IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICE MOORE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 79817

RESPONDENT'S ANSWERING BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICE MOORE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 79817

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STATEMENT OF THE ISSUE(S)

1. The district court did not err when it prevented a mistake of age defense.
2. The district court did not err by refusing to give Appellant's proposed jury instruction.
3. Any error was harmless.
4. There was no cumulative error.

STATEMENT OF THE CASE

On February 27, 2017, Appellant Maurice Moore (hereinafter "Appellant"), was charged by way of Criminal Complaint with four counts of Sexual Assault with a Minor Under Sixteen Years of Age (Category A Felony – NRS 200.364, 200.366) and two counts of Lewdness with a Child Under the Age of 16 (Category B Felony – NRS 201.230). I Appellant's Appendix ("AA") 6-7. On or about May 3, 2017, an

Amended Complaint was filed adding an additional count of Sexual Assault with a Minor Under Sixteen Years of Age. I AA 4-5.

On August 5, 2019, Appellant's jury trial commenced. I AA 8. On December 3, 2019, after six (6) days of trial, the jury found Appellant not guilty for all five (5) counts of Sexual Assault with a Minor Under 16 Years of Age (Counts 1-5) and guilty of the two (2) counts of Lewdness with a Child Under the Age of 16 (Counts 6 and 7). I AA 267-68.

On October 8, 2019, the district court adjudicated Appellant guilty and sentenced him to an aggregate sentence of four (4) to (16) years in the Nevada Department of Corrections. II AA 303-04; II AA 306-07. Appellant received nine hundred seventy (970) days credit for time served. II AA 304. The Judgment of Conviction was filed on October 11, 2019. II AA 306-07.

On October 10, 2019, Appellant filed a Notice of Appeal. II AA 328-29.

STATEMENT OF THE FACTS

In the early morning hours of February 26, 2017, a missing person report was created at the home of A.M., a fourteen-year-old, after A.M.'s mother contacted the Las Vegas Metropolitan Police Department to report her daughter was missing from her home. I AA 3. A.M. would eventually return to her residence after having sexual intercourse with a male she knew as "Nathan" from social media. I AA 3.

At trial A.M. testified that in February 2017 she had been using a shared Tinder account with one of her friends. I AA 11. Her age on the account was listed as eighteen (18). She explained that while it was her understanding that some people used Tinder as a means to hook up, others, like she and her friends, used it to hang out with older people that could provide them rides. I AA 13-14. After only having the account for about a week before the incident, she recalled communicating with a man named, Nathaniel. I AA 13-14. Nathaniel had listed twenty-three as his age on his Tinder profile. I AA 14. At trial, she identified the man she communicated with as Appellant. I AA 15. Their discussions occurred on Tinder and Instagram and eventually turned romantic as Appellant started flirting with her and discussing sexual acts. I AA 23, 34.

After a day or two of communicating, A.M. made a plan to meet Appellant. I AA 25. She told Appellant that she would need to sneak out of her house to see him because her parents were strict. I AA 26-30, 41. On February 25, 2017, thinking that she and Appellant were just going to hang out in his car, she gave Appellant her address. I RA 69. When he arrived, he messaged A.M. that he was in a blue sports car to the right of her house and to not get caught. I RA 73. She explained that she eventually got into his car and was prepared to say "no" if he tried anything. I AA 75.

After talking to Appellant in the vehicle for some time, Appellant began to grope A.M.'s breasts and thighs, over her clothes. I RA 75-77. She told him something along the lines of she did not want to do that and she was not looking for him to do that. I RA 76. After the groping, Appellant forced A.M. to perform oral sex on him. I RA 77-79. She testified that he grabbed her by the arms and pulled the upper half of her body over the center console in the car, pulled down his pants, and put his penis in her mouth. I RA 77-79. She explained that when this happened she froze. I RA 77.

Appellant then climbed over to the passenger seat, got on top of A.M., pulled down her leggings, and penetrated her vagina with his penis. I RA 80. A.M. repeatedly told Appellant that she did not want him to do that. I RA 80-85. Appellant continued to say it was fine and everything was going to be okay. I RA 85.

After some time, Appellant flipped A.M.'s body over so her stomach was down on the upper part of the seat, with Appellant positioned behind her. I RA 82. A.M. began to cry and began to get louder with her cries telling him to stop. I RA 82-83. Appellant then penetrated A.M.'s anus with his penis. I RA 82-83. A.M. described these acts as painful and even told Appellant this, but he continued. I RA 87. He responded that it was okay and it was going to feel better. I RA 87. At some point during the anal sex, Appellant slapped her buttocks. I RA 128-29.

/ / /

After the anal sex stopped, Appellant flipped A.M. back over with her back against the seat and positioned himself on top of her, and he penetrated her vagina with his penis again. I RA 83. After forcing vaginal sex on A.M. for a second time, she testified that he forced anal sex on her for a second time. I RA 86. She recalls that after the final anal penetration, there was another vaginal penetration. I RA 100. Eventually she pushed Appellant away, got out of his car, and ran home. I RA 102-106. She ran up her driveway into her backyard and sat on the deck for about five minutes to collect herself before she went inside. I RA 106.

Upon returning to the residence, A.M. told her mother she had sexual intercourse with a male she knew as "Nathan" from social media. I AA 3. A.M.'s mother took the phone A.M. had in her pocket which she had been using to communicate with "Nathan." I RA 193-95. A.M.'s mother posed as A.M. and used the phone to text "Nathan" to come back. I RA 195. Officers located Appellant inside of his vehicle. I AA 3.

Appellant explained that he was just in the vehicle with A.M. and that he had met A.M. on the Tinder app. I AA 3. He explained to police that he made out with A.M. but did not have sexual intercourse with her. I AA 3. The officers did, however, observe that Appellant had several with stains outside his sweatpants next to his genital area that appeared to be semen secretions. I AA 3.

A.M. underwent a Sexual Assault Nurse Examination (SANE). II RA 308. The results of the physical examination revealed that A.M. had a red contusion on the vestibular band, in her vagina. II RA 315. The examination also revealed that A.M. had ten lacerations on her anus. II RA 317. There was light red blood on the swab taken from A.M.'s rectum. II RA 317. A swab taken of A.M.'s vagina came back positive for Appellant's sperm. III RA 361. Investigators also obtained a sample from Appellant's penis wherein Appellant and A.M.'s DNA profiles were found. III RA 355.

SUMMARY OF THE ARGUMENT

First, the district court did not err when it prevented a mistake of age defense. NRS 201.230 does not require specific intent as to the victim's age, but instead requires that the State prove specific intent as to the act committed; Such reading, is in line with the 2015 Amendments to NRS 201.230 which incorporated protections for 14- and 15-year-old children. Second, the district court did not err by refusing to give Appellant's proposed jury instruction. Due to the State only being required to show proof of Appellant's specific intent to commit the act, the district denied a jury instruction that would have permitted a mistake of age defense as to Appellant's knowledge of A.M.'s age. Further, the district court did not transform the Lewdness with a Child Under the Age of 16 charges into ones requiring general intent as the State still had to prove that Appellant specifically intended to commit the acts

prohibited by the statute. Notably, the district court properly allowed Appellant's counsel to argue that Appellant did not know A.M.'s true age, but not in the context that the State failed to meet an element of the crime. Third, any error would have been harmless. It is not clear whether the jury acquitted Appellant of the sexual assault charges because they were given a consent instruction. Regardless, Appellant's counsel argued during his closing argument that Appellant did not know A.M.'s true age. Further, the district court properly determined that specific intent as to A.M.'s age did not have to be proven, so the mistake of defense was inapplicable. Finally, there was no cumulative error.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IT PREVENTED A MISTAKE OF AGE DEFENSE

Appellant argues that the district court erred when it prevented Appellant from offering a mistake of fact defense for the two counts of Lewdness with a Child Under 16. Appellant's Opening Brief ("AOB") at 6-28. First, he argues that because Lewdness with a Child Under the Age of 16 is a specific intent crime, he should have been permitted to present a mistake of age defense. AOB at 10-12. Second, Appellant complains the district court erroneously relied on California's public policy bar on a mistake of age defense for crimes involving children under fourteen. AOB at 12-28. Appellant's arguments are meritless. There is no Nevada precedent that states mistake of age is an applicable defense to the offense of Lewdness with a

Child Under the Age of 16, nor does the legislative history indicate that such a defense should be applicable.

In 2015, Nevada made amendments to several sexual crimes against children. The bill was introduced as Assembly Bill ("A.B.") 49. Prior to A.B. 49's passage, NRS 201.030(1) stated in relevant part:

> A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of *14* years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.

(emphasis added).

NRS 201.230 now states in relevant part:

1. A person is guilty of lewdness with a child if he or she:

(a) Is 18 years of age or older and willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of *16* years, *with the intent* of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child; or

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

2. Except as otherwise provided in [subsection 3,] subsections 4 and 5, a person who commits lewdness with a child under the ag of 14 years is guilty of a category A felony and shall be punished by

> imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, and may be further punished by a fine of not more than $10,000.
>
> 3. Except as otherwise provided in subsection 4, a person who commits lewdness with a child who is 14 or 15 years of age is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years and may be further punished by a fine of not more than $10,000.

(emphasis added).

When introducing these changes to the Nevada Assembly Committee on Judiciary, James Sweetin explained that the change to the statute was necessary to introduce a more "phased approach" to the punishments under the statute:

> [w]hen a lewd, lascivious act is committed on a child the day before the child's 14th birthday that is punishable by up to life in prison. However, if it were done on the child's 14th birthday, it would only be punishable by a maximum of a year in jail. This creates a situation that is not fair or just, but in prosecuting these cases it is a situation we often see.
>
> The proposed change creates a more phased approach to this issue. The existing penalty for lewdness with a child would continue; however, the proposed law addresses acts that are committed against children ages 14 and 15…

Assembly Committee on Judiciary Meeting Minutes, A.B. 49, 2015 Leg., 78th Sess. (Feb. 13, 2015). In other words, the legislature hoped to expand punishment for lewd or lascivious acts perpetrated upon a fourteen (14) or fifteen (15) year old presumably to deter and protect children of such age from these acts. Thus, had the Court permitted a mistake of age defense it would not only have violated the plain

language of NRS 201.230, but also the legislative intent animating the 2015 amendments.

A. The Crime of Lewdness with a Child Under the Age of 16 is a Specific Intent Crime as to the Act Committed, Not as to the Age of the Victim

Appellant argues that because Lewdness with a Child under the Age of 16 is a specific intent crime, the Court should have permitted Appellant to employ a mistake of age defense. AOB at 10-12. While such crime does require a showing of specific intent, it does not require the specific intent regarding the age of the victim as purported by Appellant.

Appellant cites three cases, which he argues remain valid in the wake of the 2015 amendments. To begin, Appellant cites to Wagstaff v. State, 129 Nev. 1160, 2013 WL 3258217 (2013), which is a 2013 unpublished decision. Reliance on this case, even solely for persuasive value, is not permitted. NRAP 36(c)(3) ("[a] party may cite for its persuasive value, if any, an unpublished disposition issued by the Supreme Court on or after January 1, 2016.").

Even if Wagstaff could be used for its persuasive value, which the State does not concede, it would not support Appellant's argument. In Wagstaff, this Court concluded that the district court committed plain error by allowing a general intent instruction when the crime of lewdness with a child is a specific intent crime. Id. at *3-*4. In stating that the crime of lewdness with a child is a specific intent crime, the Court relied on State v. Catanio, 120 Nev. 1030, 102 P.3d 588 (2004), wherein

this Court held that Lewdness with a Child requires that a defendant have the specific intent to commit a lewd or lascivious act, not that he have specific intent as to his victim's age. Id.

In Catanio, the charges of lewdness against the defendant were dismissed as there was no proof shown that the defendant had any physical contact with his victims.[1] Id. at 1032, 102 P.3d at 590. As such, this Court was tasked with answering whether the lewdness statute required proof of physical contact between the defendant and his victim. Id. After concluding that physical contact was not required, the Court explained that the statute "requires specific intent by the perpetrator to encourage or compel a lewd act in order to gratify the accused's sexual desires." Id. at 1036, 102 P.3d at 592. In other words, the Court required proof that the act was committed with the specific intent of causing sexual gratification, not that the defendant had specific intent as to the victim's age.

Relying on NRS 193.190 and NRS 194.010(5), the Court has explained that a defendant must "demonstrate that specific intent is an element of his crime" in order

[1] While Catanio's charges were for Lewdness with a Child Under 14, as the law was not changed to incorporate 14- and 15-year-old children until 2015, that is a distinction without a difference as the Nevada legislature made it clear that the intent behind the change in age was to protect fourteen and fifteen year old children as well. Agreeably, as Appellant points out all that the 2015 amendments did was incorporate 14- and 15-year-old children and provide lower penalties for defendants under 18. See supra; AOB at 9.

to be able to employ a mistake of age defense.[2] Jenkins v. State, 110 Nev. 865, 868, 877 P.2d 1063, 1065 (1994).

In Jenkins, the defendant appealed his conviction of six counts of statutory sexual seduction arguing that the district court erred in refusing to give his mistake of fact jury instruction. Id. at 868, 877 P.2d at 1065. The Court examined the statutory sexual seduction statute and determined that the statutory language did not indicate that an individual having the specific intent to commit the act with a minor under the age of 16 was an element of the offense that would need to be proven. Id. at 869, 877 P.2d at 1065. In reaching this conclusion, the Court explained that "in the context of statutes aimed at the protection of infants, such as child abuse statutes, the term 'wilfully' has been defined to refer to general intent: as an intent to do the act, rather than any intent to violate the law or injure another." Jenkins v. State, 110 Nev. 865, 870, 877 P.2d 1063, 1066 (1994), *citing* Childers v. State, 100 Nev. 280, 282-83, 680 P.2d 598, 599 (1984).

In applying this Court's precedent to Appellant's case, the only specific intent that the State had to prove was that Appellant had the "intent of arousing, appealing

[2] NRS 193.190 states, "In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence." NRS 194.010 states, in relevant part, "All person are liable to punishment except those belonging to the following classes: […] Persons who committed the act or made the omission charged under and ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense."

to, or gratifying the lust or passions or sexual desires of that person or of that child." In other words, that Appellant had the intent to commit the act, not that he had specific intent as to A.M.'s age. This is precisely in line with the legislative intent behind the 2015 amendments wherein the legislature expanded the protections under NRS 201.230(1) to 14 and 15-year-old children by increasing the punishments for individuals that commit acts against children of these ages. As such, a mistake of age defense was not applicable for Appellant's two counts of Lewdness with a Child Under the Age of 16. Thus, the district court could not have committed plain error when it precluded the defense from using a mistake of age defense as to these charges.

Additionally, to the extent Appellant argues the district court erred by applying the California public policy bar on mistake of age defenses, his argument is also meritless. AOB at 12-28. While arguing whether there should be a knowledge of age requirement included in the jury's instructions, the following discussion occurred:

> THE COURT: -- lewd and lascivious acts. And you're contending that we should have knowledge -- at least have knowledge that she was under 16?
>
> MR. DRASKOVICH: Yes.
>
> THE COURT: Is that what your contention is?
>
> MR. DRASKOVICH: That he knew or should have known.

> THE COURT: All right. I mean, Nevada doesn't have anything on that. I did look at the, I think, Tennessee cases you provided. That -- those cases deal with specific rules that the state has as to the application of intent and knowledge as it relates to that state's crimes. I don't see a lot of application there.
>
> I looked at California law, and California statute is essentially the same as the, in my opinion, as the Nevada statute which provides that, except as otherwise provided in (indecipherable) a person who willfully or lewdly commits any lewd or lascivious act, including any acts constituting other crimes provided in part one upon the body or in part of the member thereof, of a child who's under the age of 14 years with the intent of arousing, appealing, or gratifying the lust, passions, or sexual desires of the child is guilty of a felony.
>
> The issue of good faith mistake of fact as to the age of a victim has been found in California to not be a defense to that charge, and the specific crime here of under the age of -- lewd and lascivious act under the age of 16 was another one of those crimes that was added by the legislature in 2015 at the same time that it broke out, a child under the age of 14 for the purposes of the sexual assault statute. So my -- my inclination at this point in time is that good faith mistake as to the age of the victim is not a defense in Nevada as to lewd and lascivious act with a child under the age of 16. But I'll be glad to hear more argument from you, if you want.

I AA 120-22.

Appellant cites to People v. Olsen, 36 Cal. 3d 638, 685 P.2d 52 (1984), to argue that the district court erred when relying on this case. In Olsen, the defendant argued that he should have been permitted to use a mistake of age defense for his lewd or lascivious act charge. Id. at 642, 685 P.2d at 54. Relying on previous precedent regarding special protections for children under 14,—what Appellant refers to as the public policy bar—the California Supreme Court concluded that the legislative purpose behind the statute authorizing California's lewd or lascivious act

charge would be violated if the court were to permit a mistake of age defense for such charge. Id. at 649, 685 P.2d at 59.

Even if one is to assume that the district court relied specifically on Olsen, which it is not clear from the record, it would have only relied on such case for the purposes of comparing the holding with the Nevada legislature's 2015 amendments. Ultimately, the district court relied on the 2015 legislative history to make its determination. I AA 87. Thus, any error would have been harmless because the district court correctly interpreted the Nevada legislature's intent to provide added protections for 14- and 15-year-old children, which appears to be the predominate purpose for the 2015 amendments as discussed *supra*.

Accordingly, to the extent Appellant argues that the district court erred in failing to apply its understanding of the delineation between 14- and 15-year-old children with the 2015 amendments to the sexual assault statute, his argument is still meritless because the Nevada's legislature's intent for the lewdness statute was clear: 14- and 15-year-old children should be protected under the statute. AOB at 23. Regardless, any error would have been harmless as the district court reached the right conclusion.[3] Wyatt v. State, 86 Nev. 294, 298-99, 468 P.2d 338, 341 ("If a

[3] For purposes of clear organization, the State has elected to discuss harmless error where appropriate for each substantive argument as well as address Appellant's additional harmless error arguments in a standalone, separate section as Appellant has done.

judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.") (*citing*, Conley v. Chedic, 6 Nev. 222 (1870); Jumbo Mining Co. of Goldfield v. District Court, 28 Nev. 253, 81 P. 153 (1905); Edmonds v. Perry, 62 Nev. 41, 140 P.2d 566 (1943); Ormachea v. Ormachea, 67 Nev. 273, 217 P.2d 355 (1950)).

II. THE DISTRICT COURT DID NOT ERR BY REFUSING TO GIVE APPELLANT'S PROPOSED JURY INSTRUCTION

Appellant argues that the court appropriately allowed a mistake of age defense instruction for Appellant's sexual assault charges but erred when it failed to permit such instruction for Appellant's Lewdness with a Child Under the Age of 16 counts. AOB at 28-50. Appellant additionally argues that the district court's error was exacerbated when it refused to instruct the jury that "willful" in the lewdness statute meant specific intent. AOB at 38-49. Finally, he argues that the district court abused its discretion when it directed counsel not to argue the mistake of fact defense to the lewdness charge. AOB at 49-50.

District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). District courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court

reviews whether an instruction is an accurate statement of the law de novo. Cortinas, 124 Nev. at 1019, 195 P.3d at 319. Further, instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000) overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); see also NRS 178.598.

A defendant is only entitled to an instruction on his theory of the case if there is "some evidence, no matter how weak or incredible, to support it." Roberts v. State, 102 Nev. 170, 173, 717 P.2d 1115, 1116 (1986). Further, though a defendant is entitled to an instruction on his theory of defense so long as there is any evidence to support it, he is not entitled to demand a specific wording of an instruction. Crawford, 121 Nev. at 754, 121 P.3d at 589. A trial court may refuse to give an instruction if it is less accurate than other instructions, or will confuse the jury. Sanchez-Dominguez v. State, 130 Nev. 85, 89–90, 318 P.3d 1068, 1072 (2014). Indeed, instructions cannot be worded such that they are misleading, state the law inaccurately, or duplicate other instructions. Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

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A. The District Court Did Not Abuse its Discretion when It Refused to Instruct the Jury Regarding Appellant's Mistake of Age Defense

Appellant once again argues that because Lewdness with a Child Under the Age of 16 is a specific intent crime, a mistake of age defense was applicable. AOB at 30-38. Accordingly, it is his opinion that the district court erred for refusing to permit a mistake of age jury instruction for the Lewdness with a Child Under the Age of 16 counts. AOB at 30-38.

To begin, the district court did not state that the crime of Lewdness with a Child Under the Age of 16 was a general intent crime. Appellant cites the part of the record where the district court and the parties were discussing the jury instruction regarding Appellant's sexual assault charges. I AA 74-100. At that time, the parties were specifically arguing whether the jury should be instructed on consent as a defense for Appellant's sexual assault charges:

> MS. KOLLINS: I don't -- I don't disagree that he has to know that he's committing a sexual penetration or -- or, you know, under circumstances where he knew or should have known. When we were talking about knowledge earlier, it was vis-a-vis her age. He does not have to have knowledge of her age. That is not an element. So that's the –
>
> THE COURT: That, I agree.
>
> MS. KOLLINS: -- distinction, only distinction.
>
> THE COURT: She [sic] doesn't have to have knowledge of her age for -- on sexual -- we'll deal with it on the other -- on lewdness --
>
> MR. DRASKOVICH: Yes.

> THE COURT: -- in a second -- doesn't need to have knowledge of her age. Now, her age is relevant as to sentencing or punishment, but it's not an element of the issue of sexual assault. I mean, it can be a matter – I mean, her age is obviously a factor in determining whether she was physically or mentally capable of -- of resisting or understanding the nature of her acts. I mean, that what was what was argued in –
>
> MR. DRASKOVICH: Guitron.
>
> […]
>
> MS. KOLLINS: So what the Court is saying right now is you want to give them basically a Honeycutt instruction that elaborates on the second portion of that statute? In other words, if he had -- because if he had a reasonable good faith belief that it was under circumstances where she was capable --
>
> THE COURT: Well, if he had a –
>
> MS. KOLLINS: -- and where --
>
> THE COURT: -- reasonable good faith belief that she consented, she could -- if he thought she was consenting and had a good faith basis to believe that, it's not sexual assault. He did not have the -- he had the intent to engage in consensual sex. That's not sexual assault.

I AA 99-101. Appellant cites to this portion of the record in order to argue that the district court should have used this analysis for Appellant's Lewdness of a Minor Under 16 charges to permit a mistake of age instruction. Specifically, because a mistake of age defense is permitted for the charge of Sexual Assault of Children Over 14, that defense should be applicable to the Lewdness of a Minor Under 16 charge.

Analogizing to the district court's discussion of Appellant's sexual assault charges does not somehow change the analysis as they are two separate crimes. As discussed *supra* and what is relevant for the instant appeal, the mistake of age defense is not applicable to Appellant's Lewdness of a Minor Under 16 charges because the only specific intent that had to be proven was that Appellant specifically intended to commit the act, not that he specifically intended to commit such act against a child under 16.

To the extent that Appellant attempts to rely on Jenkins, his argument is meritless as Jenkins would only allow a mistake of fact defense for the specific intent portion of the Lewdness statute. In other words, Appellant could have requested a mistake of fact defense as to whether he had a mistaken "intent of arousing, appealing to, or gratifying the lust or passions or sexual desires," but not a mistake of fact as to A.M.'s age. It follows then that the district court did not err when it prohibited Appellant's proposed mistake of age instruction regarding Appellant's knowledge of his victim's age.

B. The District Court Did Not Abuse its Discretion When it Refused to Give the Requested "Willful" Definition Instruction

Appellant argues that the district court should have given the jury a willful instruction and erred by giving an instruction that the Lewdness with a Child Under the Age of 16 charge was a general intent crime. AOB at 38-49. As a threshold issue, Appellant failed to specifically object to Jury Instruction No. 14 in its final form and

even assisted the district court in crafting the instruction. Due to the failure to raise such claim below, this Court should decline to consider it. Dermody v. City of Reno, 113 Nev. 207, 210–11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

However, if this Court opts to review the claim, it is reviewable only for plain error. Dermody, 113 Nev. at 210–11, 931 P.2d at 1357; Guy, 108 Nev. at 780, 839 P.2d at 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis, 107 Nev. at 606, 817 P.2d at 1173. Plain error review asks:

> To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan v. State, 131 Nev. 43, 49, 343 P.3d 590, 594 (2015).

Despite Appellant's argument to the contrary, the district court did not give a general intent instruction for Appellant's Lewdness with a Child Under the Age of 16 charges. Indeed, Jury Instruction No. 14 stated in relevant part:

> First, at or near the time alleged in the Amended Information, the Defendant used his hands or fingers to touch, grab or fondle the breasts

> or body of A.M. as alleged in Count 6 and to touch, slap or fondle the buttocks or body of A.M. as alleged in Count 7;
>
> Second, the *Defendant intended to commit a lewd or lascivious act*;
>
> Third, the Defendant in doing the act *intended to arouse, appeal to or gratify his own lust, passion or sexual desires or A.M's lust, passion or sexual desires.*
>
> Fourth, A.M was a child under the age of 16 years.
>
> To prove the charge of Lewdness with a Child under the Age of Sixteen, the State does not need to prove either the defendant or A.M.' s lust, passion or sexual desires were actually aroused. The crime of Lewdness with a Child does not require that bare skin be touched. The touching may be through the clothing of the child.
>
> A child under the age of 16 years cannot consent to another individual using his hands or fingers to touch and/or slap and/or fondle the buttocks and/or breasts and/or body of A.M. *to arouse, appeal to or gratify his own lust, passion or sexual desires or the child's lust, passion or sexual desires.* The consent of a child under the age of 16 years to such lewd and lascivious conduct is not a defense to a charge of Lewdness with a Child under the Age of Sixteen.

I AA 292 (emphasis added). As discussed *supra*, the specific intent portion of this statute is related to the intent to commit the act, not the specific intent as to A.M.'s age. Thus, through this instruction, the district court appropriately permitted the instruction to state that a mistake of age defense is not permitted for these charges.

To the extent that Appellant argues that the district court through this instruction transformed the charge into one requiring general rather than specific intent, his argument is meritless.

Once again, NRS 201.230(1) states in relevant part:

> A person is guilty of lewdness with a child if he or she:

> (a) Is 18 years of age or older and willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child[.]

Despite Appellant's argument to the contrary, the fact that the victim is under 16 is an element that must be proven for a defendant to be found guilty. Thus, there are four elements to the crime: (1) that the defendant is 18 years of age or older, (2) he "willfully and lewdly commits any lewd or lascivious act," (3) that the victim is under 16 years, and (4) that the defendant has "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or that child." Appellant cites to no authority that states that the age of the victim is not its own element. AOB at 42-43. In fact, this Court has stated the age of the victim is a material element of NRS 201.230. Gay v. Sheriff, Clark Cty., 89 Nev. 118, 119, 508 P.2d 1, 2 (1973) ("The only material elements of the crime charged are the acts of lewdness and the victim's age."). Contrary to Appellant's argument, the placement of the commas does not alter what must be proven.

Further, separating the age of the victim from the intent of the offender, does not imply general intent. Indeed, the district court recognized that Appellant's intent had to be proven when crafting the jury instructions:

> THE COURT: It says willfully -- actually, it says willfully and lewdly commits any lewd or lascivious acts. So it does say that *you have to willfully commit* –

> […]
>
> THE COURT: Yeah. So, I mean, I'm not sure what lewdly means. I mean, it seems like the concept of willful and lewd -- I mean, if you willfully commit a lewd or lascivious act, you're lewdly committing the act.
> […]
>
> THE COURT: -- it does seem like it needs to be done willful -- willfulness is *the intent to commit the act*.
>
> MR. DRASKOVICH: Yes, sir.
>
> THE COURT: All right. I'll -- an act is -- let's see.
>
> MS. KOLLINS: Well –
>
> THE COURT: An act is done willfully when done with *the intent to commit the act*.

I AA 159 (emphasis added). Thus, the record reflects that the district court did not change the charge from one requiring specific intent to general intent because the State still had to prove that Appellant had the specific intent to commit the lewd act. Accordingly, the district court did not err by failing to provide the jury with a definition of "willful." Such definition was covered by the explicit language requiring the State to prove Appellant had the specific intent to commit the act under the statute.

Appropriately, the district court also clarified that the age of the victim was not part of the specific intent that had to be proven, but instead was a separate element:

> MS. KOLLINS: Well, as long as we're not going to allow argument that says they had to be -- he had to be willful in terms of this kid's age because that's where I'm afraid this is going.
>
> […]
>
> THE COURT: Well, I mean, I -- if you -- I mean, I -- if we put -- well, is the intent to -- I mean, in the instruction 15, I mean, my mind is let's just change instruction 15 to say, second -- the defendant -- I mean, this breaks it down into the elements here and separates this from the -- he has to intend to commit the lewd or lascivious act. I mean, *the child being under the age of 16 is a totally separate element of the offense*.
>
> MS. KOLLINS: I guess my concern is it -- we're going to be arguing willful, he had to willfully touch a child under 16, and that's what Mr. Draskovich is going to get up here and argue. And by modifying it, that's what it's going to make it sound like.
>
> THE COURT: Well –
>
> MS. KOLLINS: We've already decided that that's not accurate. So there's -- that's my concern.
>
> THE COURT: I mean, I would suggest we just change 15 to, second, the defendant intended to commit a lewd or lascivious act.
>
> MR. DRASKOVICH: *I'm fine with that, Your Honor*.
>
> MS. KOLLINS: It already says willful.
>
> THE COURT: And then we don't put in a separate definition of willfulness.
>
> MR. DRASKOVICH: *I agree with that*.

I AA 161 (emphasis added). Not only did Appellant agree with the district court's draft of the jury instruction, but such draft did not somehow transfer the charge into one only requiring general intent. Indeed, the State still had to prove that Appellant

specifically intended to commit a lewd and lascivious act, which is line with this Court's precedent. Catanio, 120 Nev. at 1036, 102 P.3d at 592.

Additionally, Appellant cites Wilson v. State, No. 54814, 2011 Nev. Unpub. WL 6181386 (Dec. 9, 2011), to support the proposition that intent to commit a lewd act cannot be separate from the victim's age.[4] AOB at 47-48. Not only is relying on this case another violation of NRAP 36(c)(3), but Appellant solely relies on the concurrence in a vacuum. In context, the concurring justices were discussing what type of sexual acts were required and stated that "a 'lewd or lascivious act' cannot be determined separate and apart from the perpetrator's intent." Id. at *3. Specifically, they explained that the act cannot be separate from the sexual intent that motivates the act. Id. at *4. Indeed, they did not state that the defendant must have a specific intent to commit such act on a child under 16.

In sum, because the State did not have to prove that Appellant had specific intent of A.M.'s age, he was not entitled to a mistake of age jury instruction. As such, the district court did not commit clear error when it denied Appellant's jury instruction.

/ / /

[4] Although this case cannot even be used for persuasive purposes, it is interesting to note that the Court listed the following as material elements for the charge of lewdness with a child: "(1) a lewd or lascivious act, (2) upon or with the child's body or any part of the child's body, (3) the child's age, and (4) the intent to arouse, appeal to, or gratify, the lust or passion of the accused or the child." Id. at *2.

C. The District Court Did Not Commit Clear Error Regarding Appellant's Argument about the Lewdness with a Child Under the Age of 16 Charges

Appellant also complains that the district court erred when it told Appellant's counsel not to argue a mistake of age defense to the lewdness charge and when it permitted the State to instruct the jury that it did not have to prove that Appellant knew A.M.'s age. AOB at 49-50. However, his argument is meritless.

Appellant incorrectly argues that the district court prevented him from arguing a mistake of age defense. In context, the district court allowed him to argue that Appellant did not A.M.'s age, but appropriately limited his argument:

> THE COURT: And then fourth, the -- you know, A.M. was a child under the age of 16. It doesn't say that he has to -- and, you know, if you make the argument that it's a defense –
>
> MS. KOLLINS: Okay.
>
> THE COURT: -- they would object, and I -- and I will –
>
> MR. DRASKOVICH: I won't say it's (indecipherable) but I –
>
> THE COURT: -- instruct the jury that – that that's not a defense and to strike -- strike your argument.
>
> MR. DRASKOVICH: But I -- just so we're clear, now, I mean, I intend to say that he didn't know -- he didn't know her age.
>
> THE COURT: Well, I mean, that's fine to say he didn't know –
>
> MR. DRASKOVICH: I'm not going to say this is –
>
> THE COURT: -- her age.

MR. DRASKOVICH: -- a offense -- he's entitled to it, you know, because –

THE COURT: But, I mean, if you sit here and say, listen, you know, that mean he doesn't -- you know, if State doesn't prove the fourth element –

MR. DRASKOVICH: You're not going to –

THE COURT: -- I'm going to -- they're going to hopefully object, and I'm going to say, you know, sustain the objection, and instruct the jury that mistake of the age is not a defense.

MR. DRASKOVICH: I will not –

THE COURT: I mean, if you go that route, I'm -- you know, if you want to argue he didn't know, and that's a -- that's part of the, you know, that he wasn't operating under the belief that he was, you know, engaging in force -- you know, against will or with somebody who –

MR. DRASKOVICH: Yes.

THE COURT: -- was mentally or physically incapable, then that's fair. But if I'm -- I hear at all that he didn't know, so the State can't prove the fourth element or the State can't –

MR. DRASKOVICH: Not –

THE COURT: -- you know, establish, you know, the crime of child under the age of 16, you know, they're going to object, and I will instruct the jury then and there that mistake of fact as to age is not a defense to the crime – to this crime, which I don't think will look good. But, I mean –

MR. DRASKOVICH: I -- I understand.

I AA 161-63.

Indeed, the district court explained that it would allow Appellant's counsel to argue that Appellant did not know A.M.'s actual age but would not permit an argument that the State failed to meet the age element of the lewdness charge through such an argument. Such limitation was appropriate because, as discussed *supra* in Section II.B, a mistake of age defense was not available for the age element of the crime. Accordingly, the district court did not err by stating that the State did not have to prove that Appellant *knew* A.M.'s age. Indeed, the only part of the age element the State needed to prove was that A.M. was under the age of sixteen.

Regardless, Appellant's counsel was able to argue in his closing argument that Appellant did not know A.M.'s age:

> Mr. Moore -- back to the age -- did not know her age. Not once did you hear anywhere, any kind of direct evidence or circumstantial evidence, that he knew of her age. In fact, I would submit to you that her statements and her actions speak otherwise. She posted repeatedly that she was 18 on Tinder. She was on Tinder to begin with, which is understood, is an adult hookup site.
> […]
> You may not like Mr. Moore, or what he did, to find him not guilty of these counts. I would submit to you, though, that the facts in this case have shown counts one through seven, that he didn't know her age.

Here, the district court explained that it would not allow the defense to argue

II AA 253-54. Thus, any error would have been harmless.

III. ANY ERROR WAS HARMLESS

Appellant argues that the district court's errors were not harmless and his substantial rights were violated. AOB at 50-55. Specifically, he addresses three ways

in which he can demonstrate his substantial rights were violated: (1) the fact that the jury was acquitted of the two sexual assault charges, (2) the jury was instructed that Lewdness with a Child Under the Age of 16 was a general intent, rather than specific intent crime, and (3) the district court did not apprise the jury that there was a specific intent element to the crime. AOB at 51-55. However, as discussed in each section *supra*, any error in this case was harmless and would not have effected Appellant's substantial rights. See NRS 178.598 (Any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether 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).

Under any standard, any error would have been harmless. Despite Appellant's speculation, it is not clear why the jury acquitted Appellant of the sexual assault charges. It could have been because the jury determined Appellant thought that he had a good faith mistaken belief that A.M. could have consented, but it also could

have been because the jury determined that the State had not proven its case on another element of the sexual assault charges. It is certain, that Appellant cannot prove that if the jury had been so instructed for the Lewdness with a Child Under the Age of 16 charges he would have been acquitted of those charges. Regardless, he was able to argue during his closing argument that Appellant did not know A.M.'s true age.

Further, as discussed *supra*, even if for the wrong reason, which the State does not concede, the district court properly determined that the mistake of age defense was not applicable for the way in which Appellant wished to employ it. The district court properly determined that because specific intent as to the victim's age does not have to be proven, the mistake of age defense was not applicable. Indeed, such conclusion is in line with legislative intent. Accordingly, despite Appellant's argument to the contrary, the jury was instructed about the specific intent the State needed to prove.

Therefore, any error would have been harmless.

IV. THERE WAS NO CUMULATIVE ERROR

Appellant argues that there was cumulative error based on Wagstaff. Once again, citing to such case is a violation of NRAP 36 36(c)(3). However, the State does not dispute Appellant's reference to the case to the extent that this Court has stated that the charge of Lewdness with a Minor Under Fourteen Years is a grave

crime. However, Appellant has failed to meet the other two factors of the cumulative error analysis, so his claim must fail.

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854–55 (2000). Appellant must present all three elements to succeed on appeal. Id. at 17, 992 P.2d at 854–55. Moreover, an appellant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (*citing* Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357 (1974)).

First, there was more than sufficient evidence to support Appellant's convictions and, therefore, the issue of guilt is not close. A.M. testified to both lewd acts: Appellant touched her breasts over her clothes and slapped her buttocks during the anal sex. I RA 75-77, 128-29. Although actual arousal of Appellant or A.M. was not required, there was evidence presented that Appellant ejaculated demonstrating Appellant's intent to arouse. I AA 3; III RA 355, 361. His intent could also be inferred by the messages he sent A.M. leading up to the night he committed the lewd acts. I AA 23, 34. Further, the jury was presented with evidence of A.M. was fourteen at the time Appellant committed these acts. I AA 9.

Second, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir.

1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*") (emphasis added). Even if there were errors, they were harmless, and do not collectively warrant reversal.

Third and finally, as stated *supra*, Appellant was convicted of a grave crime. Nevertheless, Appellant's claim of cumulative error has no merit and this Court should affirm the Judgment of Conviction.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this Court AFFIRM the Judgment of Conviction.

Dated this 13th day of April, 2020.

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,768 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 13, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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