IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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Appellant,	)	
	)	
vs.	)	
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THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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APPELLANT'S REPLY BRIEF

ARGUMENT

I. FACTUAL MISSTATEMENTS IN RESPONDENT'S STATEMENT OF FACTS

Respondent's Answering Brief is replete with factual inaccuracies, misstatements and overstatements of the record. Whether careless or deliberate, the sheer number of misstatements is staggering, undermining the brief's reliability and rendering many of Respondent's arguments untenable. The inaccuracies begin in Respondent's Statement of Facts.

Initially, Respondent claims Appellant exposed his penis to J.M. "*inside* the power box located near Appellant's apartment." RAB at 5 (emphasis added). Not only would this have been physically impossible, but

J.M.'s testimony states that the alleged exposure occurred "at" – not inside – the power box. (X:1875).

Next, Respondent claims "M.M. testified that Appellant would touch his penis with KitKat chocolates". (RAB at 6). Yet, M.M. actually *denied* this -- she testified that Appellant put the chocolates "in front of his thing" but that she "*did not see*" the KitKats "touch the skin of his part". (XI:1955) (emphasis added).

Respondent claims Y.E. testified that "Appellant would touch his penis with the candy before offering it to her." RAB at 8. Yet, Y.E.'s trial testimony was that the chocolate would be "inside his pants" and "going around his thing". (XII:2090). And Y.E. previously told the grand jury that the candy would be in his front pocket. (I:49-50). Y.E. *never* testified that the candy actually *touched* Azucena's penis.

Finally, Respondent claims "Y.E. testified she witnessed Appellant touching her sister N.E.'s breasts (when N.E. was approximately one year old.)" (RAB at 8). However, Y.E. *actually* testified that Appellant was holding N.E. and rubbed her "boobs and neck" against *his* chest (XII:2104-2108), and the jury later acquitted Azucena of count 37 relating to this claim. (III:552,594).

Although these misstatements may seem minor, they are part of a broader pattern of factual misrepresentations and overstatements of the record that fly in the face of this Court's recent order in **Supranovich v. State**, No. 69355, 422 P.3d 1233, *2, n.1 (2018) (unpublished) (granting defense motion to disregard the State's oral argument and "caution[ing] counsel not to overstate or misrepresent the record in the future").

II. STRUCTURAL ERROR DURING JURY SELECTION

Azucena's constitutional rights to due process and a fair trial by an impartial jury were violated when the judge intimidated a potential juror who disclosed bias, threatened the venire with "repercussions" if they made similar disclosures, and then refused to dismiss the venire upon Azucena's request. See AOB at 10-19.

Respondent attempts to justify the judge's egregious behavior by claiming that Juror 177 "used numerous excuses in an attempt to be excused from jury duty". RAB at 10. Respondent overstates the record, claiming that Juror 177 tried to get out of jury duty by saying she was a victim of two crimes and that she was dissatisfied with the investigation of one of those crimes. RAB at 10. Yet, a fair reading of the record indicates that Juror 177 was simply responding to questions posed by the judge when she made those two disclosures. (V:904-05).

Next, Respondent tries to excuse the judge's behavior by falsely stating that Juror 177 "attempted to claim that she cannot read her own handwriting sometimes and this would be a reason she could not serve." RAB at 10. To make this bizarre claim, Respondent falsely attributes to Juror 177 a statement that was *actually* made by Deputy District Attorney Kollins:

> MS. KOLLINS: Okay. Thank you. Could you pass the microphone to – is it Ms. Gordon? 177, to your right. Sorry. I'll get to you. I can't read my own writing. Is it Gordon?
>
> PROSPECTIVE JUROR NO. 177: Yes.
>
> MS. KOLLINS: Okay. It looks like a C, but sometimes I write in a hurry.

(VI:994). It was wrong for Respondent to suggest that Juror 177 tried to get out of jury duty on this basis.

Contrary to Respondent's claim, Juror 177 did *not* give five different excuses to get out of jury duty. Cf. RAB at 11. Rather, Juror 177 identified a single reason why she did not believe she could be fair: her legitimate concern that she would be biased against Azucena based on her experience as a nurse who worked with child sex-abuse victims. (VI:995-96). In response to Juror 177's honest disclosure, the judge swore at her twice, accused her of lying, threw a book at the wall, and threatened both the juror and the entire venire with "repercussions" if anyone else tried to "fabricate

something to get out of serving on this jury." (VI:995-96); **Court Exhibit 3**, JAS, 4/25/2017 at 1:39:15-1:40:38.

The judge's violent outburst was reversible error because it had a chilling effect on the jury's willingness to answer truthfully when asked about potential bias toward the defense. See, e.g., **United States v. Rowe**, 106 F.3d 1226, 1229 (5th Cir.1997) (new trial required where judge refused to dismiss venire after making comments that gave jurors "reason to fear reprisals for truthful responses"); **People v. Cioni**, 2017 WL 1177721, 2017 IL App (2d) 150461-U (IL App. March 28, 2018) (new trial required where judge chose to "make an example" of a prospective juror who disagreed with the presumption of innocence by threatening him with contempt); **Drake v. State**, 465 S.W.3d 759 (Tex. App. 2015) (new trial required where judge arrested prospective juror who said he could not look at child pornography or sit in judgment as a Jehovah's witness).

Respondent claims that the judge's outburst had no "chilling effect" on *voir dire* because the judge excused three other jurors who also expressed bias. RAB at 11. Yet, the three jurors who were excused for bias (Jurors 162, 157 and 159) were all excused **before** the judge yelled at Juror 177. Compare (V:886,896-900;VI:983-84) (prior excusals) with (VI:995-96) (subsequent yelling). Juror 162 was excused after disclosing that she would

be "pretty biased" based on her experience as a sexual assault victim. (VI:886-87). Juror 157 was excused after disclosing that he couldn't "guarantee" he could be fair to the defendant because his daughter had been sexually abused. (VI:896-900). And Juror 159 was excused after stating that she had "severe doubts that [she] could be objective", as a sexual assault survivor. (VI:983-84). These jurors felt free to disclose how they honestly felt about the case because they had not yet been collectively yelled at by the judge.

Citing Volume 6 of Appellant's Appendix at pages 1074-1076 and 1084-86, Respondent claims that "after Prospective Juror No. 177 was admonished and excused, other prospective jurors did, in fact, express potential biases". RAB at 11. However, there are **no** admissions of bias **anywhere** on these pages. Although Jurors 237 and 228 both agreed that it "hurt" to hear the children's sad allegations (VI:1074-76), they *also* agreed not to prejudge the case and that Azucena was still presumed innocent. (VI:1075,1079-80). While Juror 230 acknowledged that it would be "emotionally draining" to sit through the case, she understood that "at this moment we're here on an allegation" and "[w]hether it's true or false, we don't know yet." (VI:1082-84). Juror 230 also agreed she could be "fair" to both sides. (VI:1083). While Juror 232 was "sadden[ed]" by the allegations,

he agreed "not to judge anybody until I hear facts" (VI:1085) and he also said he could be "fair". (VI:1091). While Juror 214 admitted that the allegations were a father's "worst nightmare", he promised to "give a fair trial due to the evidence" (VI:1086) and said he did *not* think he would be "biased" against the defendant. (VI:1090). Even Juror 333 -- another sexual assault survivor -- claimed she could be fair to Azucena. (VI:997). Respondent could not identify a **single** juror who admitted bias **after** the judge's outburst because no one actually did! (VI:995-1137).

After the judge's outburst, Azucena could not be assured that any of the jurors were telling the truth about their lack of bias. See **Rowe**, 106 F.3d at 1229-30 (presumption that potential jurors answer *voir dire* questions truthfully does not hold "when jurors are given reason to fear reprisals for truthful responses."). As defense counsel explained to the judge when he requested a new venire, Azucena could not be confident that the remaining jurors were "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).

Respondent misleads the Court by claiming that defense counsel "commended the jury that was ultimately selected" and "stated that the court had done an outstanding job." RAB at 12. The language relied on by

Respondent was taken completely out of context: it was the lead-in to defense counsel's objection and motion to strike the venire, which was a delicate objection to make without offending this irate judge. Regardless of whether defense counsel told the judge he "liked" the jury panel or agreed with the judge's handling of other cause challenges, he was *still* asking for a new venire, and it is misleading for Respondent to insinuate otherwise. (VI:1049).

Contrary to Respondent's claim, harmless error analysis does not apply when a judge threatens the venire with reprisals after a juror admits bias. See, e.g., **United States v. Rowe**, 106 F.3d 1226, 1229 (5th Cir.1997) ("no need to show specific prejudice" where the district court's remarks may have chilled prospective jurors from truthfully answering questions about possible bias). As this Court explained in **Barral v. State**, 131 Nev Adv. Op. 52, 353 P.3d 1197, 1200 (2015), "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." In this case, the judge's outburst violated Rule 2.8(B) of the Code of Judicial Conduct, **NRS 175.031**, **NRS 16.030(6)**, and the state and federal constitutions. **U.S.C.A. V,VI, XIV, Nev. Const. art 1, § 3**. A new trial is required.

III. COERCIVE ALLEN CHARGE

Azucena's state and federal constitutional rights to due process and a fair trial by an impartial jury were violated when the court singled out the lone hold-out juror and gave him an Allen charge that was, under the totality of the circumstances, unduly coercive. See AOB at 23-28.

The court received a note from the foreperson advising that there was one juror who believed "not guilty on all counts" and asking the court to "talk to him". (XV:2887,2955-56). The court understood the note to be a collective request by all of the other jurors to, "Go talk to this holdout." (XV:2983). Acquiescing to the majority's request, the court called the jurors in to the courtroom, *read the jury note aloud*, and then gave him Nevada's "approved" Allen charge. (XV:2897-98). The court's actions were unduly coercive where the court was aware of the jurors' numerical division and where it directed the Allen charge to the sole juror who believed Azucena to be "not guilty on all counts". See **U.S. v. Sae-Chua**, 725 F.2d 530 (9th Cir. 1984); **Smith v. United States**, 542 A.2d 823 (D.C. 1988); see also **Ransey v. State**, 95 Nev. 364 (1979).

Respondent claims that the court did not actually know "the substance of this division" and that "eleven could have been for finding Appellant not-guilty or for finding him guilty." RAB at 16. Yet, the note was crystal clear

that there was *only one* juror who believed Azucena "not guilty on *all* counts". (XV:2887,2955-56) (emphasis added). That means that the *eleven* other jurors were prepared to find Azucena guilty of *something* – and that *something* turned out to be 30 out of 39 counts. (XV:2888-89).

Citing **NRS 175.481**, Respondent suggests that the court had discretion to instruct the jurors to "retire for further deliberation" after learning their numerical division. See RAB at 15. Yet, Respondent's reliance on **NRS 175.481** is misplaced. That statute governs the polling of jurors *after* a verdict is reached and does not apply in deadlock situations. It is well-settled that courts are not permitted to inquire into the numerical division of a still-deliberating jury. **Brasfield v. United States**, 272 U.S. 448, 449-50 (1926).

Respondent argues that the Allen charge was not coercive because the instruction given was "expressly adopted by this Court in Staude." RAB at 17. However, even "approved" jury instructions can become coercive if the court is aware of the numerical division of the jurors and the instruction is directed at a hold-out juror. See **Sae-Chua**, 725 F.2d at 532; **Smith**, 542 A.2d at 825; **Rubi v. State**, 952 So.2d 630 (2007). Here, in addition to giving the "approved" instruction, the court read the jury note that disclosed

the numerical division and asked the court to "talk to" the holdout juror. Doing so rendered the approved instruction coercive.

Respondent claims that the jurors deliberated for "three and a half hours" after the Allen charge was given. RAB at 17. Yet, the court clarified that the jury had its verdict by 11:20 a.m. (*e.g.*, almost a half-an-hour before the verdict was delivered) and the Deputy District Attorney agreed that the jury only deliberated for "another two and a half hours". (XV:2914). In any event, as Azucena pointed out in his Opening Brief, coercion may be found even when jurors deliberate for "several hours" after receiving an Allen charge. AOB at 27.

Although Respondent claims Azucena relies on **United States v. Foster**, 711 F.2d 871, 884 (9th Cir. 1983), Azucena did not discuss that case anywhere in his Opening Brief. Cf. RAB at 17, n.1. Instead, Azucena relied on the Ninth Circuit's decision in **Sae-Chua**, which distinguished **Foster** as follows:

> In cases holding that the giving of the charge was not coercive [such as **Foster**], our Court has frequently laid emphasis on the fact that the judge, in giving the charge, was unaware of the nature or extent of numerical division, concluding from that fact that there was no danger that the minority jurors would believe that the judge was directing his remarks to them rather than to the jury as a whole.

Sae-Chua, 725 F.2d at 531-32 (citing, inter alia, **Foster**, 711 F.2d at 884).

Unlike in **Foster**, the court in this case was aware that a single juror wanted to acquit Azucena of all 39 charges and that 11 jurors were opposed to a blanket acquittal. Unlike in **Foster**, there was a danger that the lone holdout in this case "would believe that the judge was directing his remarks to [him] rather than to the jury as a whole"[1] because the court *actually read him the jury's note* before delivering the Allen charge. Cf. **Foster**, 711 F.2d at 884 ("Moreover, because the trial judge in this case was unaware of how the jury stood, there was no danger that the *Allen* charge would 'suggest to the minority position jurors that [the judge] was speaking directly to them.'"). Contrary to Respondent's claim, this is more than just a "bare and naked conclusion without support." Cf. RAB at 18.

Respondent recognizes that this Court may also consider "whether the jury or judge 'expressed a sense of frustration at the jury's failure to reach a verdict'" when determining if there was coercion. RAB at 17 n.1 (citing **United States v. Moore**, 653 F.2d 384, 390 (9th Cir. 1981). At trial, defense counsel made a record that Juror 6, who was over 6-feet-tall, 300 pounds and a professional hockey player, was visibly angry during the reading of the Allen charge, as was the foreperson. (XV:2909-10). Defense counsel advised the court that "on the way out they were loudly talking back

[1] **Sae-Chua**, 725 F.2d at 532.

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).

In response, the Deputy District Attorney made a record that ***he*** **did not know** if Juror 6 "was potentially the one juror" or a member of the majority who was frustrated by the holdout. (XV:2912-13). The Deputy District Attorney acknowledged that Juror 6 was a large, NHL hockey player and that defense counsel had insinuated that he intimidated the holdout. (XV:2913-14). The Deputy District Attorney **did not deny** telling defense counsel in the hallway about Juror 6, "Wow he's pissed". (XV:2914-15). And the Deputy District Attorney **admitted** that he "didn't see" the communication between Juror 6 and the foreperson that was placed on the record by defense counsel. (XV:2914).

In response, the court stated that it "didn't notice any particular juror acting any more or less frustrated by anybody else. **But it's possible it happened and I just dismissed it. So I'll just let your – your guys' memory speak for itself.**" (XV:2914) (emphasis added).

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On the whole, the record strongly indicates that juror frustration played a part in coercing the verdict. See **Moore**, 653 F.2d at 390.[2]

Respondent fails to address Azucena's argument that, given the judge's earlier angry outburst during *voir dire*, the lone holdout could have reasonably believed that, if he failed to reach an agreement as instructed, he might suffer the court's previously threatened "repercussions". See AOB at 27. Respondent also fails to address the fact that the lone holdout juror was pressured into illegally convicting Azucena of alternatively-pled lewdness and sexual assault charges. See AOB at 27. Reversal is required in this case because the court's Allen charge "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.

IV. RESPONDENT CONCEDES COUNT 26 MUST BE VACATED

As Respondent concedes, Azucena's conviction and sentence on Count 26 must be vacated. See RAB at 19.

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[2] Respondent's claim that Azucena "concedes that there is no way of knowing whether [Juror 6] was the one juror or not or if he was simply frustrated by the deadlock" is false. Compare RAB at 18 with AOB at 22. Azucena **never** made such a concession in his brief nor did he do so in the district court.

V. INSUFFICIENCY OF THE EVIDENCE

Respondent failed to prove, beyond a reasonable doubt that Azucena committed child abuse as alleged in counts 3, 10, 19 and 30 or lewdness as alleged in counts 1 and 15 and all six convictions must be vacated.

A. CHILD ABUSE (COUNTS 3,10,19,30)

As explained in his Opening Brief, Azucena could not be liable for child abuse under the State's theory of "negligent treatment or maltreatment" because, as a mere neighbor, he was not responsible for any of the children's welfare. AOB at 30-33.

Respondent argues that it did not need to prove that Azucena was "responsible for a child's welfare" because it charged him with child abuse under **NRS 200.508 (1)** rather than **NRS 200.508 (2)**. See RAB at 23-24. Respondent's argument fails. Even if Respondent charged Azucena with child abuse under subsection 1, it still had to prove that one of five types of "abuse or neglect" occurred in this case. See **Clay v. Eighth Jud. Dist. Ct.**, 129 Nev. 445, 452-53 (2013) ("NRS 200.501(1) criminalizes five different kinds of abuse or neglect: (1) nonaccidental physical injury, (2) nonaccidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment.").

In this case, the "abuse or neglect" theory that Respondent chose to pursue was "negligent treatment or maltreatment." (XV:2777-78,2781-82,2789-90,2790-92;2970). Because the State proceeded under a theory of "negligent treatment or maltreatment", it had to satisfy the definition of that crime as set forth in **NRS 432B.140**. See **NRS 200.508(4)(a)** (criminalizing "negligent treatment or maltreatment of a child under the age of 18 years, as set forth in paragraph (d) and NRS 432B.070, 432B.100, 432B.110, 432B.140 and 432B.150, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm"); see also **NRS 432B.020(1)(c)**.

"An underlying premise of criminal negligence statutes . . . is that they presuppose that the defendant owes some duty of care to the victim". Lawrence Zahn, Extending the Scope of the Duty of Care Under Criminal Negligence Statutes, 21 Am. J. Crim. L. 491, 492–93 (1994). It should come as no surprise, then, that **NRS 423B.140** limits the class of persons who can be liable for child abuse in the form of "negligent treatment or maltreatment" to persons "responsible for the welfare of the child." Because Azucena was not a person "responsible for the welfare" of *any* children in this case, he could not be liable for child abuse under that theory. See **NRS 432B.130** (defining "persons responsible for child's welfare" as, *inter alia*,

"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"). The court committed reversible plain error by failing to instruct the jury on the statutory definition of "persons responsible for child's welfare". See AOB at 32. Azucena's convictions must be reversed because the State presented no evidence establishing this essential element of negligent child abuse.

B. LEWDNESS (COUNTS 1 and 15)

Azucena was convicted of two counts of lewdness with a minor where the "lewd or lascivious" acts that were alleged were the acts of kissing two children on their mouths.[3] (III:512,515,587,590). Azucena's convictions on Counts 1 and 15 must be dismissed because, in **Shue v. State**, 133 Nev. Adv. Op. 99, 407 P.3d 332, 340 (Nev. 2017) (*en banc*), this Court held that "[a] kiss on the mouth, without more, does not constitute lewd conduct because it is not lustful or sexually obscene."

Respondent falsely claims that **Shue** is "unpublished and shall not be regarded as precedent." RAB at 22. Unfortunately for Respondent, **Shue** is

[3] Although the Indictment alleged that Defendant used "his mouth and/or tongue to touch and/or kiss and/or lick the mouth and/or tongue and/or body of" J.M. and M.M.2, the only testimony offered on these counts was that of a kiss on the mouth. (XIII:2318,2351;IX:1599;IX:1651;X:1873;XI:2006).

binding legal authority because it is a published decision of the Nevada Supreme Court sitting *en banc*.

Respondent's efforts to distinguish **Shue** are unavailing. Respondent is correct that Shue took an "up-skirt" photograph of the victim and kissed her later that night. RAB at 21. Yet, Respondent fails to mention that Shue *also* secretly recorded the victim and her brother naked in the bathroom and was convicted of 29 child pornography counts as a result. **Shue**, 407 p.3d at 335-36. Despite having this evidence that Shue was sexually motivated when he kissed his victim (why else would he have secretly taken naked photographs of her in the bathroom?), this Court held that "there is simply insufficient testimony about the nature of the kiss" that he gave his victim to "conclude beyond a reasonable doubt that Shue's kiss constituted a lewd act". 407 P.3d at 340.

In this case, just as in **Shue**, there was absolutely no testimony about the nature or circumstances of the kisses that were at issue in Counts 1 and 15. See AOB at 35-36. Contrary to Respondent's claim, there was no testimony that Azucena kissed J.M. "while touching her vagina and calling her his 'girlfriend'". Cf. RAB at 22. Likewise, there was no testimony that Azucena "touched her breast, her vagina, and kissed her on the mouth" all at the same time. Cf. RAB at 22. All the jury heard was that Azucena at some

point kissed J.M. and M.M.2 on the mouth. The jury heard nothing else about those kisses. Because the kisses in Counts 1 and 15 did not constitute "lewd or lascivious" acts under Nevada law, Azucena's convictions for those counts must be vacated.

C. NRS 51.385 ERRORS

Respondent claims that **NRS 51.385** permits the introduction of hearsay statements "by a child under the age of 10 describing *any sexual conduct performed*". RAB at 25 (emphasis added). Yet, the statute is not that broad – it only permits the introduction of hearsay statements "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". **NRS 51.385** (emphasis added). The statute does not permit the admission of hearsay statements that describe sexual or physical abuse of children *other than the declarant*. See AOB at 40,42-43.

Respondent fails to address Azucena's argument that the district court exceeded the scope of **NRS 51.385** by allowing Yusnay Rodriguez and Maria Barajas to testify about hearsay involving sexual abuse of children *other* than the declarants. See AOB at 42-43. The prejudice from Yusnay's improper testimony can be seen in Respondent's Answering Brief:

> J.M. told Yusnai that Appellant was touching her **and her sisters (twins M.M. and M.M.)** 8 AA 1479. 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," Apppellant would rub the candy against his penis. 8 AA 1474. J.M. said that on at least 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."

RAB at 3-4 (emphasis added). Where Respondent relied on Yusnay's improper testimony in its brief, it is likely that the jury also relied on her improper testimony in convicting Azucena. Additionally, Yusnay's improper testimony unfairly bolstered Y.E.'s claim that Azucena "put tape on [her] hands, took away [her] clothes, and pushed [her] down on the bed." See AOB at 43,48.

Although Respondent is correct that ***NRS 51.385*** did not require the State to give written notice of its intent to admit hearsay from the five children, **NRS 175.125** *did require* the State to request a 51.385 hearing 15 days before trial. Respondent fails to explain why they did not have to give Azucena 15 days' notice pursuant to **NRS 175.126**, where its request resulted in a one-day delay of trial so the State could question five different witnesses, four of whom required a Spanish translator. AOB at 39.

Similarly, Azucena's Sixth Amendment rights were violated when the State failed to notify the defense which statements it sought to admit beforehand so the defense could adequately prepare for trial. AOB at 39-40.

Respondent misstates the record when it claims that Azucena "conceded that it was clear which statements the State would use at trial." RAB at 27. A fair reading of the record indicates no such concession (VII:1389), particularly where defense counsel reiterated, "I still don't know what statements they want to get in" two pages later. (VII:1391). In any event, Respondent's Appendix proves that Azucena was not given *prior notice* of the statements that were at issue (see RA1-2) and defense counsel's comments to the judge *after* the evidentiary hearing are irrelevant to the issue of prior notice.

Respondent all but ignores Azucena's argument that the court made an improper "blanket ruling" by admitting "every single statement . . . that was inculpatory, which was a statement out of court by the minors." AOB at 42. With a one-sentence response that cites the very same part of the record relied on by Azucena, Respondent claims that "the district court did consider each statement individually." RAB at 27 (citing VII:1389). Yet, the record does not support Respondent's conclusory claim. See **Consol. Generator-Nevada, Inc. v. Cummins Engine Co.**, 114 Nev. 1304, 1311, (1998) ("This court need not consider conclusory arguments which fail to address the issues in the case"). Instead, the record reveals that the court merely "wrote down every single statement that the witnesses on the stand said came from

the minors" and that it was "crystal clear to [to the court] what they want to use". (VII:1389). This does not mean that the court found each statement independently reliable.

Respondent fails to address Azucena's argument that the hearsay statements were unreliable because they changed over time, because they included allegations that were never disclosed to the police, because Yusnay Rodriguez was an unreliable witness, because Elizabeth Espinosa was not neutral but an agent of the State, because the statements were inconsistent, and because the children kept "coming up with new things, and then more things and then more things" after talking to one another and to their parents. AOB at 43-46. Respondent also fails to address Azucena's argument that it improperly introduced the parents' and forensic investigator's statements first, without determining whether any of the child witnesses could fully and accurately describe the crimes alleged, in violation of **Felix v. State**, 109 Nev. 51, 199-203 (1993).

Respondent asserts that Azucena failed to "object contemporaneously" to Maria Barajas' testimony that when she was applying cream to Y.E.'s vagina, Y.E. told her, "That's how Grandpa touches me". See RAB at 28. Yet, Azucena's objection was preserved

because he previously opposed all hearsay statements under **NRS 51.385**[4] and he could not have known, prior to Barajas giving this testimony, that it would exceed the scope of the hearing. In any event, Azucena did object shortly after the statement was made. (X:1733-34). Furthermore, it was clear from the Deputy District Attorney's leading questions about "cream" and about whether "the way [Azucena] touched her vaginal area reminded [Y.E.] of something" that she had intentionally elicited the improper testimony. (X:1731-32;1778-79).

The court erred when it allowed Barajas to continue discussing Y.E.'s comments about "chorizo" and Azucena's penis in front of the jury without first determining, outside the presence, whether the testimony exceeded the scope of **NRS 51.385**. (X:1735-36). Although the court later granted Azucena's motion to strike the "chorizo" testimony (X:1737), the damage was already done and there was no way to "unring the bell" without drawing the jury's attention to it. (X:1742,1790).

The court also erred when it refused to grant mistrials based on the "chorizo" and vaginal cream comments. (X:1742-51;1778-79). Rather than

[4] Previously, the court acknowledged that defense counsel did not need to continue objecting under **NRS 51.385** because his "prior comments and discussions are incorporated by reference, so your objection is preserved." (VIII:1470)

grant a mistrial, the court gave a curative instruction that failed to address Azucena's concerns about the vaginal infections. See AOB at 51-52.

Although Respondent claims that these errors were all harmless given the "overwhelming" evidence against Azucena (RAB at 30), Respondent fails to explain how Azucena could *possibly* have been convicted of alternatively-pled counts 25 and 26, or how he could have been convicted of either child abuse or lewdness based on kissing, which the State failed to prove beyond a reasonable doubt. In addition, Azucena presented evidence that the children and their parents had motive to fabricate the claims against him.

D. FLIGHT INSTRUCTION

The court abused its discretion by giving the jury an unwarranted flight instruction. See AOB at 52-56. Although Respondent relies on **Miles v. State**, 97 Nev. 82, 84-85 (1981) and **Hutchins v. State**, 110 Nev. 103, 113 (1994), to argue that a flight instruction was proper in this case, those cases are inapposite.

Respondent claims that in **Miles**, "an employee left work with missing money, and this Court held that it was sufficient for a flight instruction to be given." RAB at 32. However, Respondent fails to mention that Miles *also* "left the area and was arrested several months later in a neighboring state."

110 Nev. at 85. Without a doubt, those additional facts played an integral part in this Court's decision to approve the flight instruction. Here, by contrast, there was no evidence that Azucena fled to another state or left his place of employment. To the contrary, Azucena was found precisely where his neighbors knew he would be: AT his place of employment.

Hutchins does not support a flight instruction in this case either. In **Hutchins**, there *was* a chain of unbroken inferences indicating his flight from the scene of a violent crime:

> In the early morning hours after the crime, Hutchins was not in his residence, wherever that may have been, despite the fact that his leg was painful and bleeding. Terry Walker testified that Hutchins called her three times in the early morning hours of September 16th, immediately following the incident, from "Ralph's Market." During these calls, Hutchins stated that he was "scared." Inferentially, Hutchins was too "scared" to go where he was living or to a place where he could receive medical attention even though he told Walker that his leg was bleeding badly. Furthermore, Hutchins chose, on the evening of the 16th following the incident, to be picked up and taken to his home by Hutchinson, which appears unusual as Hutchinson testified that Hutchins "really wasn't staying at home" at the time.

Hutchins, 110 Nev. at 113. This Court found it important that Hutchins was too "scared" to go home or seek medical treatment when "his leg was bleeding really bad". **Id.** This Court also found it important that Hutchins did something "unusual" by going home with Hutchinson, who testified that he "'really wasn't staying at home' at the time." **Id.**

Respondent claims that a flight instruction was warranted because Appellant "disappeared from the apartment complex" the day after the children reported his abuse. RAB at 32. However, the record does not support that claim.

Although Amanda Moiza testified that she did not see Azucena at the apartment complex for "two weeks" after she reported him to police (IX:1628), she admitted she did not see Azucena very much during the first few years they were neighbors and she admitted she spent a lot of time with Azucena's wife because Azucena often "wasn't around". (IX:1640). Moiza did not testify that his absence was unusual.

Contrary to Respondent's claim, Yusnay never actually "testified that, after Appellant was reported to the police, he disappeared from the apartment complex." RAB 33 (citing IX:1517). Instead, Yusnay testified that she saw Azucena "one time" after the children reported to her and she spoke with Amanda. (citing IX:1517). Yusnay also admitted that she only saw Azucena twice during the entire time she lived in the apartment complex: once before her conversation with Amanda and once after her conversation with Amanda. (IX:1519). As such, Yusnay could not possibly know whether Azcuena's subsequent absence was "unusual".

Crucially, Respondent never established how often Azucena was around before the children reported the abuse, so Respondent could not show that his absence was so "unusual" as to warrant the inference of flight that was deemed proper in **Hutchins**. (XIV:2727,2729). Furthermore, unlike **Hutchins**, there were no statements from Azucena indicating that he was "scared" to be at the apartment complex or otherwise indicating a consciousness of guilt. Finally, to the extent Respondent relied on a hearsay statement by Azucena's wife to establish the duration of his absence, her statement was inadmissible for that purpose. See AOB at 54-55.

Contrary to Respondent's claim, the court's error in giving this flight instruction was not harmless. Cf. RAB at 33. The evidence against Azucena was not overwhelming, particularly as to the alternatively-pled counts and the child abuse and lewdness counts that Azucena has already demonstrated to be invalid. Azucena presented a credible defense that the children fabricated their claims along with their parents to obtain U-Visas. Indeed, at least one juror was prepared to acquit Azucena of all counts until the court delivered a coercive Allen charge. Under the circumstances the erroneous flight instruction was not harmless. See **Barnier v. State**, 119 Nev. 129, 132 (2003) (harmless error analysis applies to jury instruction errors).

E. PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct violated Azucena's state and federal constitutional rights to a fair trial and due process of law. As explained in Azucena's Opening Brief, Respondent indoctrinated the jury during voir dire, created an artificial concept called the "kid's standard" and used that artificial standard throughout the trial to lower its burden of proof. AOB at 56-64.

Respondent argues that its questions during voir dire were not improper because "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.*" RAB at 37 (emphasis added). Although Respondent claims this was all permissible, the italicized language certainly sounds like an admission that the State intended to indoctrinate jurors about certain factors impacting children's credibility. Cf. **Khoury v. Seastrand**, 132 Nev. Adv. Op. 52, --, 377 P.3d 81, 86 (2016) (parties may not "indoctrinate or persuade the jurors").

Respondent fails to explain why it had to question Juror 159 extensively about "grooming", since the answers to those questions did not affect her ability to serve as a juror. Indeed, Respondent admits that Juror

159's bias stemmed from her own personal experience of being molested by her father. RAB at 38. As such, Juror 159's general understanding of how pedophiles might groom their potential child victims was irrelevant to her bias. The only possible reason to ask Juror 159 about "grooming" was to indoctrinate the panel about anticipated expert testimony.

Likewise, Respondent fails to demonstrate that it needed to question Juror 230, a nurse, about investigating "acute" sexual abuse claims within 72 hours. (V:945-46). The answer to this question would have no bearing on whether or not she was biased. If Respondent truly wanted to know whether Juror 230's "work experiences as a nurse and mandatory abuse reporter" rendered her biased in any way (RAB at 38), it could have asked her that specific question.

As even the district court recognized, it was improper for the State to disclose factual details about the case during *voir dire*. (V:948-49). Respondent had no business telling the jury about all the hypothetical reasons that child victims might not report right away, particularly where those "reasons" were actual excuses offered by the children in this case. AOB at 60.

If Respondent *truly* wanted to "make sure that potential jurors would not be biased against the victims just because they did not report Appellant's

crimes right away" (RAB at 38), Respondent should have simply asked them that question. Instead, the Deputy District Attorney went on and on, describing factual scenarios similar to those at issue in this case and conjuring up images of poor frightened children who were too scared to report sexual assaults to their parents and who were intimidated to appear in a courtroom. AOB at 58-60.

While it may not be "unusual" for jurors to find it difficult to sit on a sexual assault case (RAB at 38), several prospective jurors indicated that the Deputy District Attorney's own indoctrinating comments led them to that conclusion. See, e.g., (VI:983) (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:1075) (explaining that it "hurts" to hear the allegations because, "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:1076) (parroting back the Deputy District Attorney's earlier comments that it was "difficult" for the children "to even be able to go up there to speak about it").

Under the circumstances, Respondent cannot show that its indoctrination was harmless beyond a reasonable doubt.

F. JUDICIAL MISCONDUCT

As set forth in Azucena's Opening Brief, the district court openly displayed animosity toward defense counsel as early as the discovery phase and continuing throughout the trial. The court also vouched for child witnesses. See AOB at 65-69.

Respondent tries to justify the court's decision to remove defense counsel from the courtroom at a discovery hearing by claiming that defense counsel's tone of voice "was so inappropriate for a courtroom that the State made a contemporaneous record of it." RAB at 44. However, this so-called "contemporaneous record" was made much earlier in the hearing, when the court asked the Deputy District Attorney what *she* had done so far to satisfy *her* Brady obligations and, in response, *she* became defensive with the *court*:

> THE COURT: I'm simply asking what you have done so far?
> MS. KOLLINS: Well, it's a little hard not to get defensive with Mr. Westbrook's tone this morning.
> THE COURT: Okay. Alright but don't get defensive with me, I'm trying to just get to the facts here.

(XV:2944-45).

Although Respondent suggests that defense counsel improperly "argued with the judge" at the hearing, the JAVS demonstrate that defense counsel's tone was respectful throughout the hearing and that it was the judge who became irate. See **Court Exhibit 14**, JAVS 3/23/17.

When defense counsel asked the judge to reconsider his blanket denial of Azucena's discovery motion, the judge began making generalizations about defense attorneys as a group and expressed frustration about having to rule on their "overbroad" discovery motions:

> This – you're – *what you do and what defense counsel that I'm starting to see is really becoming frustrating to me is these extremely overbroad discovery requests where they ask for everything*, things that the State has, things that the State doesn't have, things that you wished the State have but they never have, and you require me to go through and try to figure out what they might have that they aren't turning over when it's your job to come forward with evidence on some evidence that they have something that they haven't turned over.

(XV:2952-53) (emphasis added). Only after escorting defense counsel from the courtroom did the judge reconsider his ruling, granting almost all of Azucena's discovery requests. (III:611-13).

Although Respondent accuses Azucena of misrepresenting the record regarding the court's interruption of his opening statement, Azucena had insufficient space in his Opening Brief to reproduce the entirety of the court's admonishment, so appellate counsel simply directed the Court to the full record at (VII:1445-54) and at **Court Exhibit 4**, JAVS 4/27/17 at 2:59:06-3:02:00. See AOB at 65-66. Azucena certainly welcomes this Court's full review of the record.

CONCLUSION

Whether considered alone or cumulatively[5], the egregious errors in this case require reversal.

Respectfully submitted,

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[5] Respondent offers no support for its claim that the jury's decision to convict him of two alternatively-pled counts is not a "trial 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 Times New Roman in 14 size font.

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

DATED this 20 day of November, 2018.

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CERTIFICATE OF SERVICE

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

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