>
> (b) If substantial bodily or mental harm does not result to the child:

> (1) If the person has not previously been convicted of a violation of this section or of a violation of the law of any other jurisdiction that prohibits the same or similar conduct, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.

NRS 200.508. Thus, NRS 200.508(1) does not require that a person be responsible for a child's welfare. Appellant appears to confuse NRS 200.508(1) with NRS 200.508(2) – it is NRS 200.508(2) that contemplates a showing that the defendant is responsible for the care of the minor victim. Compare NRS 200.508(1) with NRS 200.508(2). Moreover, Appellant's argument regarding not instructing the jury as to the meaning of "responsible for a child's welfare" also fails since this was not an element.

Accordingly, the evidence at trial was not insufficient and, viewing the evidence in the light most favorable to the State, it was reasonable for the jury to find Appellant guilty beyond a reasonable doubt. Therefore, this claim should be denied.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION ADMITTING STATEMENTS UNDER NRS 51.385

Appellant challenges the district court's admission of statements under NRS 51.385 alleging that: (1) the hearing was not timely; (2) the district court did not consider each statement individually; (3) the statements were cumulative requiring

a mistrial; and (4) one witness's trial testimony was beyond the scope of the NRS 51.385 hearing. This is without merit.

Under NRS 51.385(1), a statement made by a child under the age of 10 describing any sexual conduct performed is admissible in a criminal proceeding if:

> (a) the court finds that the statement provides sufficient circumstantial guarantees of trustworthiness; and
>
> (b) the child testifies at the proceeding or is unavailable to testify. In determining trustworthiness, a court shall consider whether:
>
> i) statement was spontaneous,
> ii) child was subjected to repeated questioning,
> iii) the child had a motive to fabricate,
> iv) the child used terminology unexpected of a child of similar age;
> v) the child was in a stable mental health.

District courts are vested with considerable discretion when determining the admissibility of evidence. Castillo v. State, 114 Nev. 271, 956 P .2d 103, 107 (1998). The district court's determination is given great deference and will not be reversed absent manifest error. Nolan v. State, 122 Nev. 363, 132 P.3d 564 (2006). When considering the admission of evidence, "it is within the district court's sound discretion to admit or exclude evidence." Means v. State, 120 Nev. 1001, 1008, 103 P.3d 25, 29 (2004).

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). Such an abuse only "occurs if the district court's decision is arbitrary or

capricious or if it exceeds the bounds of law and reason." Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005). It is Appellant's burden to show the district court abused its discretion. Weber v. State, 121 Nev. 554, 575, 119 P.3d 107, 121 (2005); Floyd v. State, 118 Nev. 156, 164, 42 P.3d 249, 255 (2002).

Here, the challenged statements were made by children under ten and described sexual conduct. Moreover, the court conducted an evidentiary hearing outside the presence of the jury and the victims testified and were subject to cross-examination.[2] 10 AA 1835, 1854; 11 AA 1943, 1995; 12 AA 2076. After considering the testimony from the hearing and the factors in NRS 51.385, the court found the statements to be trustworthy. 7 AA 1394-99. Therefore, the district court did not abuse its discretion in admitting the statements under NRS 51.385.

Despite this, Appellant claims that the district court abused its discretion admitting this evidence. First, Appellant argues that the NRS 51.385 hearing was untimely and insufficiently noticed. AOB 38. However, this is incorrect—NRS 51.385 does not set a deadline by which the district court should hold such hearing, it only requires the district court to hold a hearing to determine the trustworthiness of the statements to be introduced at trial. See NRS 51.385(1). Moreover, written

[2] The only victim who did not testify was N.E. (who was approximately two years old at the time of trial and one year old at the time of the touching) and defense counsel did, in fact, receive notice regarding who would be testifying at trial. 10 AA 1708; RA 1-2.

notice regarding the statements is only required if the child is unavailable or unable to testify. See NRS 51.385(3). Here, as discussed supra, all the victims except one (N.E. who was approximately two years old at the time of trial and one year old when Appellant touched her) testified at trial, thus NRS 51.385(3) would not apply except as to one victim. 10 AA 1835, 1854; 11 AA 1943, 1995; 12 AA 2076. In addition, even though not required, as discussed supra, defense counsel did, in fact, receive notice regarding who would be testifying at trial. 10 AA 1708; RA 1-2. Finally, defense counsel conceded that it was clear which statements the State would use at trial. 7 AA 1389.

Second, Appellant claims that the district court abused its discretion by making a "blanket ruling on admissibility" rather than consider the statements individually. AOB 41. However, in deciding to admit the statements, the district court did consider each statement individually. 7 AA 1389.

Third, Appellant argues that the statements were cumulative and warranted a mistrial under Felix v. State, 109 Nev. 151, 156, 849 P.2d 220, 224 (1993). AOB 37. This is misplaced. In Felix, six witnesses testified about one child victim's statements. Id. In contrast, in this case several witnesses testified as to six different child victims. Yusnai testified to the statements made to her by the minor victims when they first disclosed what Appellant has done to them (8 AA 1463-90) and parents of each victim testified to what their children disclosed to them about

Appellant's actions: the mother of three of the minor victims (J.M. and twins M.M and M.M.) testified to the statements made by her three daughters regarding the abuse (9 AA 1571-1639) and S.R.'s father testified about what his daughter told him about Appellant exposing his private part to her (9 AA 1677-80). The parent of each child victim testified regarding their own child. Therefore, the statements were not cumulative.

Fourth, Appellant argues that Y.E. and N.E.'s mother testified at trial beyond the scope of her testimony at the NRS 51.385 hearing. 10 AA 1707; AOB 49. Appellant takes issue with: (1) testimony regarding when she put cream on her daughter's vagina to treat rush (10 AA 1732); and (2) testimony that "[e]ven 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." (10 AA 1733).

Appellant did not object contemporaneously to the first statement; his objection to the second statement was sustained and the testimony was stricken:

> MR. WESTBROOK: Objection. Hearsay. Move to strike.
>
> THE COURT: All right. So I'll grant that. The jury will just disregard that the witness was getting ready to talk about something which she wanted to stand up and show you. Disregard all that. All right. Let's just move on.

10 AA 1735.

Regarding the first statement, the district court noted:

> But that's not – for the – for [the witness] to testify as to what she did, all right, that doesn't require a 51.385. That would only require a 51.385 if her daughter told her something. The hearsay has to be subject, but her act of putting the cream, which prompted the statement by the minor about he used to touch me there, you know, that's not something that requires a 51.385. Do you see the distinction?

10 AA 1747. Regarding the second statement, the district court found that this testimony "certainly didn't come out as – as any kind of intentional attempt to bring something out beyond the 51.385 hearing" and inquired if counsel wanted any additional statement to be made to the jury regarding disregarding this comment. 10 AA 1743-44.

Appellant contends that the district court allowed the State to continue questioning the witness despite knowing that the statement was beyond the scope of the NRS 51.385 hearing. AOB 50-51. This is incorrect. As is evident from the record, the district court allowed further questioning to determine whether it was beyond the scope. 10 AA 1736. Once it was established that the statement was beyond the scope, the district court immediately struck the statement and instructed the jury to disregard it. 10 AA 1737. Appellant also takes issue with the fact that the district court decided not to question the witness outside the jury's presence, however, excusing the jury would not have made a difference because the jury had already heard the statement. 10 AA 1733.

Appellant also contends that the court erred in not granting a mistrial based on this statement. AOB 51. The Ninth Circuit Court of Appeals has explained that there are degrees of necessity and only a "high" degree justified a mistrial. United States v. Bates, 917 F.2d 388, 389, 1990 U.S. App. LEXIS 18369, *1 (9th Cir. Cal. October 22, 1990). Reviewing courts should respect the setting in which the trial judge finds herself or himself and give substantial deference to the district court. Here, this was an isolated statement that was immediately stricken and the jury was instructed to disregard it. Moreover, given the overwhelming amount of the evidence against Appellant, he cannot argue that a mistrial was warranted.

Finally, Appellant argues that the court erred in giving a curative instruction that allegedly did not address his concerns. AOB 52. "District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, 319 (2008). The standard of review for a district court's decision to give a particular instruction is for an abuse of discretion or judicial error. Howard v. State, 102 Nev. 572, 578, 729 P.2d 1341, 1345 (1986). The instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. See also, NRS 178.598; Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 125, 147 P.3d 1101 (2006)). Here, the court gave a curative

instruction after this testimony. 10 AA 1796; 15 AA 2988. Accordingly, this claim is without merit.

For all these reasons, the district court did not abuse its discretion in admitting statements under NRS 51.385. Therefore, this claim fails and should be denied.

VI. THE DISTRICT COURT DID NOT ERR REGARDING A FLIGHT INSTRUCTION

Appellant claims the district court erred in giving a flight instruction because, he argues, there was no evidence to support it. AOB 53. This fails.

"District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, 319 (2008). The standard of review for a district court's decision to give a particular instruction is for an abuse of discretion or judicial error. Howard v. State, 102 Nev. 572, 578, 729 P.2d 1341, 1345 (1986). The instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 125, 147 P.3d 1101 (2006)); see also, NRS 178.598. A district court may refuse to give a jury instruction which is substantially covered by another instruction. Davis v. State, 130 Nev. ___, ___, 321 P.3d 867, 874 (2014); Crawford, 121 Nev. at 754-55, 121 P.3d at 589; Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000).

"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, 17 P.3d 998 (2001); United States v. Feldman, 788 F.2d 544, 555 (9th Cir. 1986).

"A defendant's conduct, such as flight from a scene of the crime, generally is considered a party admission, and will be admitted if the actions have probative value." Turner v. State, 98 Nev. 103, 106, 641 P.2d 1062, 1064 (1982). The giving of a flight instruction is not reversible error if evidence of flight has been admitted. Potter v. State, 96 Nev. 875, 619 P.2d 1222 (1980).

In Miles v. State, 97 Nev. 82, 84-85, 624 P.2d 494, 495-96 (1981), an employee left work with missing money, and this Court held that it was sufficient for a flight instruction to be given. Similarly in Hutchins v. State, 110 Nev. 103, 113, 867 P.2d 1136, 1142-43 (1994), this Court decided that the defendant calling his wife to ask her to take him to their home, when he was not staying there at the time, in the hours after the crime occurred, warranted a flight instruction.

Here, sufficient evidence was presented to support a flight instruction including, but not limited to: on October 16, 2016, the children reported the abuse, the very next day Appellant was reported to the authorities and was never seen in the apartment complex again and where he had lived for 8 years. 9 AA 1625-1628, 1639. Because Appellant disappeared from the apartment complex, the victims'

parents started looking for him, and eventually located him at work on November 12, 2016. 9 AA 1632. They called the police and Appellant was apprehended. Id. Yusnai testified that, after Appellant was reported to the police, he disappeared from the apartment complex. 9 AA 1517. Additionally, Detective Campbell testified that after the victims' parents reported Appellant to the police, the police also were looking for him in the apartment complex and questioned his wife about his whereabouts, but she said that she did not know where he was. 14 AA 2492-93. When Appellant was apprehended, he confirmed that he was not living at home and that he did not tell his wife where he was. Id. Accordingly, like in Miles and Hutchins, there was a sufficient factual basis to give a flight instruction.

In addition, even assuming arguendo that there was any error regarding the flight instruction, any such error was harmless. For nonconstitutional errors, evidentiary or otherwise, an error is harmless unless there was a "'substantial and injurious effect or influence in determining the jury's verdict.'" Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quotation omitted). Given the overwhelming evidence in against Appellant, there was no substantial, injurious effect, or influence giving this flight instruction.

For all these reasons, the district court did not abuse its discretion regarding the flight instruction. As such, Defendant's claim fails and should be denied.

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VII. NO PROSECUTORIAL MISCONDUCT OCCURRED

This Court applies a two-step analysis to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). This Court first determines whether the prosecutor's conduct was improper and second, whether the conduct warrants reversal. Id. "A prosecutor's comments should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quotation omitted). However, prosecutorial misconduct may occur when (1) matters are discussed that are not in evidence, (2) a prosecutor expresses their personal beliefs, or (3) a prosecutor "blatantly attempt[s] to inflame a jury. Collier v. State, 101 Nev. 473, 478-79, 705 P.2d 1126, 1129-31 (1985); Valdez v. State, 124 Nev. 1172, 1191, 196 P.3d 465, 478 (2008). "[T]his Court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Valdez, 124 Nev. at 1188, 196 P.3d at 476.

One of two harmless error standards applies to review of prosecutorial misconduct depending on whether the alleged error is of a "constitutional dimension." Id. at 1188-89, 196 P.3d at 476. When the alleged misconduct is of a constitutional nature, this Court applies the Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824 (1967) standard, and will not reverse if "the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Chapman.

Valdez, 124 Nev. at 1189, 196 P.3d at 476. Alternatively, when the alleged error is not constitutional, this Court "will reverse only if the error substantially affects the jury's verdict." Id. The nature of the alleged misconduct determines whether the error is constitutional or not. Id. at 1189, 196 P.3d at 477. "Whether these distinctions make a significant difference in the ultimate analysis of harmlessness may be the subject of some debate," but there are nonetheless two standards. Id.

A defendant is entitled to a fair trial, not a perfect one, and therefore "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044 (1985); accord Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001). "[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error." Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004) (citation omitted). In determining prejudice, this Court considers whether a comment had: 1) a prejudicial impact on the verdict when considered in the context of the trial as a whole; or 2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208-09, 163 P.3d at 418. It is defendant's burden to show prejudice. Valdez, 124 Nev. at 1190, 196 P.3d at 477.

At trial, Appellant only objected to some instances of this alleged prosecutorial misconduct. As such, since these issues were properly preserved, this

Court applies harmless-error review. Valdez, 124 Nev. at 1190, 196 P.3d at 477. The instances where Appellant did not object, however, are not preserved and thus, this Court applies plain-error review. Id. "Under that standard, an error that is plain from review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Id. "As a general rule, the failure to move to strike, move for a mistrial, assign misconduct or request an instruction will preclude appellate consideration." Clark v. State, 89 Nev. 392, 393, 513 P.2d 1224, 1224-24 (1973).

1. Voir Dire

The purpose of "jury 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.'" Its scope rests within the sound discretion of the district court, whose decision will be given considerable deference by this court. Johnson v. State, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006).

"Decisions concerning the scope of voir dire and the manner in which it is conducted are reviewable only for abuse of discretion, and draw considerable deference on appeal." Lamb v. State, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011) (citation and quotation omitted). "The purpose of jury 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." Johnson v. State, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006) (quotation omitted).

This Court favors a thorough examination of prospective jurors, and where some of the proposed questions were repetitive and even "aimed more at introduction than acquisition of information," this Court found no abuse of discretion. Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987).

Absent a showing that the district court abused its discretion or that the defendant was prejudiced, the appellate court shall not disturb a district court's determination to conduct a collective voir dire of prospective jurors. Summers v. State, 102 Nev. 195, 196, 718 P.2d 676, 677 (1986).

Appellant claims that the State "indoctrinated" the jury during voir dire by asking hypothetical questions. AOB 58. Specifically, Appellant takes issue with questions to Prospective Juror No. 159 and Prospective Juror No. 230.

As an initial matter, Appellant concedes that he did not object at trial. AOB 59. Therefore, it should not be reviewed on appeal unless it constitutes "plain error." Leonard, 17 P.3d at 415 (2001).

Moreover, the prosecutor's questions were not improper—the record shows that the questions were aimed at potential biases and to ensure that potential jurors understood that it is difficult for a child victim of sexual assault to come forward and, after disclosing the abuse, to come to court and testify. See 5 AA 926-928; 5

AA 961-62. Because child victims in this case were threatened by Appellant and did not report the abuse right away, it was important to make sure that potential jurors would not be biased against the victims just because they did not report Appellant's crimes right away.

Regarding questions to Prospective Juror No. 159 – who had previously disclosed that she was sexually assaulted by her father – the State followed up with questions to ensure that she could be fair and impartial to both sides. See 5 AA 930-32. In support of this claim, Appellant argues that the questions were improper because Prospective Juror No. 159 expressed doubts about being able to serve. 6 AA 983. However, the record shows that the reason why this prospective juror doubted that she could serve was that she was a victim of sexual assault as a child, which is understandable, stating: "[b]ut with my past history, it's very difficult for me to do that." 6 AA 983.

Regarding Prospective Juror No. 230, the State asked questions regarding this prospective juror's work experiences as a nurse and mandatory abuse reporter to determine if there were potential biases. 5 AA 944-45, 950. This line of questioning is proper and in accord with the main purpose of the voir dire. Johnson, 122 Nev. at 1354, 148 P.3d at 774.

In support of the argument that the State "swayed" the panel with these questions, Appellant states that some prospective jurors said it would be difficult for

them to hear about allegations of sexual assault of children. AOB 61. However, that is hardly an unusual reaction to cases of this nature. Hence, Appellant's argument that the jury panel was "swayed" fails. Because it is the main purpose of the voir dire to elicit potential biases, the questions to the jury were not inappropriate.

Further, plain-error review applies and the record shows that, even if assuming arguendo that these questions were not appropriate, defendant failed to demonstrate that they affected his substantial rights or cause prejudice. Because the evidence of guilt in the instant case is overwhelming, even assuming arguendo that some of the questions were inappropriate, it was harmless. Smith, 120 Nev. at 948, 102 P.3d at 572. Thus, Appellant is not entitled to relief.

Finally, Appellant cites Garner v. State and Biondi v. State and claims that these questions "infected Azucena's trial with unfairness." However, these cases did not concern questioning during voir dire. See Garner v. State, 78 Nev. 366, 367, 374 P.2d 525, 526 (1962) (prosecutor commented on defendant's prior criminal record in its opening statement, witness testimony, and summation); Biondi v. State, 101 Nev. 252, 254, 699 P.2d 1062, 1064 (1985) (the State commented during its closing arguments regarding an aiding and abetting theory).

For all these reasons, this claim fails. As such, the Judgment of Conviction should be denied.

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2. Burden of proof

Appellant contends that the State committed prosecutorial misconduct by allegedly lowering its burden of proof by discussing how a child's demeanor and ability to relay facts could be different. AOB 62. Appellant challenges the following statements during voir dire:

> MS. KOLLINS: If you could pass the microphone to Mr. Elliston, right next to you, Badge 305. What do you think about that?
>
> PROSPECTIVE JUROR NO. 305: I believe what you said is true. They will be embarrassed, giggly, try to hide things.
>
> MS. KOLLINS: Along those lines, do you think every victim or a kid that's been preyed on sexually, is going to show the same trauma –
>
> PROSPECTIVE JUROR NO. 305: No.
>
> MS. KOLLINS: – in their personality?
>
> PROSPECTIVE JUROR NO. 305: No, I don't believe that.
>
> MS. KOLLINS: So do you – are you comfortable, then, kind of judging a kid by a kid's standard?
>
> MR. WESTBROOK: Your Honor, may we approach for a minute?
>
> THE COURT: Sure.
>
> [Bench conference transcribed as follows.]

MR. WESTBROOK: I'm deeply concerned about the State asking the jury to judge kids by a kid's standard. The standard is this courtroom is proof beyond a reasonable doubt. I think what they're trying to do is to preemptively lower the standard to make up for the fact that they have witnesses who are contradicting each other, contradicting themselves. Kids need to be judged by the content of what they say and the surrounding circumstances. But there is no different standard under law for how you judge kids and how you judge other witnesses. There isn't. And what they're trying to do is create a lesser standard in the law that doesn't exist.

MS. KOLLINS: Actually –

THE COURT: I don't think it had anything to do with the – the burden of proof in this case. She was going towards how to access their credibility.

MR. WESTBROOK: By a kid's standard?

THE COURT: That's what she's talking about.

MS. KOLLINS: Well, there's a jury instruction on point that talks about the demeanor, their ability to relay facts on the stand. And the court's exactly right, that's what I'm talking about is credibility. I hadn't completed the rest of my follow-up questions yet, but I am in no way diluting the reasonable doubt standard.

THE COURT: Question is kind of vague. You got to try to rephrase that a little bit. Because I didn't know what you meant. I didn't know what a kid's standard is.

MS. KOLLINS: Okay.

THE COURT: Can you try to tweak that a little bit?

MS. KOLLINS: Sure.

MR. WESTBROOK: Thank you.

5 AA 923.

Appellant complains that the State then disregarded this exchange and continued discussing a "kid's standard." AOB 63. However, the record shows that the State instead explained to the potential jurors that the comment regarding a "kid's standard" referred to assessing a child's credibility versus an adult's credibility and related that to a specific jury instruction on credibility. See 5 AA 963; 6 AA 993-94, 1001; 15 AA 2760-61. Therefore, the State did not attempt to lower its burden of proof, Appellant's constitutional rights were not violated, and he was not prejudiced.

Second, to the extent that Appellant complains that the district court abused its discretion regarding a jury instruction on this matter, this fails. AOB 63. "District courts have broad discretion to settle jury instructions." Cortinas, 124 Nev. 1013, 195 P.3d at 319. The standard of review for a district court's decision to give a particular instruction is for an abuse of discretion or judicial error. Howard, 102 Nev. at 578, 729 P.2d at 1345. The instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v, 116 Nev. at 1155-56, 14 P.3d at 30; see also, NRS 178.598. Here, the district court did not abuse its discretion because it instructed the jury on the issue in slightly different language. 15 AA 2761.

Third, Appellant claims that the State improperly argued this matter during closing argument. However, the State was explaining the credibility instruction. 15 AA 2761. It is permissible for the prosecutor to discuss the jury instructions in closing argument. Moreover, even assuming arguendo that there was any issue with these statements, they did not affect Appellant's constitutional rights and Appellant suffered no prejudice and, therefore, would not warrant reversal.

For all these reasons, this claim fails and should be denied.

VIII. JUDICIAL MISCONDUCT

Appellant alleges numerous claims of judicial misconduct based on the court's alleged "hostility" to the defense. This is without merit.

In Nevada, a judge is presumed to be not biased. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988), overturned on other grounds by Halverson v. Hardcastle, 123 Nev. 29, 163 P.3d 428 (2007). The burden is on the party asserting bias "to establish sufficient factual grounds warranting disqualification." Goldman, 104 Nev. at 644, 764 P.2d at 1296. Therefore, a defendant's bare allegation of bias is not sufficient to overcome the presumption that the court is not biased. Id. at 644, at 1296; Sonner v. State, 112 Nev. 1328, 1335, 930 P.2d 707, 712 (1996).

"[R]emarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge

has closed his or her mind to the presentation of all the evidence." Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

First, Appellant complains that the district court displayed animosity toward defense counsel during a hearing on his discovery motion by removing counsel from the courtroom after the ruling. AOB 65. However, he fails to explain why the court was forced to take such measures—because defense counsel repeatedly interrupted the court and refused to abide by its ruling by continuing to argue after the decision. 15 AA 2940-41, 2952-54. The district court asked defense counsel to point out specific pieces of evidence that he was seeking from the State. 15 AA 2940. Defense counsel was given numerous opportunities to do so but instead made vague arguments and argued with the judge. 15 AA 2940-44, 2952-54. In fact, the tone of counsel's voice was so inappropriate for a courtroom that the State made a contemporaneous record of it. 15 AA 2945. As such, this claim fails.

Appellant next alleges that the district court was inappropriate during his opening statement. AOB 65. Appellant takes the court's comment out of context and fails to identify why the court admonished defense counsel – counsel was making inappropriate and argumentative statements during his opening statement, including displaying a PowerPoint slide containing the same despite repeated directions to remove it:

THE COURT: Yeah. It – Mr. Westbrook, this is argumentative. I'll instruct the jury on – on how to evaluate credibility.

MR. WESTBROOK: All right, Your Honor.

THE COURT: But it's not the time to evaluate credibility now.

MR. WESTBROOK: Thank you, Your Honor.

THE COURT: All right. Tell the jurors what the evidence will show or will not show.

MR. WESTBROOK: The evidence will show that the adults, in this case, have a bias. The evidence in this case will show that some of these things, some of these stories are clearly made up. Things will be gotten wrong. And anybody can make a mistake, anybody can say the car was blue, but it was really green, I forgot what color the car was. But huge things will – will be just wrong. They'll be gotten wrong. There'll be something that was said in the past that will be completely different on the stand or forgotten altogether.

THE COURT: So Mr. Westbrook, this is still – it's inappropriate to evaluate the evidence or to tell the jury how to evaluate to the evidence. Will you stick to the facts of the case? I want you to move on from the slide –

MR. WESTBROOK: I'll be specific about a fact that will be wrong.

THE COURT: Please take the slide down.

MR. WESTBROOK: Sure. Here we go.

THE COURT: Thank you. Anything that says credibility, I want it off of the slide.

MR. WESTBROOK: Well, Your Honor, I am going to talk about specific things –

THE COURT: I want the credibility slide removed now.

MR. WESTBROOK: Yes, Your Honor.

THE COURT: You can talk about what the evidence is going to show.

MR. WESTBROOK: That's exactly what I am going to do, Your Honor.

THE COURT: Do not express your opinions on whether it's credible. You cannot ask the jury how – you can't tell them how they're going to assess the credibility. You're going to tell them what the evidence is going to show or not show.

MR. HAMNER: Can we just queue over, so he can have an opportunity to clean up his slides and not republish them to the jury. If we could just queue over to the overhead just for a second.

THE COURT: Let's take a – we're going to take a 10-minute recess now.

MR. WESTBROOK: Your Honor, I'm ready to go.

THE COURT: Ladies and gentlemen of the jury –

MR. WESTBROOK: Your Honor –

THE COURT: We're going to take a – no, excuse me, I am talking. I don't like being interrupted when I am talking. Do you understand?

MR. WESTBROOK: Absolutely, Your Honor.

THE COURT: Thank you.

***

THE COURT: I'll – I'll invite you to speak when it's time. Just want to make sure you understand the boundaries of what I am going to allow you to say and not allow you to say. In opening statements, the party should outline the evidence he intends to produce and not argue the case or attack the credibility of the State's witnesses. So please make sure that you don't do that. But –

MR. WESTBROOK: Your Honor –

THE COURT: – but other than that, I will allow you to proceed.

***

THE COURT: The evidence is going to show, you know, but you can't tell the jurors that based upon that, you know, you should disbelieve one witness or another, because they haven't heard them yet. And that would be giving your – your impression, your opinion, you know, that's what you can't do. You can tell them the evidence does – is not going to support the charges. You can support –

***

MR. HAMNER: No, no. And I – and I plan to do so, Your Honor. I just wanted to caution him on maybe relaying a fact that's actually not even true and to give an insinuation that something happened when it never actually did. That – that's all.

THE COURT: It was – it was a potential insinuation there. Thank you for bringing it to my attention.

MR. HAMNER: Thank you, Your Honor.

> THE COURT: I'll be more careful in hearing how he's presenting his argument. But, hopefully, we don't need any more.

8 AA 1444-1450. Accordingly, this claim is without merit.

Appellant also contends that the microphone was left on during bench conferences and the jury allegedly heard some rulings. AOB 66. However, Appellant fails to establish that, even assuming arguendo that the jury heard any rulings, it affected the outcome of the case or that he suffered prejudice.

Finally, Appellant argues that the district court allegedly vouched for the credibility of witnesses. AOB 66. In support of this contention, Appellant cites 7 AA 1398. However, review of this citation reveals that it is a transcript of the NRS 51. 385 hearing, which was held outside the presence of the jury. Thus, Appellant's argument fails.

The second alleged example cited by Appellant occurred during the swearing in of a minor witness as follows:

> THE COURT: Great. The court clerk, since you're – you're seven, we're going to have the court clerk read you a statement, basically, giving you an oath to promise to tell the truth. Do you understand? Okay.
>
> THE WITNESS: Yes.
>
> THE COURT: And if you agree with what she says, then say, I do or I agree. Okay? Okay. Have you ever taken an oath before?
>
> MS. KOLLINS: She doesn't know what that means.

THE COURT: Oh, you don't know what that means? Oh. Okay. Well –

THE WITNESS: I do know.

THE COURT: You do know? Do you know – do you know what to tell the truth is?

THE WITNESS: Yes.

THE COURT: Okay. So tell you what, do you – do you promise to tell the truth?

THE WITNESS: Yes.

THE COURT: So just to make sure we understand, so if I told you that it's raining in the room, is that – today, is it truth or a lie?

THE WITNESS: A lie.

THE COURT: Great. And is it wrong to tell a lie?

THE WITNESS: Yes.

THE COURT: All right. If – if you were to tell a lie, would you feel – feel bad?

THE WITNESS: I don't know.

THE COURT: Oh, okay. You have to tell the truth in court, right?

THE WITNESS: Uh-huh.

THE COURT: Yes? Is that a yes?

THE WITNESS: Yes.

> THE COURT: Okay. Because this is important. And you see the people over here on the left, all these people, they're friendly people. They – they want to listen to the questions and the answers, and they want to hear the truth. Okay. Do you understand that?
>
> THE WITNESS: Okay.
>
> THE COURT: Okay. So you're going to tell the truth, right? In Spanish. Sure. Yes?
>
> THE WITNESS: Yes.
>
> 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.

10 AA 1830-33. Given that this witness was only seven years old, the district court had the authority to waive a formal oath. Felix v. State, 109 Nev. 151, 175, 849 P.2d 220, 236 (1993) ("[T]he court should have the opportunity to observe and interview the child if at all possible to make the threshold determination that he or she can receive impressions and relate them accurately.")

Accordingly, there was no judicial misconduct. Moreover, even assuming arguendo that there was, it was harmless given the amount of evidence against Appellant. Therefore, Appellant's claim should be denied.

IX. THERE WAS NO CUMULATIVE ERROR

The cumulative error doctrine applies where the Court finds multiple errors that, although harmless individually, cumulate to violate a defendant's constitutional

right to a fair trial. Byford v. State, 116 Nev. 215, 241 (2000). By definition, a finding of cumulative error requires that there be more than one error in a given case. McConnell v. State, 125 Nev. 243, 259 (2009). When evaluating a claim of cumulative error, this Court considers "(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 v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (citation omitted). As discussed supra, Appellant has not asserted even one meritorious claim of error, much less multiple claims, and, as such, there is "nothing to cumulate." Id.[3] Therefore, the claim fails and should be denied.

CONCLUSION

Based on the forgoing, the State respectfully requests that the Judgment of Conviction be AFFIRMED.

Dated this 20th day of September, 2018.

Respectfully submitted,

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[3] Appellant will likely claim that his sentence for Counts 25 and 26 is error. However, this is not a trial error and would not change the analysis as to whether or not Appellant received a fair trial for purposes of cumulative error.

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 11,863 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 20, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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