IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA HONEA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 76621

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is retained by the Nevada Supreme Court because it appeals from a judgment of conviction based on a jury verdict that involves a conviction for offenses that are category A felonies.

STATEMENT OF THE ISSUES

I. Whether the district court erred in refusing to instruct the jury on the nonessential element of lack of consent.

II. Whether the district court abused its discretion in denying Appellant's request for a judgment of acquittal.

III. Whether the district court abused its discretion in striking jurors' and Appellant counsel's affidavits and denying his request for a new trial based on juror misconduct during voir dire and deliberation.

IV. Whether the evidence was sufficient to convict the Appellant of sexual assault with a minor under sixteen years of age.

V. Whether any error is harmless.

STATEMENT OF CASE

The State charged Appellant Joshua Ray Honea with 52 counts of sexual crimes involving a minor, M.S. 1 AA 1-15. On December 18, 2017, the jury returned a guilty verdict on one count of sexual assault with a minor under sixteen years of age which took place from June 30, 2013 to December 31, 2014. 13 AA 3070, 3128.

On December 28, 2017, Appellant filed a Motion for Judgment of Acquittal or, in the Alternative, Motion for New Trial. 13 AA 3129-77. The State filed its opposition on January 9, 2018. 13 AA 3204-21. The district court held a hearing on the motion on January 10, 2018, and took the matter under advisement. 13 AA 3222, 3243. On May 17, 2018, the district court filed an order denying the motion. 13 AA 3245-48. On May 21, 2018, the district court sentenced Appellant to life in prison with the opportunity for parole after 25 years is served. 13 AA 3269. The Judgment of Conviction was filed on July 5, 2018. 13 AA 3291. Appellant filed a Notice of Appeal on August 2, 2018. 13 AA 3294.

SUMMARY OF ARGUMENTS

Appellant's judgment of conviction must be affirmed. First, the district court did not err in refusing to instruct the jury that the State must prove the lack of consent beyond a reasonable doubt because it is not an essential element of the crime of sexual assault. Furthermore, the district court did not abuse its discretion in refusing to instruct the jury on the proposed inverse instruction because such instruction does not negate any essential element or disprove any particular fact the State must prove.

Second, the district court did not abuse its discretion in denying Appellant's Motion for Judgment of Acquittal because there was an overwhelming amount of evidence of Appellant's guilt.

Third, the district court did not abuse its discretion in denying Appellant's Motion for New Trial because he failed to show that Juror 1's alleged misconduct prejudiced him. Also, Appellant failed to show that Juror 3 intentionally concealed any critical information during voir dire.

Fourth, evidence of Appellant's guilt is overwhelming.

Fifth, any potential error would be harmless because the State presented extensive and compelling evidence proving Appellant's guilt.

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ARGUMENTS

I. THE DISTRICT COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE NONESSENTIAL ELEMENT OF THE LACK OF CONSENT

Appellant first argues that the district court abused its discretion in refusing to instruct the jury 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." Defense Proposed Instruction, December 14, 201[1]; Appellant's Opening Brief (AOB), 27. Appellant argued below this instruction is appropriate because the State must prove beyond a reasonable doubt that Appellant's sexual assault against M.S. is not consensual. 11 AA 2561-62; AOB, 27. The State argued that, because the age of consent is 16, consent is not a defense to sexual assault against a child under the age of 16. 11 AA 2547. After reviewing relevant case laws and parties' arguments, the district court provided the State's proposed instruction, which stated that "[c]onsent in fact of a minor child under the age of 16 years to sexual activity is not a defense to a charge of Sexual Assault with a Minor Under Sixteen Years of Age. 13 AA 3103. Alternatively, Appellant argues for the first time on appeal that his proposed instruction should have been offered because it is an inverse version of the State's proposed instruction "[c]onsent in fact of a minor child

[1] Appellant moved this Court to transmit the Exhibits of Defense Proposed Instructions.

under the age of 16 years to sexual activity is not a defense to a charge of Sexual Assault with a Minor Under Sixteen Years of Age. 13 AA 3103.

District courts have significant discretion to settle jury instructions, and this Court reviews the district court's decision for an abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Because the lack of consent is not an essential element of sexual assault, refusing to instruct the jury cannot be structural error. See infra, Section I(i). While a defendant is entitled to have the jury instructed on his theory of the case as supported by the evidence, such an instruction cannot be misleading, duplicative, or inaccurate under the law. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007); Carter v. State, 1221 Nev. 59, 765, 121 P.3d 592, 596 (2005); Crawford, 121 Nev. at 754, 121 P.3d at 589.

i. Lack of consent is not an essential element of sexual assault

Appellant's argument that consent is an essential element of sexual assault against a minor under the age of 16 is unsupported by any law. 11 AA 2543-44. A factor that is not essential to a finding of guilt is not an element of the offense. LaChance v. State, 130 Nev. 263, 273-74, 321 P.3d 919, 927 (2014) (reasoning that an element that does not affect guilty is not an element of the offense). This Court stated in Alotaibi that a crime of sexual assault against a minor has two statutory elements under NRS 200.366(1): (1) a defendant "subjects another person to sexual penetration on himself or herself or another, or on a beast, and (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 or her conduct." Alotaibi v. State, 404 P.3d 761, 766 (2017), cert. denied, 138 S. Ct. 1555, 200 L. Ed. 2d 743 (2018).

Also, a minor under 16 years of age is incapable of giving consent. In Manning v. Warde, Nevada State Prison, this Court stated that 16 is the age of consent for sexual intercourse, anal intercourse, cunnilingus, or fellatio. 99 Nev. 82, 86, n.6, 659 P.2d 847, 849, n.6 (1983); NRS 200.364. Accordingly, this Court has already delineated the elements of a sexual assault offense against a minor and determined that consent is not an available defense for sexual assault victims who are under the age of 16. The district court adhered to these precedents and properly instructed the jury.

Furthermore, a plain reading of NRS 200.366(1) reveals that whether the sexual penetration was consensual is irrelevant to the finding of sexual assault; the statute only requires the State to prove that the perpetrator knows or should have known the victim is incapable of resisting the sexual penetration or appreciating the nature of her conduct. Thus, NRS 200.366(1) requires a broader analysis than the mere finding of consent. This means, for instance, even when a victim consents, the perpetrator may still be guilty of sexual assault if he knew or should have known

that the victim did not have the mental capacity to give a valid consent. Accordingly, proving the lack of consent is not an element of the crime.

Appellant's cited authorities do not support the proposition that consent is an essential element of the sexual assault offense. Appellant cites to Guitron v. State, 350 P.3d 93 (2015) and Shannon v. State, 120 Nev. 1030, 783 P.2d 942 (1989), but does not provide any analysis or specific citations to those cases. Generally citing to those cases and conclusively stating that they are relevant to the issue of consent does not make Appellant's argument cogent. Thus, this Court need not consider Appellant's argument regarding those two authorities. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (arguments not cogently argued need not be considered by this Court).

Nevertheless, an examination of those cases reveals that they are irrelevant to Appellant's position that the lack of consent is an essential element under NRS 200.366(1). In Guitron, the Nevada Court of Appeals only addressed the issues of the admission of a minor sexual victim's past sexual history and permissible inverse elements instructions. 350 P.3d at 98-99, 102. Shannon is also irrelevant because it deals with the issue of what must be proven to establish the crime of lewdness. 120 Nev. at 1036, 102 P.3d at 592. Neither cases discussed the issue of whether consent is an essential element of the crime of sexual assault. Thus, Appellant failed to provide any relevant authority to support his argument. Accordingly, because the

lack of consent is not an essential element of sexual assault, the district court did not abuse its discretion for refusing to instruct the jury on it.

ii. The defense's proposed instruction does not negate any essential element that the State must prove

Appellant argues for the first time on appeal that he was entitled to an inverse version of the instruction which states 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." AOB, 27. The only question argued below was whether consent was an essential element that the State must prove beyond reasonable doubt. 11 AA 2543-44. Since the question of an inverse instruction was never raised below, reversal is only required if the error is plain from the record and affected Appellant's substantial rights. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

Appellant never requested an inverse instruction of any essential element below. After the district court denied Appellant's proposed instruction regarding the State's need to prove consent, Appellant did not provide any other theory or case law based on which the proposed instruction can be given. 11 AA 2551-52. Thus, the district court did not consider whether Appellant's proposed instruction was a permissible inverse instruction under Guitron.

But even if the issue was raised before the district court, Appellant's proposed instruction was clearly not a permissible inverse instruction. "The district court is

only required to give an inverse elements instruction upon Appellant's request. Guitron, 350 P.3d at 102. However, defendants are not entitled to an inverse version of every instruction—the district courts are only required to give an inverse instruction on the essential elements. In Guitron, the State's proposed elements instruction read:

> "A person who subjects a minor under fourteen to sexual penetration, against the minor's will or under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his/her conduct, is guilty of sexual assault with a minor under fourteen."

350 P.3d, at 103. The defense's proposed inverse element instruction read:

> "If the State fails to prove beyond a reasonable doubt that any sexual penetration of a minor under fourteen was against the minor's will or under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his/her conduct, then you must find the Defendant not guilty of the offense of Sexual Assault with a Minor Under Fourteen."

Id. The only difference between the two instructions is that the defense's version contains negatively phrased elements of the crime. Thus, the Nevada Court of Appeals holding in Guitron is a narrow one—the district court abused its discretion in refusing to instruct the negatively phrased instruction on the essential elements of the crime. Id. In other words, defendants are not entitled to an inverse version of every instruction. See Starr v. State, 134 Nev. Advance Opinion 90 (2018) (reasoning that the defendant was not entitled to an inverse flight instruction because

the lack of flight does not negate any essential element of any charged crime or disprove any particular fact that the State is required to prove).

Here, Appellant's proposed instruction did not negate an essential element or disprove any particular fact that the State was required to prove. The defense's proposed instruction read "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." Appellant's Opening Brief, 27; Exhibits of Defense Proposed Instruction. Appellant claims that this instruction is the inverse of the State's proposed instruction which states "[c]onsent in fact of a minor child under the age of 14 years to sexual activity is not a defense" to the sexual assault charge. Id.; 13 AA 3103.

First, Appellant's instruction is not an inverse version of the State's proposed element instruction taken directly from NRS 200.366(1), rather, it is an inverse of the Manning holding that minimum age of consent is 16. 99 Nev. at 86, n.6, 659 P.2d at 849, n.6. Allowing Appellant's proposed instruction would inaccurately state the law because it would render the age of consent illusory. Furthermore, as consent is not an element the State had to prove in the first place, this inverse instruction would not have negated any essential element.

Second, the instruction does not disprove any fact that the State is required to prove. The State only needed to prove that Appellant sexually penetrated M.S. when

he knew or should have known that M.S. was mentally incapable of resisting or understanding the nature of her conduct. NRS 200.366(1). Therefore, the district court properly denied Appellant's request for an inverse instruction.

II. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL

Appellant next argues that the district court erred in denying his Motion for Judgment of Acquittal, or in the Alternative, Motion for a New Trial. 13 AA 3128-29. Specifically, Appellant argues that the State failed to prove its case beyond a reasonable doubt. 13 AA 3131-35. The State opposed by arguing that the only conflict in the case was the M.S.'s self-inflicted recant, which was belied by her previous testimony. 13 AA 3213-14. The district court denied Appellant's Motion for Acquittal, concluding that the M.S.'s preliminary hearing testimony alone, as well as substantial evidence adduced at trial, supported the jurors' finding as to count 39. 13 AA 3245-46.

The district court properly denied Appellant Motion for Judgment of Acquittal. Under NRS 175.381(2), the district court judge may set aside a jury guilty verdict and acquit a defendant where the evidence supporting a conviction is insufficient. Evan v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996). This does not mean "the district court should act as thirteenth juror and reevaluate the evidence and the credibility of the witnesses" and determine whether it is convinced of the Appellant's guilt beyond a reasonable doubt. Id.; Wilkins v. State, 96 Nev.

367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the Appellant guilty, the limited inquiry 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." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (internal quotation and citation omitted).

Indeed, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. In fact, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002). The district court can only acquit the defendant where the State fails to produce a minimum threshold of evidence upon which a conviction may be based. Id. (citing State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)). Here, viewing the evidence in the light most favorable to the State, the district court properly denied Appellant's Motion for Judgment of

Acquittal. To preserve judicial economy, see Section IV of the brief below for a discussion of the State's response to Appellant's claim of sufficiency of the evidence. See infra Section IV.

III. THE DISTRICT COURT PROPERLY DENIED APPELANT'S MOTION FOR A NEW TRIAL

Appellant next argues that the district court erred in refusing to grant a new trial based on Juror 1's and Juror 3's alleged misconduct. AOB, 40-49. Appellant argued below two instances of jury misconducts: (1) Juror 1 relied on a newspaper article in his deliberation, and (2) Juror 3 failed to disclose that his sister is a friend of the alleged victim. 13 AA 3136-39. Appellant provided Juror 7's and Juror 11's identical affidavits stating the following: (1) "jurors 1 (Francis Rago) and 3 (Brett-Aaron Jankiewicz) made comments that the defendant 'needed to be convicted of something.'"; (2) "juror 1 (Francis Rago) made a statement about reading a newspaper article with a headline about 'the DA getting a bomb dropped on them.'"; (3) "that juror 1 also offered to show the jurors the article, but then changed his mind."; and (4) "jurors 1 and 3 had lunch alone together during the last week of the trial." 13 AA 3148-50. At the hearing, Appellant orally requested an evidentiary hearing to investigate the matter further. 13 AA 3239-30. The State opposed Appellant's Motion for a New Trial based on juror 1's misconduct, arguing that how other jurors interpreted the juror's comments and the impact that the comments or the jurors' interpretation of those comments had on the jurors' thought processes

were not admissible for the court's consideration. 13 AA 3216. As to juror 3's misconduct, the State argued that juror 3 did not know that his sister knew M.S. 13 AA 3220. The district court declined to hold an evidentiary hearing and denied Appellant's Motion for a New Trial after striking juror 7's and 11's affidavits because it found they contained statements concerning jury deliberations. 13 AA 3247. The district court, however, found that the only complaint properly raised was juror 1's access of a newspaper article published on November 30, 2017. Id. The district court reviewed the content of the newspaper and determined that this extrinsic jury misconduct could in no way be viewed as prejudicial to Appellant. Id.

The district court did not err in denying Appellant's Motion for a New Trial based on jury misconduct. Not every occurrence of juror misconduct demands a new trial. Bowman v. State, 387 P.3d 202, 205 (2016). "To prevail on a motion for a new trial alleging juror misconduct, 'the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial.'" Id. (quoting Meyer v. State, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2002). Even when juror misconduct is established, no new trial is necessary if "it appears beyond a reasonable doubt that no prejudice occurred, a new trial is unnecessary." Bowman, 387 P.3d at 205 (quoting Hernendez v. State, 118 Nev. 513, 522, 50 P.3d 1100, 1107 (2002)).

"Proof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury." Meyer, 119 Nev. at 563, 80 P.3d at 454 (citing Government of Virgin Islands v. Gereau, 523 F.2d 140, 148-49 (3rd Cir. 1975)); NRS 50.065. Jury misconduct can be both extrinsic, such as accessing media reports about the case, or intrinsic, such as a juror making a decision based on unadmitted evidence. Meyer, 119 Nev. at 561, 80 P.3d at 453. Extrinsic misconduct can be proven with juror affidavits or testimony stating that the jury received outside information. Id. 119 Nev. at 562, 80 P.3d at 454. However, "juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." Id.

Generally, juror misconducts based on allegations of extrinsic influence are not automatically prejudicial. Meyer, 119 Nev. at 564, 80 P.3d at 455. Prejudice is only presumed in the most egregious types of extraneous influence, such as jury tampering. Id. Extrinsic materials such as media reports from television or newspaper, or intrinsic jury misconduct require case-by-case analysis. Id. 119 Nev. at 565, 80 P.3d at 456. When prejudice is not presumed, a defendant bears the burden to show "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Bowman, 381 P.3d at 205 (citing Meyer, 119 Nev. at 564, 80 P.3d at 455). Factors relevant to this determination include:

> "How the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was

> discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.)."

Id. at 566, 80 P.3d at 453.

"The district court is required to objectively evaluate the effect the extrinsic material had on the jury and determine whether it would have influenced the average, hypothetical juror." Zana v. State, 125 Nev. 541, 548, 216 P.3d 244, 248 (2009) (quoting Meyer, 119 Nev. at 566, 80 P.3d at 456). The district court's denial of a motion for new trial based on juror misconduct will be upheld absent and abuse of its broad discretion. Id. 119 Nev. at 561, 80 P.3d at 453.

i. The district court properly concluded that Appellant failed to show the alleged juror misconduct prejudiced him

The district court concluded that "the only complaint of juror misconduct properly offered by Appellant for consideration by the court is the allegation that Juror 1 accessed a media report on the trial published on November 30, 2017." 13 AA 3247. Appellant bears the burden to show both jury misconduct and prejudice. Bowman, 387 P.3d at 206-07. The district court need not address both prongs in order—it can assume misconduct and deny the Motion for a New Trial if it does not find that the alleged misconduct influenced the verdict. Id. Also, not every allegation of jury misconduct requires a hearing. U.S v. Montes, 628 F.3d 1183, 1187 (9th Cir.

2011). A hearing is not required if the seriousness of the alleged misconduct or bias is minimal and that the content of the allegations could not have prejudiced the defendant. Id. at 1187-88; see also People v. Ray, 13 Cal. 4th 313, 344, 914 P.2d 846, 863 (1996) ("a hearing is required only where the court possess information which, if prove to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties . . .).

The district court properly categorized that accessing the news article was extrinsic juror misconduct. 13 AA 3247. Under Meyer, such a juror misconduct requires case-by-case analysis. 119 Nev. at 565, 80 P.3d at 456. The district court considered the content of the news article and concluded that it did not influence the verdict because the article "was merely an objective account of what had occurred at trial and could in no way be viewed as prejudice to the Defendant." 13 AA 3247.

An examination of the Meyer factors shows that the district court properly ruled that the newspaper article could not have prejudiced Appellant. First, the source of the material is Las Vegas Review Journal, a neutral media outlet. 13 AA 3152. There is no allegation that the news article is inflammatory and had the danger of prejudicing the verdict. In fact, Appellant's only argument concerning prejudice is the fact that Juror 1 allegedly read the article when he was admonished by the district court not to. AOB, 42-43. Appellant speculates that Juror 1's conduct, coupled with his alleged intrinsic statements during deliberation, show that he was

determined to convict Appellant. Id. Thus, Appellant is not claiming that the content of the news article improperly influenced the jury verdict—it is Juror 1's conduct of seeking out the article. However, the limited inquiry here is how Juror 1's access to the news article could have improperly influenced an average, hypothetical juror. The neutral source of the extrinsic material has minimal danger of influencing the jury verdict. This factor favors upholding the jury verdict.

Second, the jury did not spend any time on the article at all because even the declarations of Appellant's counsel only stated that Juror 1 briefly referenced it during deliberation. 13 AA 3143, 3146. In fact, the declarations from Jurors 7 and 11 stated that the news article was never shown to the jury. 13 AA 3148, 3150. Therefore, the evidence shows that the jury did not spend any time reading the article. Accordingly, this factor favors upholding the jury verdict.

Third, an examination of the news article shows that its content was merely an account of the evidence that were adduced at trial. See 13 AA 3153. In fact, every single quotation in the news article is taken directly from trial, mostly from M.S.'s testimony and parties' closing argument. Thus, the news article did not contain any information that was not in the record. Accordingly, the district court properly concluded that the news article "could in no way be viewed as prejudice to the Defendant." 13 AA 3247. This factor favors upholding the jury verdict.

Appellant does not offer any cogent argument to show that the jury verdict was improperly influenced. Appellant's arguments do not apply the law. First, despite citing to Meyer, Appellant does not offer any analysis on the enumerated factors the district court may consider. Instead, Appellant boldly claims that "any juror who was deliberating would naturally have been influenced by the certainty of someone who seemed to have outside information." AOB, 42. This conclusory statement is illogical and offers nothing even slightly relevant to the Meyer factors. Furthermore, Appellant's arguments require the admission of matters and statements that took place during Juror 1's participation in jury deliberations. However, Appellant offers nothing to show how the district court abused its discretion in striking those statements. Thus, Appellant has not cogently argued the issue. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Accordingly, Appellant cannot show that the district court abused its discretion in denying his oral request for an evidentiary hearing and Motion for a New Trial.

ii. Juror 3's nondisclosure of his sister's Facebook friendship with M.S. was not a juror misconduct

Appellant's investigator discovered that Juror 3 had a sister who was a Facebook friend of M.S. 13 AA 3143-44. Appellant argued below that Juror 3's failure to disclose his sister's Facebook friendship with M.S. is a juror misconduct that warranted a new trial. 13 AA 3139-40. At very least, Appellant argued that the district court should hold an evidentiary hearing to find out the extent of M.S.

relationship with Juror 3's sister. 13 AA 3237. The State opposed and argued that, other than speculation, there is no evidence that Juror 3 even knew of his sister's Facebook relationship with M.S. 13 AA 3220. The district court denied Appellant's Motion for a New Trial and his oral request for an evidentiary hearing. 13 AA 3247.

The district court properly denied Appellant's request that was based on speculation. To prevail on a motion for a new trial based on juror misconduct during voir dire, Appellant must show (1) "that a juror failed to answer honestly a material question on voir dire," and (2) "that a correct response would have provided a valid basis for a challenge for cause." Brioady v. State, 396 P.3d 822, 824 (2017) (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845 (1984)).

The first prong of this inquiry requires the showing that the motives for answering falsely are those that affect a juror's impartiality. Brioady, 396 P.3d at 824. Generally, this prong is satisfied when the concealment is intentional. Id. at 825. But this prong is not satisfied when the concealment is the result of simple forgetfulness. Id.; See also United State v. Edmond, 43 F.3d 472, 473 (9th Cir. 1994) (holding that a juror's failure to disclose that he was a victim of armed robbery 26 years earlier because he simply forgot to mention it is insufficient to require a new trial.). A district court's order denying a new trial for juror misconduct during voir

dire is reviewed for abuse of discretion. Lopez v. State, 105 Nev. 68, 89, 769 P.2d 1276, 1290 (1989).

Many jurisdictions have held that friendships on social networking websites do not constitute disqualifying relationship. The Kentucky Supreme Court held that "friendships on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationship in the community, which are generally the concern during voir dire." McGaha v. Com., 414 S.W. 3d 1, 6 (2013). The relevant inquiry "is the extent of the interaction and the scope of the relationship." Id. Thus, the Kentucky Supreme Court held that a Juror's failure to disclose his Facebook friendship with the victim's wife, without more, did not warrant a new trial. Id. at 7. Similarly, the Indiana Court of Appeals held that a juror's failure to disclose during voir dire that rape victim's sibling was among her friends was not a misconduct that warrants a new trial. Slaybaugh v. State, 44 N.E.3d, 111, 118-19 (2015). Finally, the California Supreme Court held that the trial court did not abuse its discretion for refusing to hold an evidentiary hearing on the issue of jury misconduct during voir dire because the only allegation was that a juror was a school counselor where the victim's daughter attended. People v. Ray, 13 Cal. 4th 313, 343-44; 914 P.2d 846, 863 (1996).

In this case, there is no evidence to suggest that Juror 3 intentionally concealed any information during voir dire. Appellant is speculating that Juror 3 must know

M.S. because Juror 3's sister is a Facebook friend of M.S. AOB, 44. The "relationship" is far more removed than the "relationships" in McGaha, Slaybaugh, and Ray, where nondisclosure of a third-degree relationship was insufficient to warrant a new trial. Furthermore, Juror 3 did not recognize any names after the State and Appellant's counsel read their lists of potential witnesses. 1 AA 125-26. What Appellant is proposing is the unreasonable request that every potential juror must be familiar with all their family members' friends on Facebook. Accordingly, Juror 3 did not commit any misconduct during voir dire.

Appellant's reliance on Canada v. State, 113 Nev. 938, 944 P.2d 781 (1997), and impermissible statements during jury deliberation is inapposite. The juror in Canada concealed information about his father's death, his repeated victimization by organized crime, and gave inconsistent voir dire answers. 113 Nev. at 941, 944 P.2d at 783. The crime in Canada was conspiracy to murder and related to organized crimes, which was directly relevant to the information that the juror concealed. Id. This court held that the numerous crimes of which the juror claimed to be a victim and his inconsistent voir dire answers demonstrated intentional concealment. Id. Thus, Canada was a case where the facts strongly indicated the juror had intentionally concealed critical information about himself. The instant case is fundamentally different because the allegation is that Juror 3 failed to disclose his

sister's tenuous Facebook friendship with the victim. Thus, Appellant failed to establish that Juror 3 had committed misconduct during voir dire.

Because Appellant offered nothing to show Juror 3 had committed misconduct during voir dire, the district court did not abuse its discretion by denying the request for an evidentiary hearing. Not every allegation of jury misconduct requires a hearing. U.S v. Montes, 628 F.3d 1183, 1187 (9th Cir. 2011). A hearing is not required if the seriousness of the alleged misconduct or bias is minimal and that the content of the allegations could not have prejudiced the defendant. Id. at 1187-88; see also People v. Ray, 13 Cal. 4th 313, 344, 914 P.2d 846, 863 (1996) ("a hearing is required only where the court possess information which, if prove to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties . . .).

Here, the district court determined that an evidentiary hearing was not warranted because there was no good reason to hold one. It is puzzling how a potential juror can be expected of knowing all the Facebook friends of a family member. In fact, Appellant states "counsel cannot determine when [Juror 3] became aware that his sister was Facebook friends with M.S." AOB 45-46. Thus, it is only Appellant's speculation that Juror 3 is even aware of M.S.'s Facebook friendship with M.S. The seriousness of the alleged misconduct is not just minimal, it is nonexistent. Even if Juror 3 was aware of his sister's Facebook friendship with M.S.,

Appellant offers nothing to show that his ability to perform his jury duties can be doubted. Ultimately, Juror 3 acquitted Appellant of 40 counts of crimes and there was no evidence that he could not be impartial. 13 AA 3128. Therefore, the district court did not abuse its discretion in denying Appellant's request for an evidentiary hearing.

iii. Appellant was not entitled to a new trial under State v. Purcell because there was no conflicting evidence

Under State v. Purcell, a district court may order a new trial if it determines that the evidence of guilt was conflicting, the victim's testimony was inconsistent, and the victim had a motive to fabricate. 110 Nev. 1389, 1392, 887 P.2d 276, 277-78 (1994). In essence, a motion for a new trial based on conflicting evidence is a claim challenging the sufficiency of the evidence. See McMahon v. State, 125 Nev. 1061, 281 P.3d 1200 (2009). As discussed below, evidence of Appellant's guilt is overwhelming. See infra Section IV. Furthermore, Purcell is distinguishable. Unlike Purcell, where the victim was the State's only witness, here, the State presented forensic evidence from Appellant's and the victim's electronic devices, corroborating evidence from the victim's best friend since elementary school, and an expert who testified about Appellant's control and manipulation of M.S. 110 Nev. at 1391-92, 887 P.2d at 277; see infra Section IV. The only conflicting evidence is M.S.'s recanted testimony. However, as the district court indicated, M.S. recanted testimony, when juxtaposed with the strong circumstantial evidence and M.S.'s prior

testimony under oath, is insufficient to warrant a new trial. 13 AA 3246; see infra Section IV. Accordingly, the district court did not abuse its discretion in denying Appellant's Motion for a New Trial based on a claim of conflicting evidence.

IV. EVIDENCE OF APPELLANT'S GUILT WAS OVERWHELMING

When reviewing a sufficiency-of-the-evidence claim, the relevant inquiry is *not* whether the court is convinced of the Appellant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the Appellant guilty, the limited inquiry 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." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (internal quotation and citation omitted).

Here, the State offered an overwhelming amount of evidence proving Appellant was guilty of sexual assault with a minor under 16 years of age on or about June 30, 2013, to December 31, 2014. 1 AA 12.

First, the State demonstrated to the jury that Appellant began to control and manipulate M.S. when she was only 11 years old. 5 AA 1323. John Pacult testified that "it seemed to be almost every aspect of her life was under (Appellant's) control. 7 AA 1651. Appellant attempted to keep his relationship with M.S. a secret. 7 AA 1658. In fact, M.S.'s best friend since elementary school, Taylor Roberts, was

surprised when she found out how early M.S. started her relationship with Appellant. 3 AA 734, 741. Taylor deemed M.S.'s relationship with Appellant unhealthy because during summer of 2015, Appellant consistently called M.S. even though she did not sound enthusiastic in talking with him. 3 AA 741, 742. Pacult also testified that a minor sexual victim's "recantation is an element of sexual abuse because it becomes so overwhelming for the child to have to deal with it. . ." 7 AA 1652. Also, Pacult was certain about Appellant's effort to groom M.S. and testified that Appellant engaged in "continued efforts to make contact with [M.S.] to regain power and control of the relationship, the sexual contact." 7 AA 1644-45, 1657. M.S. did not have the ability to refuse Appellant's grooming efforts. 7 AA 1659.

Second, between September 2013 and December 2013, Appellant would pick M.S. up from her high school to go to her house. 6 AA 1286-87. Appellant would then sexually assault M.S. by having penis-vagina sex while M.S.'s mom was at work. 6 AA 1287. This occurred almost every day. 6 AA 1288. M.S. testified about a specific sexual assault incident where M.S. took a shower upstairs. 6 AA 1287. Appellant then had penis-vagina sex with M.S. Id.

Third, M.S. testified about another similar incident where Appellant was waiting for her in the room undressed while she was taking shower at home. 6 AA 1288. When M.S. finished, Appellant tongue kissed M.S. and put his penis inside of

her mouth. Id. Appellant also put his mouth on M.S.'s vagina. Id. Appellant then penetrated M.S.'s vagina with his penis. Id.

Fourth, M.S. testified that Appellant took her to the strip where they ended up at Excalibur Casino. 6 AA 1288-89. M.S. indicated that Appellant took her to his car's backseat and he placed his penis inside of her mouth and had penis-vagina sex with her. 6 AA 1289.

Fifth, the credibility of M.S.'s recanted testimony is tarnished and the State offered corroboration to M.S.'s original account of the events. M.S.'s best friend Taylor Roberts testified that M.S. told her about the whole situation in the summer of 2015. 3 AA 745-48. Not only did M.S. tell Taylor about her relationship with Appellant, they went through photo albums and texts. 3 AA 748. Taylor also explained why that M.S. said she loved Appellant and did not want to hurt him. 3 AA 749. Additionally, forensics recovered pictures of M.S. with Appellant, a picture of M.S. kissing Appellant's cheek, a picture of Appellant and M.S. kissing on the lips, and pictures of M.S. from Appellant's iPad. 8 AA 1763-65, 1812. There was also a selfie photo that showed Appellant placing his right hand over M.S.'s buttock while she is kissing him. 8 AA 1767. Thus, viewing the evidence in the light most favorable to the State, evidence of Appellant's guilt was overwhelming.

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V. ANY ERROR IS HARMLESS BECAUSE EVIDENCE OF APPELLANT'S GUILT WAS OVERWHELMING

Appellant's conviction must be affirmed under a harmless-error standard of review because he cannot show any of his substantial rights was prejudiced. Furthermore, given the extensive and compelling evidence at trial, any rational jury would have found Appellant guilty.

NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3, 119 S. Ct. 1827, 1830 (1999)). Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). Here, the State presented extensive and compelling evidence proving Appellant's guilt. See Supra Section IV. Thus, any error would not have any injurious effect on jury's verdict. Accordingly, Appellant's conviction must be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirms Appellant Joshua Honea's Judgment of Conviction.

Dated this 19th day of February, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 6,729 words and 28 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 19th day of February, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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