IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA HONEA, Appellant, v. STATE OF NEVADA, Respondent.	Docket No. 76621	Electronically Filed Dec 18 2018 11:53 a.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entries as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

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JURISDICTIONAL STATEMENT

A. Basis for Supreme Court's or Court of Appeal's Jurisdiction:

Pursuant to NRS 177.015(3), this is an appeal from a Judgment of Conviction pursuant to a jury verdict, in a criminal case.

B. The Filing Dates Establishing the Timeliness of the Appeal:

Judgment of Conviction Filed: 07/05/2018

Notice of Appeal Filed: 08/02/2018

C. Assertion that Appeal is From a Final Order or Judgment:

This Appeal is from a Judgment of Conviction in a Criminal Matter; thus, jurisdiction is proper before this Court.

ROUTING STATEMENT

This appeal is appropriately assigned to the Supreme Court pursuant to NRAP 17(b)(2)(A) because it is a direct appeal from a judgment of conviction based on a jury verdict on a category A felony.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

V. **DID THE DISTRICT COURT ERR IN INSTRUCTING THE JURY?**
VI. **DID THE DISTRICT COURT ERR IN NOT GRANTING THE MOTION FOR A JUDGMENT NOT WITHSTANDING THE VERDICT?**
VII. **DID THE DISTRICT COURT ERR IN NOT GRANTING THE MOTION FOR A NEW TRIAL?**
VIII. **WAS THE EVIDENCE SUFFICIENT TO CONVICT THE DEFENDANT AS CHARGED?**

STATEMENT OF THE CASE

The State charged Joshua Honea (hereinafter, "Honea"), by way of Information, with four counts of First Degree Kidnapping, twenty-two counts of Sexual Assault on a Minor Under 14, 22 counts of Sexual Assault on a Minor Under Sixteen, two counts of Use of a Minor in the Production of Pornography, one count of Luring Children or Mentally Ill Persons with the Use of Technology with the Intent to Engage in Sexual Assault, one count of Lewdness with a Minor Under Fourteen. AA00001-17. The jury found Mr. Honea guilty of one sole count, Sexual Assault on a Minor Under Sixteen. AA2813. After the verdict, defense counsel learned of juror misconduct, and filed a Motion for Judgment of

Acquittal, or in the Alternative, Motion for New Trial. AA2814. The court denied that motion, and sentenced Mr. Honea on May 21, 2018. AA2930-2933, AA2976-2977.

STATEMENT OF FACTS

The State charged Joshua Honea with over fifty counts of sex related offenses against their alleged victim, M.S. AA1-17. Prior to the start of trial, the State sought a material witness warrant for M.S., as they had concerns about M.S. showing up to trial. AA103-108. During the second day of trial, the State informed the court that M.S. was currently in custody on that warrant. AA337. At the start of the next day, the defense informed the court that it had met with M.S. and had concerns about possible violations of the State's duty to disclose exculpatory evidence. AA446.

During the conversation with the defense, M.S. informed counsel that she had told the district attorney that she did not want to proceed with the case, she indicated she was concerned that she now had to tell the court she had lied at the preliminary hearing and was worried about being prosecuted for perjury. AA447. M.S. further indicated that she believed she had to testify the State wanted her to, or she would not get released from custody. AA448. The State denied that M.S. ever indicated that she did not wish to proceed with the case. AA450. The court sought counsel for M.S. and continued voir dire. AA479.

At the time of the hearing, M.S. was represented by an attorney, and the court allowed questioning of M.S. regarding the record made by defense counsel. AA561. The State asked M.S. if she told the truth when she testified at the preliminary hearing, and M.S. answered, "I'm pleading the fifth." AA563. The State then indicated that it would not proceed on perjury charges against M.S. The State inquired again from M.S. if she told the truth under oath at the preliminary hearing. M.S. answered, "No, I did not." AA565. When asked what she did not tell the truth about, M.S. responded, "Just about everything." AA5645. M.S. admitted that about four days prior, she had used heroin. AA565. M.S. indicated that she had not told the State before that she lied, but that she had told the State she did not want to participate in this case. AA566. M.S. indicated that she testified at preliminary hearing because she was angry at Honea. AA567. M.S. had not spoken to Honea since July 2015. AA1337.

M.S. indicated that she felt the State told her what to say, to a degree, and told her "bad things" about Honea, and that he was a predator. AA570. She further indicated that she felt that she was being pushed to come in and testify and that the State should not be prosecuting Honea because she had lied. AA573. M.S. tried to reach the district attorney, asking the State investigator to have the district attorney Ms. Kollins contact her because she wanted to let Ms. Kollins know that she had lied and wanted to fix "it." AA573. M.S. admitted she had failed to attend

meetings with Ms. Kollins because she was embarrassed to have to admit she lied to someone who had worked so hard on the case. AA577. M.S. testified for the State for four days, during which time she remained in custody. AA1335. M.S. did not have any means of posting bail, so she had to stay in custody the entire time until her testimony was completed. AA1334-1335. M.S. was aware that her testimony would have gone faster had she agreed with the State and not recanted. AA1335.

M.S., whose birthdate is June 30, 1999, turned 18 in the summer preceding trial. AA777. She turned 11 before she started sixth grade. AA778. M.S. attended Johnson Middle School for sixth grade, and during an orientation for middle school, she met Honea. AA784. M.S. did not do well in sixth grade, as she had problems at home and was in the dean's office frequently. AA784. Honea worked in the dean's office and the two began to talk when she was sent there. AA786. M.S. asked Honea if he could help her with her homework if she had to stay after school, as she did not have anyone else to help her. AA787. Honea sometimes helped her. AA787.

M.S. kept contact with Honea during that school year, talking to him about her life. AA789. M.S. testified that the tone of the conversations did not change. AA790. Around the time of Honea's birthday, M.S. went to Minnesota to stay with her Aunt. AA790. During that trip, she and Honea would text and talk about

her vacation and her life. AA791. M.S. celebrated her birthday while she was there. AA792.

M.S. remembered when she got back from Minnesota, she and her friend Taylor had a sleep over, at which the two had a disagreement about M.S. wanting to go be with Honea. AA794. Taylor did not know at the time that it was Honea, only that it was a boy. AA737, 739. At the trial, M.S. did not remember if she met Honea the next day; however, she did tell Detective Lisa Cho in her statement in July, 2015, that she did in fact meet with Honea that next day. AA797. M.S. admitted at trial that the statement to Detective Cho was a lie. AA797.

In July 2015, M.S. also told this same story about meeting Honea to Taylor, at a time when M.S. was "building a case against Josh." AA740. During that conversation with Taylor, which was the first time she had ever told Taylor a thing about Honea, she took notes of what she would tell the police. AA1420. The pair also "smoked weed" and the pair burned photographs of Honea. AA1424.

M.S. admitted that some of the details, such as she and Honea speaking while she was in Minnesota, were factual, and others, like the conversation about kissing, were a lie. AA800. M.S. admitted that, at the time she spoke to the police, she was very angry at Honea for something that now seems petty, although she cannot remember what it was. AA802. She knew that Honea could face prison time for her allegations, but because she was young, she did not realize how

terrible that was. AA806. M.S. did remember that the fight was likely because, at that time, M.S. wanted to associate with "bad" people and do drugs, drink and have sex. AA811. Honea, who worked for the police department, would sometimes get angry when M.S. wanted to engage in harmful activities, and the two would fight. AA812.

M.S. admitted that at some point prior to her speaking to detectives, she had developed feelings for Honea beyond brother and sister. AA1471. Despite those feelings, and despite her telling the police that Honea did not allow her to have relationships with other people, M.S. was shown photos from her freshman year of high school where she was with other men that she admitted she dated and was able to have normal relationships with. AA1475. She did have a discussion with Honea about dating, but was told it was not possible because of his work with the police and their ages. AA1477.

One of the frustrations with M.S.'s relationship with Honea was that she wanted more than he could give her, and M.S. admitted that she was more mature than Honea. AA1482. M.S. admitted that when she was 8 or 9, she witnessed her father having sex with one of his girlfriends, and had a knowledge of sex before she had ever met Honea, or anyone else mentioned in her testimony. AA1414-15.

M.S. knew that up until some point in 2015, Honea was a virgin. AA1483. When Honea lost his virginity in June 2015, to a Brisa Perez, M.S. became angry.

AA1483. M.S. would turn 16 in June of 2015, becoming of legal age, but Honea had started a sexual relationship with someone else. AA1484. While M.S. could not remember the exact fight in July of 2015 that prompted her to go to police, she did remember that his losing his virginity to someone else, prior to her 16th birthday, was a large part of her anger. AA1484. M.S. clearly remembered that Honea had told her about Brisa Perez, including showing her screenshots of their conversations. AA1517.

M.S. admitted that she provided the detective information about kissing Honea, and how he pressured her for more than kissing; however, when asked if M.S. remembered telling the detective that when Honea pressured her for sex, she laughed, and then offered, "Yes. I don't mean to laugh or anything. I thought it's ridiculous how I said this." She further categorized her telling the detective this as "retarded." AA816.

M.S. told the detective that when she was in Minnesota, she texted Honea a naked picture of herself, and Honea responded with a picture of his penis. AA819. M.S.'s version to the police was that when she got back to Las Vegas after her trip, Honea picked her up and took her to the Suncoast, where they had intercourse in the parking lot. AA829, 832, 834. M.S. told the detective that she and Honea went to the Suncoast parking lot many times. AA835. According to the version M.S. told the police, Honea's penis was too large, so he suggested to her that she

use a banana or vibrator to enlarge her genital opening. AA837. At a meeting with DA Kollins, about three weeks prior to trial, where M.S. showed up to get clothing and her social security card from DA Kollins, she said she in fact used a cucumber. AA838. She did not tell the State at that time that she was lying. AA838. She admitted she was embarrassed and afraid she would face a perjury charge. AA906. District Attorney Kollins then questioned M.S. about the seemingly over involved relationship between DA Kollins and M.S., including being Facebook friends and exchanging Facebook messages and text messages. AA906.

M.S. told the detective that at some point Honea wanted to stop using condoms, so she had her mother get her birth control pills. AA920. At trial, she explained that she did in fact have her mother get her birth control pills, however, it was because she had irregular periods. AA920. M.S., around that same time frame, began to have questions from her mother about why she spent so much time with Honea. AA926. She knew that people wondered why an older boy was spending so much time with a younger girl, and she did not want to lose Honea in her life, so she told her mother that Honea was gay. AA926. She stated that Honea helped her in her life more than she could explain. AA926. M.S. characterized her earlier life as wanting someone like Honea to look up to. AA928. Her mother was never home, and her father was a "low-life" and her other family lived elsewhere, so she looked up to Honea as her hero. AA928.

M.S. told Detective Cho that she and Honea dated up until around January 2015, and that everything stopped when she turned 15. AA932. M.S. admitted at trial that she used details of her sex life with other men to provide details to the police. AA933. Two nights before M.S. went to the police, she went over all the details with Taylor, including telling Taylor she wanted to get into court because M.S. wanted Honea in legal trouble. AA935. She admitted that her belief that he would not get in trouble with work was "retarded." AA935. M.S. admitted that she knew about setting up a case through Honea's work with the police department, and through friends who had been through the process, and crime shows. AA973-4.

In high school, M.S. started dating a boy named Franco. AA941. She told Cho that Honea was jealous and that she was worried what would happen if Honea found out. AA941. She told Cho that she tried to block Honea out of her life, but he would not go away, calling and driving by her house. AA942. In reality, she broke up with Franco because he was "doing things she didn't want to be involved in" like drugs and partying. AA943. That same school year, M.S. switched schools, leaving Desert Oasis, and going back to Bonanza High School. AA987. M.S. told Cho it was because Honea did not want her around Franco. AA987. However, Franco was sharing nude photos of M.S. with others at school, including

other members of the football team. AA1429. M.S. told this to Honea, and he became angry prompting a call with Franco. AA1430.

At a break in the proceedings, but still on the record, M.S. broke down and indicated that she was having difficulty watching her taped statement to the police, because, "The video, I put everybody through this and watch this. It's very uncomfortable to me to have to sit here with Josh and his lawyers and the State of Nevada to listen to what I said. To know that it was untruthful and is very embarrassing. It's sickening, ultimately really sickening." AA1025.

The State played the video of the statement, and then questioned M.S. again regarding that statement. M.S. indicated that she did tell Honea initially when the police spoke to her because she thought it was strange and thought he should know. AA1097. M.S. spoke to police on April 1, 2015, and she told them that nothing had ever happened between she and Honea. AA1098. It was that phone call that prompted M.S. to tell Honea the police were investigating him. AA1098.

During those conversations, M.S. remembered that Honea had mentioned that an Officer Zafiris had gone to a supervisor about something unrelated to her. AA1100. M.S. was not aware of the specifics, but did remember that Honea had told her that there was an unrelated issue with Zafiris. AA1445-46. Within days of Honea telling her that, detectives with Metro were calling her asking her about Honea. AA1446. M.S. was in San Francisco when the detectives called her, and

told detectives there was nothing inappropriate about her relationship with Honea. AA1448. Prior to July 2015, M.S. and Honea were off again/on again as friends. By July 2015, however, M.S. was so angry at Honea that her feelings for him turned to hate. AA1103.

M.S. then testified about a photo album she had given to the police during her interview. AA1109. The pictures were primarily of she and Honea. AA1110. M.S. did indicate that the captions she wrote in 2015 did not match the pictures, but that there were pictures of a trip she had taken with Honea in December 2014, when she was 14. AA1111. M.S. indicated she had similar albums of her other friends and her siblings. AA1115. M.S. also gave the detective her laptop, but did not have text messages because those had all been deleted. AA1124.

Additionally, M.S. was shown pictures of she and Honea at functions with Las Vegas Metro employees also present, including Honea's supervisor, Luann. AA1442. She admitted that she told the detective Honea had made her keep their relationship a secret, but certainly that was not true by photographs the defense showed her, which contrasted the pictures in the album provided to police back in 2015, curated by M.S. AA1443.

The State then went through M.S.'s preliminary hearing testimony, almost line by line, having M.S. read her answers. AA1162. The preliminary hearing testimony told the same general details as the statement to the detective about

meeting up at the Suncoast. AA1176. M.S. provided details at the preliminary hearing that she did not provide to the detective, describing the manner of alleged sexual encounters. AA1175-1191. M.S.'s version at the preliminary described consensual sexual intercourse with Honea in 2013 and 2014. AA1250, 1258, 1259. M.S. gave a description to the detective of Honea's penis, to indicate she had seen it— and that it had a dark mole on it-- however, she admitted at trial that he described his penis to her to help allay fears she had over having to expose a mole on her buttocks to a doctor. AA1496.

Around December 2014, M.S. stopped speaking to Honea, and he sent people to check on her. AA1282, 1283. M.S. testified at trial that it was because she had previously disclosed to Honea that she had periods where she had thought about hurting herself. AA1283.

M.S. realized now, at 18, the seriousness of the allegations she made in 2015. M.S. never mentioned to the State before that she had lied at the preliminary hearing, and that was because the State had never offered her immunity, not doing so until the trial had commenced. AA1338. M.S. was detoxing when she first came into custody, and during the first part of her testimony. AA1340. She admitted that her latter testimony was clearer than her earlier testimony because she was feeling better physically. AA1340. M.S. also noticed a difference in how she was treated when she was willing to claim she was a victim versus now that

she admitted she had lied previously and now that she was not supporting the State's version. AA1341.

Prior to M.S. admitting that her allegations were lies, the district attorney provided her with food, friended her on Facebook, and offered to find her a place to live. AA1343. This included a hotel to stay in for trial, as well as helping her get into rehab for a few days. AA1344. M.S. told the district attorney that the did not want to proceed with the trial, and declined any help. AA1344-1345. The State, however, proceeded with prosecuting Honea. AA1345.

M.S. admitted that she had manipulated much of the situation with Honea, and that the district attorney was the person claiming Honea was an abuser. AA1347. M.S. agreed that the district attorney was using her to prosecute Honea. AA1349. She admitted that she had run through her story a few times by the time she testified at preliminary hearing, in 2015, but that despite running through it, she still could not keep the details straight. AA1487. It was harder, according to M.S., to keep the details of a lie straight than it would be to keep the truth straight. AA1487.

Detective Igor Dicaro, with the Las Vegas Metropolitan Police Department, testified that on March 29, 2015, he received information about some concerns with a Metro employee. AA1557. The information came from a Sergeant Clark, who relayed that there were concerns that Honea was having a romantic

relationship with a woman under the age of 16. AA1559. Based on that information, Dicaro spoke to M.S.'s mother, who told them that the relationship between M.S. and Honea was a friendship, but that she thought Honea was obsessive. AA1563. Dicaro also spoke to co-workers of Honea, who told him that some of them did not know M.S. but did know the two were friends. AA1564. The co-workers also indicated that none of them ever saw the two in any type of interaction between M.S. and Honea that would indicate a romantic relationship. AA1564.

Dicaro also contacted M.S., who told Dicaro that her relationship with Honea was that of a brother and sister, and that she had never felt harassed by Honea. AA1565. M.S. also told Dicaro that she did feel badly for not speaking with Honea much lately, because he was always willing to give her advice and help her along the right path. AA1566. On April 1, 2015, Dicaro informed M.S.'s mother that if she felt harassed by Honea, she should contact police. AA1566. Pam Savage, M.S.'s mother did not want to file a report. AA1566.

Dicaro contacted Honea at work and conducted an interview. AA1567. After the interview, the detective waited a couple of weeks, and then closed his case. AA1572. He waited because M.S. had said she would reach out to talk more when she got back from her vacation. AA1572. She did not do that, so he closed the case. AA1572. Aside from Dicaro's criminal investigation, internal affairs also

was conducting an investigation. AA1573. In July of 2015, internal affairs officer Rachel Calderon informed Dicaro that she had contact with M.S. and that M.S. wanted to give Dicaro a statement. AA1575.

After M.S.'s statement with detective Cho, and after driving around with detectives to various locations where she purportedly had intercourse with Honea, detectives had M.S. come into the office to place what Dicaro called a pretext call with Honea. AA1581. The pretext call had M.S. place a phone call to Honea in a room with detectives. AA1586. That phone call was not made on a speaker phone, but instead M.S. had the phone to her ear. AA1586. According to Dicaro, who could not testify regarding the entirety of the conversation or explain any actual context for the statements, Honea made statements such as "no victim, no crime." AA1588. Dicaro also facilitated the arrest of Honea, including the search of his home and truck, where officers confiscated his electronics, including his phone and camera and Ipad. AA1591.

Dicaro also indicated M.S. told him that the mole on Honea's penis was a large, dark mole. AA1624. However, on viewing the photographs in front of the jury, it was asked if the mole was not in fact flesh colored. AA1624. Dicaro indicated that the mole was "darker than the surrounding tissues." AA1624. Additionally, the mole was more on the head of the penis than on the shaft. AA1625.

John Pacult testified regarding grooming techniques. AA1632. Pacult testified that some of the behaviors he read about in the discovery in this case were grooming behaviors. AA1637-38. He did have to later admit, however, that he may not have had accurate information, and that would affect the quality of his opinion. AA1666, 1668, 1669-1673. He also refused to charactize the district attorney's behavior (befriending M.S. on facebook, buying her food, offering shelter, etc.) as grooming, although he characterized Honea's similar conduct as such. AA1677-78, 1686-87.

Vincent Ramirez, with the Las Vegas Metropolitan Police Department testified that he performed an analysis of the electronics in the instant case. AA1756-57. Ramirez testified about items he found on M.S.'s laptop, including a collage that read, "I hate not having you. I regret what I have done. I love you." AA1763. The collage showed photos of Honea and M.S. kissing. AA1764. Other collages using the photos say, "Merry Christmas, Baby," and "Nothing is better than the sound of his laugh." AA1765. The photos depict M.S. kissing Honea on the cheek. AA1766. There was also a photo of the two kissing in a mirror. AA1767. M.S.'s laptop also had multiple images of her naked. AA1771. The naked pictures of M.S. were dated between 2013 and 2014. AA1772.

Ramirez also went through M.S.'s iphone, and noted that there were no calls on the cell phone, no contacts listed and no text messages on the phone. AA1777.

On Honea's Ipad, there were images of he and Morgan at Valley of fire, random photos of Honea's body, and texts between Officer Zafiris and Honea. AA1792-93. There was also a receipt for a hotel room in Carlsbad from 2013, and other text messages between Honea and multiple people, including Brisa Perez. AA1794. The messages between Honea and Brisa Perez that were captured, start on June 23, 2015. AA1798. The messages between Honea and Brisa were sexual in nature, including referencing their time together in a hot tub. AA1843-44.

The only messages that were captured between M.S. and Honea were dated between June 25, 2015 and July 6, 2015. AA1799. Some of the messages were between Honea and his friends, discussing the stress the investigation was putting onto Honea, including his fear that M.S. could "hang this over his head for years." AA1807. The rest of the messages in that line of texts included the friend responding that Honea needed to have hope, especially since nothing happened with M.S. AA1848.

The messages between Honea and M.S. indicate that they were speaking about a woman, and M.S. had seen pictures of the woman, and making statements to Honea about what the woman looked like. AA1860. This was in the time frame that M.S. would have found out about Brisa Perez. There were not, however, any nude photos of M.S. on any of Honea's devices, nor were there any nude photos of Honea on any of M.S.'s devices. AA1812.

Luann Sachetti, now retired, testified that she was Honea's supervisor in the gang unit. AA1886-87. Honea worked for her in 2014, and during his employment she met M.S. at a birthday party for Honea. AA1889. Prior to that meeting, Honea had spoken about M.S., and the impression Sachetti had was that the two were friends. AA1890. Sometime in 2015, Sachetti remembered detectives interviewing Honea and the next day an internal affairs sergeant came to her and told her that it would best for the department if she terminated Honea. AA1893. The sergeant told her that it would prevent Honea from getting into the police academy, which is what they wanted to happen. AA1894.

James Wirey was another co-worker of Honea's with the department. AA1903. Wirey met Honea when they were working with the Metro Explorers. AA1905. Wirey remembered that sometimes Honea would bring M.S. to explorer meetings, and his understanding was that Honea was sort of a mentor for M.S. AA1908. He described the interactions between the pair as that of a brother and sister. AA1908. At some point, after Honea began working for the department as a volunteer and not as an explorer, he learned that Honea was upset because he found out that M.S. was using drugs and doing other things that were concerning. AA1913.

Wirey and some other co-workers took Honea to the Yard House in 2014 to talk to Honea because they felt he needed to spend time with people his own age,

as it appeared he was still spending time with the explorers. AA1915. During that conversation, Honea indicated he was waiting until M.S. was of legal age to have a relationship with her. AA1916. On March 29, 2015, Wirey had a sit down meting with Sergeant Clark and Officer Zafiris and Honea. AA1917. During that meeting, the group discussed with Honea some "things outside the scope of employment" that had become an issue. AA1917. When asked what the concern was about, Wirey indicated that he had learned about an incident with a stolen car where Honea was "way too close to the suspects and a very dangerous situation" which "brought concern by other people." AA1918. M.S. came up again during that meeting, where Honea indicated that when M.S. was of legal age, he would date her. AA1919. Wirey admitted that he was aware that Honea was the number one candidate to come out of testing for the police academy and he was happy when he found that out. AA1924. However, around the time of the stolen vehicle call is when he remembers the issues with Honea becoming prevalent. AA1924.

Officer Kevin Zafiris was Honea's supervisor in the explorer program, and then when Honea was a volunteer. AA2053. During that tenure, Zafiris saw M.S. present at the explorer meetings. AA2055. At one of the meetings, Zafiris actually spoke to Honea's mother, who indicated that M.S. was close to the Honea family, and that M.S.'s parents were not very involved, so the Honea family took M.S. into their family, like a daughter. AA2056.

In March 2015, there was an incident when Honea was out with officers on a stolen vehicle call and Honea ran the plates, letting officers know the car was stolen. AA2064. The date of that call was March 22, 2015, or seven days before Dicaro gets a complaint from Honea's chain of command about M.S. AA2064. Further, despite every other witnesses' testimony that Honea was frustrated M.S. had cut him out of his life, Zafiris testified that Honea was "hanging out with M.S." against his advice, AA2067. Zafiris also thought Honea should be around people "his own age" and not the Explorers; however, the Explorers age out at 21, which was Honea's age range. AA2069. Honea indicated that he wanted to have a relationship with M.S. when she turned 16, and according to Zafiris, it was the remark that caused him to go to his supervisor regarding Honea's intent, despite the fact that such a prospective remark is not an indication of any criminal conduct. AA2070.

The incident on March 22, 2015 that spurred the complaints, which had never previously been documented, involved Honea informing officers about a stolen car at a Chevron station. AA2094. Zafiris did not remember that Honea had spoken to a female suspect who had provided information about contraband in the car; instead, he only remembered that his concern was that Honea was too close to suspects. AA2105-06. However, when specifically asked whether or not Zafiris allowed individuals who were potential suspects to leave the scene with items from

the stolen car, Zafiris could not remember. AA2119. Zafiris continued to not remember and to not answer direct questions about policy. AA2122.

After looking at a log prepared by dispatch, it was clear that Zafiris was actually involved in contact with the suspects, including clearing the vehicle. AA2130. Officer Zafiris was asked specifically about whether or not he had let suspects go with contraband, in violation of policy, and answered, "I don't know what I did at the scene." AA2237. On March 26, 2015, Zafiris commended Honea for the traffic stop, despite later claiming Honea had violated policy. AA2239. Then, later that day, suddenly things between Honea and Zafiris became contentious. AA2239. It was shortly after that time that the letter from Zafiris regarding his concerns made its way to Dicaro. AA2239. Zafiris made allegations against two other officers regarding sexual harassment prior to his complaints about Honea, but those officers later got their jobs back. AA2250-51.

Rachel Calderon, with internal affairs, started her investigation into Honea in June 2015. AA2295. Calderon began her investigation by speaking with Pamela Savage, including going to Savage's place of employment. AA2295, 2297. After that meeting, Calderon received a call from M.S., in early July, indicating she wanted to speak to officers. AA2295. Calderon also spoke to Honea's supervisor. AA2300. Calderon denied that she ever told Sachetti to get rid of Honea. AA2300. Calderon was not aware that her supervisor Karen Hughes

initiated the internal affairs investigation, but she was aware that Zafiris's wife worked for Hughes. AA2305. When asked why Calderon was still contacting Pam Savage and investigating Honea after he was no longer an employee, her response was that she "thought he was still an employee of ours. That's why we had the investigation." AA2307. Zach Marsh, Calderon's colleague who investigated with her, admitted that Karen Hughes was responsible for starting the investigation. AA2442.

M.S.'s mother, Pamela Savage, testified regarding what she was aware of about the relationship between M.S. and Honea. She remembered that after M.S. told her she had cut off contact with Honea, Pam received a text message from Honea informing her that he was concerned that M.S. was using drugs. AA2613. Pam admitted that most of her information about M.S.'s activities came from M.S. and that she was unaware largely of the trouble M.S. was having at school. AA2635.

Pam, who testified that M.S. did not have friends other than Honea, was confronted with photos of M.S. with other friends, and had no knowledge of those friends. AA2639-40. Pam was unaware that M.S. was actually using drugs during the time frame that Honea was concerned about M.S.'s admitted drug use. AA2640, 2641.

The final witnesses were defense witnesses, who established that that when M.S. was at Johnson Middle School she was frequently in the dean's office. AA2649. Paula Krasky, who worked at Johnson when M.S. was in sixth grade, remembered meeting M.S. because of reports of a club that M.S. had started where they would get into fights. AA2650. Krasky, based on her career in schools, believed that M.S, due to her frequent visits to the office, must have been having issues at home. AA2652.

Honea's female friend, Katerina Babin, testified that she and Honea were friends, beginning in high school, and continuing through college. AA2656. Babin testified that Honea frequently gave his friends advice about how they should live their lives, and it could be frustrating at times. AA2657. During college, she and Honea spent quite a bit of time together, including after school, going to sporting events and going to and from school, and doing homework together. This time period was fall of 2011 into spring of 2012, and she saw Honea nearly every day. AA2659. After studying, the two would go to movies and out to eat. AA2659. During high school, she saw Honea with friends his own age, including girls his own age. AA2660. She had conversations with Honea about girls he had crushes on. AA2660.

During the spring into summer of 2015, Babin remembered Honea talking about a woman he was dating. AA262. Honea would sometimes tell her the

details of those dates. AA2662. Babin remembered Brisa Perez, and remembered Honea calling her to tell her that he had lost his virginity. AA2667.

Humberto Zarate, an officer with the Las Vegas Metropolitan Police Department, was friends with Honea during his time at the department. AA2681. Zarate remembered M.S. because Honea was mentoring her, and he met M.S. one time. AA2683. He met M.S. one time when he went to dinner with Honea and M.S. and then to a light show. AA2684. Zarate never saw anything that would indicate any type of sexual relationship. AA2685. Zarate also testified that the counsel for the State contacted him prior to him testifying and he met with them in their office. AA2689. During that meeting, DA Rhoades told him he had to be honest. AA2689. He felt that he was being honest, but Rhoades brought up obstruction and he felt as if she was threatening him. AA2689. Zarate indicated he told Rhoades he did not remember certain information and he then felt threatened when she brought up obstruction. AA2690. When he was leaving the interview, Rhoades remarked, "Good luck with the defense." AA2690. Zarate felt that she was intimating he was dishonest and lying for Honea. AA2690.

Finally, Honea's mother, Dara Coleman, testified that the family met M.S. because of Coleman's employment at Johnson Middle School. AA2721. Coleman remembered that people in the office were concerned about M.S., and tried making contact with M.S.'s mother. AA2722. When M.S. was in sixth grade, the family

decided to take M.S. in as they were concerned that M.S. was troubled. Dara talked to M.S. frequently, and started having her come to the home for meals because sometimes M.S. was alone at home with no food. AA2724. On one occasion, Dara remembered that Pam was out of town in August and there was no air conditioning at the Savage home. AA2726. The family invited M.S. to spend the night because Pam would not return to the home as she was leaving town to be with a boyfriend. AA2725. Dara remembered that Honea treated M.S. like a younger sibling. AA2727.

After the verdict, which was not guilty on all counts except count number 39 (which corresponded to the time period of June 30, 2013 and December 31, 2014, when M.S. was over 14), the defense counsel filed a motion for judgment of acquittal or, in the alternative, motion for a new trial. AA3070. Part of the substance of that motion was that jurors had committed misconduct in arriving at their verdict. AA3077. That motion was denied without an evidentiary hearing. AA3186.

SUMMARY OF ARGUMENT

During the settling of jury instructions, the defense asked for an instruction to the jury regarding consent as an element of sexual assault. Additionally, the defense objected to the State's instructions regarding consent not being a defense. The district court agreed with the State, and it did not offer the defense's proposed

instructions on consent; however, the court did allow the State to instruct the jury that consent is not a defense and that the age of consent in Nevada is 16.

The defendant filed a motion asking the district court for a judgment of acquittal, based on the fact that the jury convicted Honea of one count out of 52, and that one count was part of a block of acts alleged to have occurred during a the same time as acts of which Honea was acquitted. The jury could not have believed M.S.'s statement to the police or at preliminary hearing and acquit him of the companion charges.

Further, due to issues of juror misconduct, the defense asked the district court, if it was not inclined to grant the motion for judgment of acquittal, to grant a motion for a new trial, based on the juror misconduct tainting the verdict. The defense asked for an evidentiary hearing to further flesh the issue out, but the court denied that request and denied the motion in whole, which was error.

Finally, the evidence was not sufficient to sustain a conviction of count 39, considering the evidence was not enough to sustain a conviction of any of the other companion counts.

ARGUMENT

I. THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY.

Standard of Review: This Court reviews a district court's decision on jury instructions for abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

The State proposed a jury instruction that consent was not a defense to the charge of Sexual Assault on a Minor Under Sixteen or a Minor Under Fourteen. AA2543. The defense proposed instructions included inverse language that if the State did not prove that the alleged victim did not consent, they must find the defendant not guilty of sexual assault on a minor under fourteen or sixteen. See Defense Proposed Jury Instruction, Court Exhibit Filed on Day 14 of Trial, December 14, 2017.[1] The district court heard argument, where the State argued that recent Nevada Supreme Court caselaw held that statutory sexual seduction was not a lesser included offense of sexual assault on a minor AA2545-46. However, the defense was not asking the court to give a lesser included instruction. In fact, the only mention during argument of statutory sexual seduction was simply to explain to the district court that consent was an element of sexual assault, even on a minor, despite the fact that the legal age of consent is 16. The court not only did not allow the defense to instruct that consent was a defense, but it also allowed the State to affirmatively instruct the jury that consent was NOT a defense. AA3103.

[1] A Motion to Transmit the Exhibits is pending before this Court.

The court also instructed the jury that the legal age of consent in Nevada is 16 AA3104.

It was error for the court to not allow the defense to instruct the jury that, if they believed M.S. consented, they must find the defendant not guilty of the sexual assault charges and it was error to instead instruct the jury that consent is not a defense.

According to NRS 200.366:

> 1. A person is guilty of sexual assault if he or she:
> (a) Subjects another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct; or
> (b) Commits a sexual penetration upon a child under the age of 14 years or causes a child under the age of 14 years to make a sexual penetration on himself or herself or another, or on a beast.

That statute, however, was amended in 2015, adding the language in section B. The crimes against Honea were charged to have taken place prior to 2015, and therefore the statute that was in effect at the time read:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

See N.R.S. 200.366 (2007).

The statute is clear that an element of sexual assault is that the victim did not consent, or that the crime occurred under conditions in which the perpetrator knew, or should have known, the person could not consent. The age of the victim is not an element, and does nothing more than set the sentencing range. In *Altobai v. State*, 404 P.3d 761 (2017), this Court noted that the elements necessary to convict a defendant of sexual assault are contained in subsection 1 of NRS 200.366, whereas the age is contained in a different section as determining the appropriate sentence. *Id.* at 766. This Court further noted that the offense of sexual assault has two statutory elements:

> (1) Subject[ing] another person to sexual penetration or . . . forc[ing] another person to make a sexual penetration on himself or another, or on a beast,
> (2) "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct."
> *Id.*, *citing* 2007 Nev. Stat., ch. 528, § 7, at 3255 (NRS 200.366(D)).

Quite clearly, from the plain language of the statute, the State MUST prove that the sexual penetration was not consensual. The State's burden does not change depending on the age of the victim.

In fact, there is a body of Nevada Supreme Court caselaw dealing with evidence that was excluded by district courts that was relevant to consent, in cases with child victims. *See Guitron v. State*, 131 Nev. Adv. Op. 27 (2015),

Shannon v. State, 783 P.2d 942 (1989). Consent is an element. To instruct the jury that consent is not a defense therefore completely relieves the State of their burden to prove that element. To not allow the defense to argue that even if there was penetration, the penetration was consensual then no longer requires the State to prove that element.

It is well-settled that the State must prove every element of the crime charged beyond a reasonable doubt. *See* NRS 175.201; *Watson v. State*, 110 Nev. 43, 45, 867 P.2d 400, 402 (1994). *Rosete v. State*, 997 P.2d 816, 116 Nev. Adv. Op. No. 52 (Nev., 2000). In this case, the district court instructed the jury in a manner that relieved the State of that burden, and thus the verdict is not constitutionally sound.

While instructional errors are not usually structural, requiring immediate reversal, the error in this case is structural, and therefore not subject to a harmless error analysis. In *Sullivan v. Louisiana*, the jury received a defective reasonable doubt instruction and that instruction relieved the prosecution from its burden of proof. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). The instruction allowed the jury to render a guilty verdict on findings supported by less than reasonable doubt, therefore that error defied harmless-error analysis. *Id.*

Here, the jury was instructed on the elements of sexual assault, including the prong of "against the will of"; however, the court then instructed the jury that evidence that the sexual contact was in fact consented to is not to be considered. This confusion was only compounded by the next instruction informing the jury that the age of consent is sixteen, which led to further instructing the jury that it cannot consider consent in this case. The jury was instructed to NOT even do an analysis about whether or not the State had met its burden regarding an element of the offense. If the jury had reasonable doubt of the sexual assault count because of M.S.'s statements to the police that described how, under that version of events, the contact during the timeframe on that particular count was consensual, the only reasonable conclusion is that the jury could only have understood that all the State need prove was sexual penetration. An inquiry into whether or not the jury would have returned that verdict had it been instructed about consent is meaningless.

Should this Court find that the error is subject to a harmless error analysis, the error was not harmless. In this case, M.S. told the police that she and Honea were in a relationship that became sexual in nature. She described that the two went on dates, and did the usual boyfriend-girlfriend activities. While she felt at one point during her non-trial version of events that the first sexual contact was because Honea pressured her, there was no such

explanation for the contact on count 39, which fell into the dates of June 30, 2013 and December 31, 2014. AA12.

M.S. told the detective during her now recanted statement that initially, part of her did not want to have sex with Honea, but she did so to make him happy. AA828. That may be begrudging consent, but it is still consent. The State could have argued that she was too young to truly understand the nature of her consent; however, because the State was relieved of having to prove consent at all, there was no need for the State to prove that this was not consent, or that she was not capable of forming consent. Instead, the jury was instructed that because M.S. was under 16, she COULD not have consented, and even if she had, it would not matter.

When it comes to Count 39, what M.S. told police prior to her recantation, was that during timeframe of that count, M.S. was in high school, and was dating other men, as well as Honea. She was having sexual relationships with at least one of those men, Franco, and was certainly aware what sex was and what she was consenting to. AA941, 943. At trial, M.S. testified that she was aware of what sex was from an early age, and was more sexually mature than Honea. AA1414-15, 1482. At no point, either to detective Cho, or at preliminary hearing, or after the recant, did M.S. testify that any sexual contact with Honea during 2013-2014 was nonconsensual.

There is no rubric by which the jury could have found Honea guilty of that count had it been properly instructed.

The State even put on an expert in the area of grooming, ostensibly to argue that any "consent" was the product of grooming, not true consent. But the State, under the instructions provided to the jury, need not have even sought that testimony, and the defense would not have been allowed to argue against it, as the jury was mis-instructed. In a case where the jury returned a not guilty verdict on fifty one counts, but a guilty verdict on one, it is clear that the error could not have been harmless. SOMETHING caused the jury to render such an inconsistent verdict, and for the jury to find Honea guilty of that count, it would have had to given credence to M.S.'s statement to Cho and/or her preliminary hearing testimony, which included no mention that she was forced to engage in sex or that she was not fully aware or capable of making that decision.

Further, the defense requested an instruction arguing that if the prosecutor did not prove the against the will portion of the statute, the jury must find the defendant not guilty. See Defense Proposed Instructions. The statute, as written and codified into law, lists consent as an element. The defense was entitled to an instruction on the absence of an element. *Brooks v. State*, 103 Nev. 611 (1987). This Court held that the failure to instruct on

the absence of an element of a crime is reversible error. *Id.* Further, in *Margetts v. State,* 107 Nev. 616, 818 P.2d 392 (1991), this Court noted that an inverse instruction does not actually say anything a juror could not infer from the other instructions, but instead instruct the jury that it has to acquit if an element is lacking. *Id.* Not allowing that instruction is reversible error. In this case, the defense proposed instruction would have actually fixed the problem with the State's instructions given by the court, as it would have informed the jury that consent is a defense, and the State must prove lack or consent or lack of ability to consent. The failure to give the defense instruction, combined with constitutionally infirm instructions given by the Court, require reversal.

Because the district court erred in instructing the jury, this Court must reverse the conviction.

II. THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR A JUDGMENT NOT WITHSTANDING THE VERDICT

Standard of Review: The decision of a trial court to grant a new trial or acquittal will be presumed to be proper until the contrary is shown by the appellant. *State v. Crockett*, 84 Nev. 516, 518, 444 P.2d 896, 898 (1968).

The jury convicted the defendant of one count of Sexual Assault of Minor Under 16 Years of Age, based on count 39 of the Second Amended Information,

out of the 52 counts with which the State charged Mr. Honea. Count 39 alleged that defendant did:

> On or between June 30, 2013 and December 31, 2014, then and there, willfully, unlawfully and feloniously sexually assault and subject M.S., a child under sixteen years of age, to sexual penetration, to wit: sexual intercourse, by said Defendant inserting his penis into the genital opening of the said M.S., against the will of the said M.S., or under conditions in which Defendant knew, or should have known, that M.S. was mentally or physically incapable of resisting or understanding the nature of Defendant's actions.

This count corresponds in timeframe to Counts 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 38, 40, 41, 51 and 52. AA1-17. The verdict was based on the now recanted previous statement to police of M.S. and the now recanted preliminary hearing testimony of M.S.[2] The State presented no direct evidence other than the now recanted testimony or statement of M.S. that any sexual assault occurred. The jury acquitted Mr. Honea of all charges, save for count 39, despite the fact that its verdict would have to have been based on the recanted testimony of M.S., and

[2] Each of those counts charges the same crime, during the same period of years; however, some of the sexual assaults are based on fellatio, some on cunnilingus and some for sexual penetration of penis into vagina.

despite the fact that such result would require them to discount the portions of those statements that established the other attendant counts.

Pursuant to NRS 175.381(2):

> The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. . .

A district court may enter a judgment of acquittal only when there is insufficient evidence. *Evans v. State,* 112 Nev. 1172 1193, 926 P.2d 265, 279 (1996), discussing NRS 175.381(2)). Evidence is insufficient when the State has failed to produce "a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." *Id.* (internal quotation marks and emphasis omitted).

As one leading treatise states, a "judgment for acquittal . . . is an important safeguard to the defendant. It tests the sufficiency of the evidence against defendant, and avoids the risk that a jury may capriciously find him guilty though there is no legally sufficient evidence of guilt." 2A Charles A. Wright, Fed. Prac. & Proc. Crim. § 461 (4th ed. 2013). To determine whether a verdict was based on sufficient evidence to meet due process requirements, this Court has determined that the standard is 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." *Mitchell v. State,* 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (internal quotation marks omitted). A reviewing court will not disturb a verdict on appeal if it is supported by substantial evidence. *Domingues v. State*, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996) (citation omitted).

While not binding precedent, the 6th Circuit provides a helpful, persuasive definition of substantial evidence: "Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred." *United States v. Martin*, 375 F.2d 956, 957 (6th Cir. 1967). Circumstantial evidence alone can support a conviction, however, there are times that it amounts to only a reasonable speculation and not to sufficient evidence. *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008).

In the instant case, the State was required to prove beyond a reasonable doubt, with substantial evidence and not only reasonable speculation, that the defendant did, between June 30, 2013 and December 31, 2014 insert his penis into the genital opening of the said M.S., against the will of the said M.S., or under conditions in which Defendant knew, or should have known, that M.S. was

mentally or physically incapable of resisting or understanding the nature of Defendant's actions.[3]

The only evidence brought before the jury that a sexual penetration occurred during that timeframe was the voluntary statement of M.S. and the preliminary hearing testimony of M.S.; however, after the State conferred immunity on M.S. when she expressed concerns she may be charged with perjury, M.S. testified at trial that those statements were a lie. AA798. M.S. also provided ample information as to how she arrived at her story, including that she and a friend had discussed the details and wrote them all down prior to her interview with the police. AA740, 1420. M.S. took with her to the police her cell phone, a photo album and a laptop. A11214. However, her phone had been wiped of contacts and text messages. AA1177. While her photo album contained photos of she and the defendant, the photos could have been photos of dates or photos of she and a friend. She also testified that she had numerous reasons to be angry with the defendant in the lead up to her speaking with the police—for the second time. AA811, 1484. For the first interview with the police, M.S. denied that there were any inappropriate actions with the defendant, and even alerted him to the fact that people were asking odd questions about their relationship. AA1097-98.

[3] The court instructed the jury that consent was not a defense; however, by the elements listed in the statute, the State must prove lack of consent, or that the defendant knew or should have known that the victim was unable to form consent.

All of the other witnesses for the State only confirmed that people had suspicions. The most damning piece of evidence the State presented was a picture of M.S. and Honea kissing. Evidence of kissing is, at best, speculative that there was any sexual penetration related to the charged count. A kiss does not equal sex, and M.S, pre-recantation, was inconsistent about the details even when she was, according to the State, telling the truth. Her details did not match details from other witnesses, nor her own details vis a vis the voluntary statement versus the preliminary hearing. Additionally, the kissing photos would suggest that, if there were any sexual contact, it was consensual, thus making a conviction for sexual assault impossible. The captions of the collages M.S. made of photographs were, "I hate not having you. I regret what I have done. I love you." AA1763-1764. Other collages using the photos say, "Merry Christmas, Baby," and "Nothing is better than the sound of his laugh." AA1765. The photos depict M.S. kissing Honea on the cheek. AA1766. Certainly, the testimony by M.S. that she wanted more from Honea were accurate, and she certainly had romantic feelings for Honea, bolstering her admission that any contact between the two was consensual. There is simply no evidence that there was unconsented sexual penetration—even if the State tried to argue that she was incapable of consenting, the photographs and their captions, M.S.'s own testimony that she knew what sex was and was sexually mature, would counter that contention. Even their own grooming expert admitted

that his information regarding the grooming was misapprehended because he was not given updated information regarding M.S.'s contentions. AA1667-1673.

At best, the State's evidence merely leads to the reasonable inference that the defendant and M.S. knew each other, had kissed each other, and wanted to be in a relationship when she was sixteen. Further, assuming *arguendo* that this Court finds that the evidence did tend to show that the defendant and M.S. had sex, the State failed to prove at all the elements related to consent. The district court should have granted the motion for judgment of acquittal, and this Court should vacate the conviction.

III. THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL

Standard of Review: The decision of a trial court to grant a new trial or acquittal will be presumed to be proper until the contrary is shown by the appellant. *State v. Crockett*, 84 Nev. 516, 518, 444 P.2d 896, 898 (1968).

The alternative motion for a new trial was based on juror misconduct, discovered after the verdict. Juror Misconduct falls into two categories: 1) conduct by jurors contrary to their instructions or oaths, and 2) attempts by outside third parties to influence the jurors. *Meyer v. State*, 119 Nev. Adv. Op. 61 (2003). Conduct in the first category includes failing to follow the admonition to only discuss the case during deliberations, accessing media reports about the case, basing the decision on evidence not admitted, making a decision on the basis of

bias or prejudice, lying during voir dire. *Id.* Proof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury. *Id.* The defendant prevails on a motion for new trial based on juror misconduct when he establishes that juror misconduct occurred and that the misconduct was prejudicial. *Id.* Extrinsic sources of information are unlikely to raise a presumption of prejudice, and therefore this court must analyze such misconduct in the context of the tiral as a whole and determine if there is a reasonable probability that the information affected the verdict. *Id.*.

Generally, intra-jury, or intrinsic misconduct, because it would generally be proven with inadmissible information related to jurors deliberative processes, will not justify a new trial. *Id.* However, intrinsic cases of misconduct will justify a new trial in extreme cases. *Id.* The court must determine whether the "average, hypothetical juror would be influenced by the juror misconduct." *Id.*

After the verdict, defense counsel learned that one juror relied on outside, extrinsic information in the form of newspaper articles, to inform his opinion and told the other jurors that they must convict the defendant of something. AA3146.

Per conversations, as recorded in the Declarations of Monique McNeill, Jonathan MacArthur, and Blaire Savko, Juror number one, Francis "Tony" Rago indicated that the State did not do its job, and therefore the jury must do that job. AA3143-3150. Juror number one engaged in misconduct by accessing outside

sources of information, namely at least one newspaper article about the case. That juror then used that information to engage in intra-jury and intrinsic misconduct, namely disregarding court admonitions to avoid the media, using outside information to inform the deliberation process, making up one's mind prior to hearing all the evidence, and shifting the burden of proof to the defendant, contrary to jury instructions.

The jurors indicted that there was a split amongst the jurors. AA3146. Having a juror who was insisting that the defendant must sustain a conviction, for some reason unknown to the other jurors, but with the implication that there was an outside reason for that mandate, would influence an average juror. People cannot completely compartmentalize evidence. Any juror who was deliberating would naturally have been influenced by the certainty of someone who seemed to have outside information. To declare that the State did not do its job indicates that the State did not prove the case beyond a reasonable doubt. To follow that with statements that it was now their job to convict the defendant (contravening the United States Constitution) and that they must convict the defendant of something lead to a systematic process of intrinsic misconduct that led to an inconsistent verdict. It is clear that an average juror would have been affected by juror number one's insistence that the jury become a second prosecutor. That insistent juror then intimated that there was information the prosecution should have used, and using

those intimations was steadfast that despite the burden of proof not being met, the defendant must sustain a conviction. This conduct alone is enough for a new trial. However, juror numbers one and three both engaged in misconduct, leading to a verdict that is so suspect it cannot stand.

Juror number three failed to disclose that he was related to a friend of M.S.. This juror also made statements that the defendant "must go down for something" and this juror spent time with juror number one. Additionally, the district court did not grant an evidentiary hearing to further inquire into the matter.

In *Lopez v. State,* 105 Nev. 68, 89, 769 P.2d 1276, 1290 (1989), this Court held that where a juror has failed to reveal potentially prejudicial information during voir dire, the relevant inquiry is whether the juror is guilty of intentional concealment. In such cases, a new trial must be granted unless "it appears, beyond a reasonable doubt, that no prejudice has resulted." *Canada v.* State, 113 Nev. 938, P.2d 781, 783 (1997) *citing Lane v. State,* 110 Nev.1156, 1164, 881 P.2d 1358, 1364 (1994).

In *Canada*, a jury convicted the defendant of murder, but the defense later learned that a juror did not disclose during *voir dire* that his father had been murdered. *Canada*, at 938, 944 P.2d at 782. During deliberation, there was a "strong five person contingent to acquit" the defendant; however, the jurors later admitted that an acquittal could "never materialize" because the juror

who failed to disclose his father's murder "would have insisted on conviction" even if it had been eleven to one. *Id.* Other jurors indicated that the offending juror "repeatedly and unequivocally stated his feelings about a crime of this nature." *Id.* The *Canada* court held that the concealment of the information by the juror was prejudicial, and noted that because the concealed information was used in deliberations, because the gravity of the crimes charged was great, and because the issue of guilt or innocence was close, the court could not say, beyond a reasonable doubt, that the defendant was not prejudiced by the juror misconduct and reversed the conviction and remanded for a new trial. *Id.*

A juror failing to disclose information that would have been used to excuse the juror for cause is another source of juror misconduct. *See generally Brioady v. State*, 396 P.3d 822 (2017). A juror in *Briordy* failed to disclose that she was a victim of sexual abuse, and the defendant in that case was charged with sexual assault on a minor and lewdness with a minor. *Id.* This Court noted that had the defendant had that information, the defense would have used that information to remove the juror for cause. *Id.*, *citing McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 556, 104 S. Ct. 845, (1984). Whether or not the concealment is intentional matters, however, "the motives for concealment may vary." *Id.*

In this case, Juror number three, Brett-Aaron Jankiewicz is related to a friend of the alleged victim. AA3146, 3154-3177. Of concern is that Mr. Jankiewicz obtained information regarding M.S. from his sister, who is her friend. Juror number three, along with juror number one, was adamant that the defendant sustain a conviction, without any explanation as to why. AA3143-3151. Jurors one and three spent time together during the trial, and juror one also engaged in misconduct in the form of looking up extrinsic information. Any information that juror number three obtained through his sister would have been extrinsic information in violation of the admonition to not obtain outside sources, as well as the admonition to not discuss the case and, utilizing such information to inform his deliberations runs afoul of the Confrontation Clause of the United States Constitution. *Meyer v. State*, 119 Nev. Adv. Op. 61 (2003). The fact that juror 3, Mr. Jankiewicz, is related to a friend of M.S. is troubling and the implications far reaching.

Certainly, if Jankiewicz had any outside information that may have been purported to come from M.S., that is prejudicial and clearly affected the outcome. Jankiewicz was one of two jurors who were insistent that the defendant, despite the State not proving its case, sustain a conviction. A rational explanation for that behavior, outside him having extrinsic information, is difficult to adduce. While counsel cannot determine when Mr. Jankiewicz became aware that his sister knew

M.S., again, it is hard to imagine another explanation that does not implicate misconduct as to why he insisted on subverting the burden of proof that the State failed to meet. The defense informed the Court that some jurors would not speak with them, and asked for an evidentiary hearing. AA3229, 3224. The district court denied that motion without an evidentiary hearing.

The State argued that the extrinsic evidence that juror number one may have seen was "favorable" to the defendant. AA3129. However, it is unknown how the juror viewed the article. The district court should have held an evidentiary hearing to determine the actual nature of the misconduct before denying the motion. On this basis alone, the court erred in not granting the motion for new trial. However, this court has held that conflicting evidence is also grounds for a new trial.

In *Purcell v. State*, this court noted that "we have consistently held that pursuant to the provision regarding 'other grounds,' the district court may grant a motion for a new trial based on an independent evaluation of the evidence." *Purcell v. State*, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994).

In *Purcell,* the defendant was charged with lewdness with a minor and sexual assault on a minor. *Id.* 110 Nev. At 1391, 887 P.2d at 277. The State presented the alleged victim who testified regarding the elements of the charged offense, and the defense presented a witness who testified regarding the alleged victim's truthfulness and motive to fabricate the charges. *Id.* The Jury returned a verdict of

guilty on all counts, the defendant made a motion for a new trial, which the district court granted. *Id.* at 278.

The district court noted that the evidence of Purcell's guilt was conflicting and the court therefore "had the duty to independently evaluate the evidence" and further noting that there were inconsistencies in the victim's testimony, and that based on the witness's demeanor on the stand, and the testimony of the other witnesses, the district court concluded that the testimony of the alleged victim was not credible. *Id.* The district court granted the defendant's motion for a new trial. *Id.* The State appealed, and this Court concluded that a district court may order a new trial based on conflicting evidence. *Id.* at 1393.

The facts of the instant case are analogous to *Purcell*. Here, the State presented M.S., who recanted her previous statements and indicated that she had perjured herself. The State then provided her with immunity and proceeded with M.S., impeaching her with her prior statements. However, M.S. did not simply maintain her previous statements were untrue. She also provided how she came to make up the allegations, as well as her motive for doing so. She watched herself giving her voluntary statement to the police, and her demeanor while doing so was indicative of her disbelief, now two years later, that she had said such outlandish things. She provided the framework for how she would know certain pieces of information, and acknowledged that some of her lies were based in truth.

Additionally, M.S. testified over the course of four days, while remaining in jail until she was done testifying, and did not change her mind regarding the recantation. While the State's grooming expert indicated that victims will recant because it is easier, even he conceded that testifying over the course of multiple days, and being held in custody while doing so was not easier than just adopting the prior testimony. This was not a simple recant that was easily impeached by the prior statements. This was a recant that was corroborated by most of the other evidence, including M.S.'s own computer. Did the kissing photos go to evidence that there was sex, or were they really, when combined with the captions, evidence that M.S. did indeed ask Honea for a dating relationship, that Honea was interested but knew they had to wait until M.S. was 16? The latter seems more plausible when factoring in the sheer ignorance combined with near perjury of Pam Savage, the testimony of Katerina Babin, Paula Krasky and Dara Coleman as to what Honea was like, and the heart wrenching breakdown of M.S. years later to how "sick" it was that she did this to Honea.

The nude photos of M.S. were found only on her device, and she admitted that she had sent nude photos to Franco. She denied her previous statements that she had sent any to the defendant at his behest. She provided the explanation for why she made the false allegations, and she had knowledge that the police were seeking such information because detectives had called her previously, asking her

questions. Further, the fact that a jury disregarded guilt on counts that would have been based on the same evidence as count 39 indicates that there was a clear conflict in the evidence. The district court erred in not granting the motion for a new trial, and this Court should reverse the conviction.

IV. THE EVIDENCE WAS INSUFFICIENT

Standard of Review: This Court has held that in determining sufficiency of the evidence on appeal, the question is 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." *Mejia v. State*, 122 Nev. 487, 492 (2006).

Section two of this brief provides the framework for this argument, as the district court briefed on the insufficiency of the evidence, and that section will largely be repeated here. The State was required to prove beyond a reasonable doubt, with substantial evidence and not only reasonable speculation, that the defendant did, between June 30, 2013 and December 31, 2014 insert his penis into the genital opening of the said M.S., against the will of the said M.S., or under conditions in which Defendant knew, or should have known, that M.S. was

mentally or physically incapable of resisting or understanding the nature of Defendant's actions.[4]

The only evidence brought before the jury that a sexual penetration occurred during that timeframe was the voluntary statement of M.S. and the preliminary hearing testimony of M.S.; however, after the State conferred immunity on M.S. when she expressed concerns she may be charged with perjury, M.S. testified at trial that those statements were a lie. AA798. M.S. also provided ample information as to how she arrived at her story, including that she and a friend had discussed the details and wrote them all down prior to her interview with the police. AA740, 1420. M.S. took with her to the police her cell phone, a photo album and a laptop. A11214. However, her phone had been wiped of contacts and text messages. AA1177. While her photo album contained photos of she and the defendant, the photos could have been photos of romantic dates or photos of she and a friend. She also testified that she had numerous reasons to be angry with the defendant in the lead up to her speaking with the police—for the second time. AA811, 1484. For the first interview with the police, M.S. denied that there were any inappropriate actions with the defendant, and even alerted him to the fact that people were asking odd questions about their relationship. AA1097-98.

[4] The court instructed the jury that consent was not a defense; however, by the elements listed in the statute, the State must prove lack of consent, or that the defendant knew or should have known that the victim was unable to form consent.

All of the other witnesses for the State only confirmed that people had suspicions. The most damning piece of evidence the State presented was a picture of M.S. and Honea kissing. Evidence of kissing is, at best, speculative that there was any sexual penetration related to the charged count. A kiss does not equal sex, and M.S, pre-recantation, was inconsistent about the details even when she was, according to the State, telling the truth. Her details did not match details from other witnesses, nor her own details vis a vis the voluntary statement versus the preliminary hearing. Additionally, the kissing photos would suggest that, if there were any sexual contact, it was consensual, thus making a conviction for sexual assault impossible. The captions of the collages M.S. made of photographs were, "I hate not having you. I regret what I have done. I love you." AA1763-1764. Other collages using the photos say, "Merry Christmas, Baby," and "Nothing is better than the sound of his laugh." AA1765. The photos depict M.S. kissing Honea on the cheek. AA1766. Certainly, the testimony by M.S. that she wanted more from Honea were accurate, and she certainly had romantic feelings for Honea, bolstering her admission that any contact between the two was consensual. There is simply no evidence that there was unconsented sexual penetration—even if the State tries to argue that she was incapable of consenting, the photographs and their captions, M.S.'s own testimony that she knew what sex was and was sexually mature, would counter that contention. Even their own grooming expert admitted

that his information regarding the grooming was misapprehended because he was not given updated information regarding M.S.'s contentions. AA1667-1673.

At best, the State's evidence merely leads to the reasonable inference that the defendant and M.S. knew each other, had kissed each other, and wanted to be in a relationship when she was sixteen. Further, assuming *arguendo* that this Court finds that the evidence did tend to show that the defendant and M.S. had sex, the State failed to prove at all the elements related to consent. As further evidence of how infirm the conviction is, the only way a rational trier of fact could have come to the conclusion to convict Honea, is if that juror had been incorrectly instructed about consent and sexual assault, as this jury was. This twisted logic indicates how prejudicial, harmful and constitutionally infirm the court's instructions to the jury were, and how the evidence was insufficient to convict by any rational person who had actually been instructed correctly. Because the evidence was insufficient, this Court must vacate the conviction.

CONCLUSION

The district court erred in by instructing the jury that consent was not a defense, denying the defense its instructions, in not granting a motion for judgment of acquittal, or in the alternative, a new trial, and the evidence in this case was

/ / /

Insufficient. The Appellant implores this Court to vacate the conviction, as the evidence was insufficient.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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3. Finally, I hereby certify that I have read this appellate brief, and to the best

of my knowledge, information, and belief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that 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 sanction in the event that the accompanying brief is not in conformity with requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th Day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17th day of December, 2018 Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document, via email, to the Appellant:

JOSHUA HONEA

Dated this 7th Day of December, 2018.

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