IN THE SUPREME COURT OF THE STATE OF NEVADA

GUSTAVO GUNERA-PASTRANA,	)	NO. 79861
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

GUSTAVO GUNERA-PASTRANA, Appellant, vs. THE STATE OF NEVADA, Respondent.	NO. 79861

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The appellant, Gustavo Gunera-Pastrana ("Gustavo"), appeals from his judgment of conviction pursuant to **NRAP 4(b)** and **NRS 177.015**. Gustavo's judgment of conviction was filed on September 26, 2019. (Appellant's Appendix Vol. II at pp. 461-463).[1] This Court has jurisdiction over Gustavo's appeal, which was timely filed on October 16, 2019. (II:464-467). See **NRS 177.015(1)(a).**

ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because Gustavo went to trial and was convicted of four Category A

[1] Hereinafter, citations to the Appellant's Appendix will start with volume number, followed by page number. For example, (Appellant's Appendix Vol. II at pp. 461-463) will be shortened to (II:461-463).

felonies: two counts of lewdness with a child under the age of 14 and two counts of sexual assault with a minor under 14 years of age. (II:461-463); See **NRAP 17(b)(2)**.

ISSUES PRESENTED FOR REVIEW

I. Prejudicial juror misconduct during deliberations was not harmless beyond a reasonable doubt.

II. Violation of the fair cross section requirement is structural error requiring reversal.

III. The district court failed to properly instruct the jury.

IV. Judicial misconduct undermined Gustavo's presumption of innocence.

V. Prosecutorial misconduct requires reversal.

VI. Cumulative error requires reversal.

STATEMENT OF THE CASE

On July 14, 2016, the State filed a criminal complaint charging Gustavo with two counts of lewdness with a child under the age of 14 and two counts of sexual assault with a minor under the age of 14. (I:1-2). The minor in question was Gustavo's 13-year-old stepdaughter, M.M. On September 30, 2016, after M.M. testified at Gustavo's preliminary hearing, the justice court bound Gustavo over to district court on all four charges. (I:7). On the same day, the State filed a four-count information in district court. (I:9-11).

At Gustavo's initial arraignment on October 12, 2016, he pled not guilty and invoked the 60-day rule. (II:470). Gustavo later waived the 60-day rule. (III:636). After several continuances, Gustavo's ten-day jury trial began on June 4, 2019. (II:491-III:508).

On the first day of trial (June 4, 2019), Gustavo made a fair cross-section challenge, requested an evidentiary hearing with the jury commissioner, and moved to strike the venire. (II:491-92). The court denied Gustavo's motion to strike based on the jury commissioner's prior testimony without calling the commissioner to testify. Id.

On the second day of trial (June 5, 2019), the court excused the first venire based on improper statements made by one of the veniremembers that may have tainted the panel. (II:493). Gustavo made a second fair cross-section challenge, requested an evidentiary hearing and moved to strike the second venire. (III:493). The court again denied Gustavo's motion without conducting an evidentiary hearing. Id.

On the seventh day of trial (June 12, 2019), the State moved to amend the information to conform with M.M.'s trial testimony and the court permitted the amendment over Gustavo's objection.

After closing arguments on the ninth day of trial (Friday, June 14, 2019), the jury retired to deliberate at 12:21 p.m. (III:506).

On the tenth day of trial (Monday, June 17, 2019), the jury reconvened at 10:30 a.m. (III:507). At 1:47 p.m., the court advised the parties that the jury had submitted a note reading: "We the jury have reached a decision on Counts I and IV, however, we are at an impasse on Counts II and III", the sexual assault counts. (X:2231). The parties agreed that the court would instruct the jury to "continue to deliberate." (X:2231). At 5:05 p.m., the jury returned guilty verdicts on all four counts. (III:507).

After the verdict had been delivered to the Court and most jurors had left, the jury foreman spontaneously advised the marshal that "it took Googling common sense to get them to reach a verdict." (X:2271). The very next day (June 18, 2019), the court advised the parties that the jury foreperson had googled the definition of "common sense" during deliberations. (III:509; X:2241). The court agreed to hold an evidentiary hearing to evaluate the impact of the juror misconduct. (X:2242).

On June 21, 2019, the court held an evidentiary hearing and received testimony from both the jury foreman and the marshal about the juror misconduct. (III:510-11). The court expanded the timeframe for filing a motion for new trial based on juror misconduct and set a briefing schedule. (III:511).

Gustavo timely filed his written motion for a new trial based on jury misconduct on July 8, 2019 (II:429-40), and the State filed its written opposition on July 22, 2019. (II:441-53). At the hearing on August 7, 2019, the court denied Gustavo's motion for a new trial. (III:512). The court issued written Findings of Fact, Conclusions of Law and Order on August 16, 2019. (II:454-60).

Gustavo appeared in district court for sentencing on September 25, 2019. (III:513). The court adjudicated Gustavo guilty of all four counts and sentenced him as follows:

- Count 1 (lewdness with a child): 10-to-life;
- Count 2 (sexual assault with a minor): 35-years-to-life;
- Count 3 (sexual assault with a minor): 35-years-to-life;
- Count 4 (lewdness with a child): 10-to-life.

The court ran Counts 1, 3, and 4 concurrent with Count 2, so that he would have an aggregate total sentence of 35-years-to-life, with 1,171 days credit for time served. (III:513).

The court entered Gustavo's Judgment of Conviction on September 26, 2019. (II:461-463). Gustavo timely appealed on October 16, 2019. (II:464-467).

STATEMENT OF THE FACTS

Meili Casillas Ortiz was a single mother with two children: a girl named M.M. (born in December of 2002) and a boy named J.J.M. (born in January of 2004). (VIII:1800,1849-50).

In 2013, Appellant Gustavo began dating Meili after becoming acquainted with her at the Mexican restaurant where she worked. (VIII:1851). In 2014 (when M.M. was 11 and J.J.M. was 10), Gustavo moved in with Meili and her two children. (VIII:1852). While together, Meili and Gustavo eventually had two children of their own, a boy named AO (born in October of 2014), and a boy named GA (born in February of 2016). (VII:1536-37; VIII:1850).

In 2015, when she was twelve, M.M. had surgery to remove her left ovary. (VII:1542;VIII:1759). The surgery left M.M. with three scars under her belly button which took a while to heal. (VII:1542).

In January 2016, when she was thirteen, M.M. started health class in school. In health class, M.M. learned about sexual intercourse, which she called "having relations". (VII:1686). During the 2015-2016 school year, a classmate in M.M.'s English class told M.M. that her stepdad had tried to abuse her. (VII:1688). M.M. learned that after her classmate made those claims, she never had to live with her stepfather anymore. (VII:1688).

During the summer of 2016, Meile was working six days a week at her brother's Mexican restaurant. (VIII:1858,1878). Gustavo worked on and off in construction laying tile. (VIII:1858). Twelve-year-old J.J.M. often went to work with Gustavo, learning how to lay tile. (VII:1686). Yet, thirteen-year-old M.M. was not working during this time period. (VII:1687). It was M.M.'s opinion that if she had to work, she would work with her mom at her uncle's restaurant. (VII:1687). But M.M. couldn't work there until she was sixteen, and M.M. did not think she should have to work anywhere else until she turned fifteen or sixteen. (VII:1687). M.M.'s refusal to work disappointed Gustavo, and on July 11, 2016, she and he argued about the fact that he did not want her in the house because she didn't work. (VII:1687).

On July 11, 2016, Gustavo drove Meili to her brother's restaurant so she could work her 3:00-to-10:00 p.m. shift. (VIII:1861). When Meili was at work, sometime before 5:00 p.m., she received a phone call from M.M. (VIII:1862-63). According to Meili, M.M. told her that Gustavo did not want her to live with them anymore, that he had forced a kiss on her, and that he had told M.M. she was going to "be with him" after he dropped Meili off at work the following day. (VIII:1862). Meili told M.M. that nothing was going to happen and to "act normal" and try to be with her brother until she

got home. (VIII:1864). When Gustavo came to pick her up at 10:00 p.m., Meili did not say anything to him about what M.M. had told her. (VIII:1864).

Meili did not speak with M.M. about what had happened until Gustavo and J.J.M. left for work the following morning at 8:00 a.m. (VIII:1865). When M.M. told Meili that Gustavo had also "touched" her, Meili called the police sometime after 9:00 a.m. (VIII:1865). Thereafter, M.M.'s stories about the "kiss" and the "touching" changed over time.

MM's Statement to Officer Kravetz

On the morning of July 12, 2016, Officer Matthew Kravetz responded to Meili's home at the Miracle Mile Trailer Park. (VII:1493,1515). Kravetz was still in "training" at that time, accompanied by his field training officer. (VII:1493-94). Kravetz interviewed M.M. at Meile's home. M.M. told Kravetz that "it started last June". (VIII:1931). Kravetz clarified with M.M. that it was "just touching". (VIII:1931). M.M. told Kravetz that it happened "about once a month for the last year". (VIII:1931). And M.M. shared with Kravetz that "*yesterday*, he kissed me". (VIII:1931) (emphasis added). When Kravetz specifically asked M.M. if Gustavo put his finger inside her, she nodded. (VIII:1931).

/ / /

M.M.'s Statement to Elizabeth Espinoza

Later that same day, forensic interviewer Elizabeth Espinoza interviewed both M.M. and her brother J.J.M. at the Southern Nevada Children's Assessment Center (CAC). (VIII:1941).

MM told Espinoza that *the day before*, Gustavo had "forced" a kiss on her mouth with his tongue and told her that "her time was up" and that "the next day he was going to have relationships with her." (VIII:1944). M.M. told Espinoza that after Gustavo had forcibly kissed her, she told her mother she was afraid because of what had transpired. (VIII:1945).

M.M. also told Espinoza about an incident in August 2015, when things first started to happen. (VIII:1946). M.M. said they were on the living room couch watching Planet of the Apes and Gustavo used her surgery as an excuse to check her wounds, then played with her zipper, put his hand under her pants, under her underwear, and used his palm to touch her "private part" or "vagina", as though wiping a window. (VIII:1946).

Finally, M.M. told Espinoza about an incident in the fourth week of June 2016 where Gustavo "grabbed her, threw her on the bed, pulled her shorts down, her underwear down, and that he kissed her private part with his mouth and his tongue", then put his index finger "in her vagina", and

then pulled down his pants and underwear but stopped when the baby started crying. (VIII:1946).

On cross-examination, Espinoza admitted that M.M. had never mentioned anything about oral penetration until *after* Espinoza asked the following suggestive question: "what part of his body, besides his fingers, touched your body?" (IX:1973-74). In response, M.M. said, "oh, his mouth" and claimed he began kissing her "part". (IX:1974). Espinoza was unaware that earlier in the day, officer-in-training Kravetz had similarly prompted M.M. to disclose digital penetration by asking if Gustavo had inserted his finger into her private part. (IX:1972).

On cross-examination, M.M. admitted that that she told Espinoza "it happened every single week or month." (VII:1646).

MM's Preliminary Hearing Testimony

At Gustavo's preliminary hearing on September 30, 2016, M.M. testified that in August of 2015, Gustavo touched her vagina under her clothes, skin on skin, with his hand flat like "wiping a table". (IX:2011-12). When asked "how this stuff started", M.M. testified that "[h]e told me he was going to check my surgery, but didn't, he went further down." (IX:2011). M.M. testified that the August 2015 incident occurred in the living room on the couch. (IX:2011). It was in the afternoon, and J.J.M. was

in his bedroom. (IX:2022). M.M. testified that "[h]e told me not to tell my mom because he was going to go to jail." (IX:2012).

M.M. testified that the second incident occurred in June 2016 while she was sitting on Gustavo's and her mother's bed. (IX:2014). Although M.M. had previously accused Gustavo of grabbing her and throwing her on the bed before engaging in oral and digital penetration (VIII:1946), M.M. testified that she laid down because Gustavo threatened to "do something to [her] brother" if she did not lay down. (IX:2015). M.M. testified that Gustavo's hands touched her vagina on the inside with his finger and that Gustavo's mouth touched her private part. (IX:2015). M.M. testified that she tried to prevent him from touching her by falsely telling him that she was on her period. (IX:2015). M.M. testified that Gustavo threatened "to take my baby brothers away and that he was going to do something bad to my brother and my mom" if she told anyone (IX:2016).

Finally, M.M. testified that on July 11, 2016, when they were in the living room, Gustavo told her "her time was over" and she had to "have sex with him". (IX:2016-17). When M.M. refused, Gustavo told her if she did not have sex with him, "he was going to kick [her] out of the house . . . because [she] didn't work or [she] was no one in the world." (IX:2017). Then, Gustavo kissed her and his "mouth and tongue touched [her] mouth."

(IX:2018). After Gustavo left the house, M.M. "immediately called [her] mom and told her everything that had happened." (IX:2018).

M.M.'s Trial Testimony

At trial, M.M.'s story changed significantly. M.M. testified that Gustavo did not kiss her on July 11, 2016, the day she called her mom at work. (VII:1582). Instead, M.M. claimed that July 11th was the day that Gustavo had inserted his finger into her vagina and performed oral sex on her in the master bedroom. (VII:1581). The State attempted to rehabilitate M.M.'s testimony by reminding her that at a prior hearing she testified that the incident of digital and oral sex "actually happened a couple of weeks before [she] told her mom." (VII:1578). However, M.M. stuck to her new story at trial. (VII:1581-82).

M.M. testified that after the digital and oral sex, Gustavo wiped his mouth with a tissue,[2] received a phone call and went out of the room. (VII:1574). Then, Gustavo allegedly told her that the next day, he was going to force her to have sex with him and that he would throw her out of the house if she did not want it. (VII:1577). After that, she called her mom at work. (VII:1578).

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[2] However, M.M. did not tell police about the tissue that Gustavo allegedly used to wipe his mouth, nor did M.M. keep the tissue to give to police. (VIII:1731).

At trial, M.M. claimed that the kissing incident actually happened a week or two earlier when she was in the living room with her youngest baby brother sleeping in her arms. (VII:1582). After brushing his teeth, Gustavo sat down next to her and asked if she "ever have had [her] first kiss" and she said "no" (VII:1582). M.M. testified that Gustavo asked her if she would "like to have one" and she said "no". (VII:1582). M.M. testified that Gustavo asked her for a kiss, but she only gave him a peck on the cheek. (VII:1582). In response, Gustavo kissed her with his lips and tongue without her consent. (VII:1583). When Gustavo stood up, she screamed at him, "Why do you kiss me" and he didn't say anything. (VII:1583). M.M. testified that Gustavo told her she had to obey him and she replied, "I don't obey anyone except my mom." (VII:1583). When Gustavo told her that she was "his woman", M.M. told him, "I'm nobody's woman." (VII:1583). Then, Gustavo told her she was a "lazy person" because she didn't have a job, and that "your mom works, your brother works, but you don't do anything." (VII:1583). Gustavo threatened to kick her out of the house, grabbing her by the hair to make her leave. (VII:1583). M.M. testified that this was a couple of weeks before she told her mom. (VII:1584).

As for the August 2015 incident, M.M. testified that the incident began not with Gustavo asking her to check her scars, but with Gustavo

asking her to sit on his lap. (VII:1546). M.M. testified that after she sat on his lap, Gustavo started touching her on her stomach area under her clothes, asking if she "liked the way he touched [her]". (VII:1547). According to M.M., Gustavo did not tell her why he was touching her stomach area. (VII:1547). In fact, Gustavo did not mention anything about checking her surgery scars until "after" he began touching her. (VII:1547). Then, M.M. claimed that Gustavo put his hand inside her pants and touched her vagina *over her underwear* like "wiping a table" (VII:1549-50), and that it was not "skin touching . . . skin" as she'd previously testified. (IX:2012).

Additional Evidence at Trial

To corroborate M.M.'s version of events, the State presented testimony from M.M.'s brother, J.J.M. who testified that M.M. told him Gustavo had "raped her", and told him about a time that Gustavo called her into the room "to show her his parts". (VIII:1834). M.M. testified that she told J.J.M., "I didn't like to be with Gustavo anymore because he was doing certain things that I wasn't okay with doing, and he asked me what kind of things, and I told him sexually related things, and that's all." (VII:1692).

To establish consciousness of guilt, the State argued that Gustavo tried to "flee" when he drove home with J.J.M. on July 12, 2016 and saw police vehicles parked near the family's mobile home. (IX:2163). However,

this argument was misleading because Gustavo, born in Honduras, was likely avoiding police due to immigration issues. (IX:2092).

Gustavo presented evidence that M.M. had a motive to fabricate her sexual abuse claims, which explained why her allegations kept changing. M.M. admitted that Gustavo would call her "a useless person because [she] didn't work, because [she] didn't do anything. He would always compare [her] with his family in Honduras, telling [her] that they were better than [her], that [she] was a dumb girl." (VII:1700). And M.M. admitted that when she called her mom on July 11, 2016, she "wanted to stop living with Gustavo. I didn't want to see him anymore." (VII:1695).

In closing, Gustavo argued that M.M. fabricated her sexual abuse claims to get rid of him, because M.M. knew from speaking with her classmate that if she accused Gustavo of sexual abuse he would be gone. (IX:2186-2187). Gustavo pointed out that M.M.'s stories about the lewdness and sexual assault counts changed significantly over time. (IX:2189-92). Gustavo also argued that M.M.'s sexual assault claims lacked credibility because the idea of oral and digital penetration were initially fed to her by officer-in-training Kravetz and forensic examiner Espinoza. (IX:2187). Despite the foregoing arguments, the jury convicted Gustavo of all four charges.

SUMMARY OF THE ARGUMENT

Gustavo is currently serving 35-years-to-life in the Nevada Department of Corrections for crimes that he never committed after a jury trial that was replete with constitutional violations. First, Gustavo's two convictions for sexual assault must be reversed because jurors engaged in prejudicial misconduct during deliberations by googling the term "common sense" to break a deadlock on those counts. Second, Gustavo is entitled to a new trial because the jury that tried him was selected from a venire that was not representative of a fair cross section of the community. Third, jury instruction errors lowered the State's burden of proof and rendered Gustavo's trial fundamentally unfair. Fourth, the district court undermined Gustavo's presumption of innocence. And fifth, prosecutorial misconduct requires reversal. Whether considered alone or together, these errors violated Gustavo's constitutional right to a fair trial, requiring reversal.

ARGUMENT

I. Prejudicial juror misconduct during deliberations was not harmless beyond a reasonable doubt.

The district court erred by denying Gustavo's motion for a new trial after jurors googled the definition of "common sense" shortly before verdict after reaching an "impasse" on both counts of sexual assault, in a case where the State emphasized common sense as a basis for conviction. This jury

misconduct violated Gustavo's state and federal constitutional rights to due process and a fair trial, requiring reversal of his two sexual assault convictions because it was not harmless beyond a reasonable doubt. See **United States v. Lawson**, 677 F.3d 629 (4th Cir. 2012) (jurors' unauthorized use of a dictionary during jury deliberations implicates a "defendant's Sixth Amendment right to a fair trial . . . and the sanctity of the jury and its deliberations"); **Barker v. State**, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979) (recognizing "the confrontation clause and due process implications of juror misconduct"); see also **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.**

To prevail on his motion for a new trial based on juror misconduct, Gustavo needed to present the district court with "admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." **Meyer v. State**, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003)). As to the second element, "[p]rejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." **Id**. at 566, 80 P.3d at 456. When evaluating prejudice, the district court may consider a variety of factors, including but not limited to "'how the material was introduced to the jury,' 'the length of time it was discussed by the jury,' 'the timing of its

introduction' and 'whether the information was ambiguous.'" **Jeffries v. State**, 113 Nev. 331, 335, 397 P.3d 21, 26-27 (2017) (quoting **Meyer**, 119 Nev. at 566, 80 P.3d at 456). The district court must objectively evaluate "whether the average, hypothetical juror would be influenced by the juror misconduct." **Id**. at 336, 397 P.3d at 27 (quoting **Meyer**, 119 Nev. at 566, 80 P.3d at 456).

"This court will uphold a district court's denial of a motion for new trial based on juror misconduct absent an abuse of discretion." **Id.** (citing **Meyer**, 119 Nev. at 561, 80 P.3d at 453). Although "this court will not disturb the district court's factual findings absent clear error", it will review the district court's conclusions about the "prejudicial effect" of juror misconduct de novo. **Id**. The "proper standard to be applied in light of the confrontation clause and due process implications of juror misconduct is that a new trial must be granted, unless it appears, beyond a reasonable doubt, that no prejudice has resulted." **Barker**, 95 Nev. at 313, 594 P.2d at 721.

In this case, the district court correctly found that juror misconduct occurred during deliberations – an error of constitutional dimension:

> The evidentiary hearing in the case established the occurrence of juror misconduct. The testimony of the jury foreperson was credible. That testimony established that, during deliberations, at least one juror used their cell phone to complete a google search for the definition of "common sense." That definition was then shared with all the other jurors.

(II:459). The foreperson testified that on the second day of deliberations, jurors conducted Google research on the term "common sense". (X:2260). The foreperson believed "there was a few people that looked it up at the time." (X:2261). The foreperson testified that, "[w]hen the definitions were read back, they were read back by a couple of different people. And I know that one of them was female, the other one I don't remember." (X:2261). "What they read was, obviously when you look up the definition of something, there's different phrases for that. . . And those were – those were the definitions that were read back." (X:2263). Finally, the foreman admitted that, "[w]e had come to a decision on [counts] 1 and 4 before [lunch]" and that "the Google [search] was done *toward the end of deliberation.*" (X:2262) (emphasis added). It was undisputed that the court had received a note earlier that same day (at 1:20 p.m.) advising that, "We the jury have reached a decision on Counts 1 & 4 *however we are at an impasse on Counts 2 & 3*" -- the sexual assault counts. (X:2231;2297) (emphasis added). It was also undisputed that "common sense" was central to both parties' closing arguments. (X:2241).

Although the district court correctly found juror misconduct in this case, it erred when it ruled beyond a reasonable doubt that Gustavo was not prejudiced by that misconduct. Instead of considering the factors identified

in **Meyer** and **Jeffries** (*e.g.*, how the definition of "common sense" was introduced to the jury, how long the definition of "common sense" was discussed by the jurors before rendering a verdict, and the timing of the introduction), the court relied on cases from "[s]everal U.S. Circuit Courts"[3] to conclude that there could be no prejudice based on the "inconsequential" nature of the term that was searched:

> The term that the jury googled in this case, "common sense," was not a term contained in the charges against Defendant, nor was it a term found in the definitions of any of the charges against Defendant. Rather, in every case, the jury is instructed that they can and should uses their common sense during deliberations. The term searched was inconsequential and extraneous to the finding of guilt. Furthermore, the search did not occur until after the jury had already found Defendant guilty of two of the counts. Courts have affirmed convictions on more serious misconduct by jurors, involving either more extensive research by jurors, or research of terms more central to the defense theory of the case. As such, based on the nature and circumstances of the jury misconduct in this case, this Court is satisfied beyond a reasonable doubt that no prejudice can be found from the search of "common sense."

(II:459). By focusing solely on the nature of the term searched, the district court ignored the fact that the jury had reached an "impasse" on the two sexual assault counts *before* the jurors researched "common sense", and that

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[3] See (II:458) (citing **United States v. Gillespie**, 61 F.3d 457, 459 (6th Cir. 1995), **United States v. Williams-Davis**, 90 F.3d 490, 503 (D.C. Cir. 1996), **United States v. Cheyenne**, 855 F.2d 566, 567 (8th Cir. 1988) and **Marino v. Vasquez**, 812 F.2d 499, 506 (9th Cir. 1987)). Importantly, none of these cases involved a situation where the jury found itself deadlocked prior to conducting prohibited research.

the search was conducted "toward the end of deliberation" on those two counts.

The district court's finding also ignored the fact that the State's closing argument repeatedly and emphatically asked jurors to use their "common sense" to find Gustavo guilty of all four charges:

- "[A]long with that reasonable doubt instruction, you also have this one that goes hand-in-hand. It's your commonsense instruction. It tells you that although you are to consider the evidence in the case, you don't check your common sense at the door. You go back into the jury deliberation room and you maintain everything that brought you here. That common sense as reasonable men and women." (IX:2153-54).

- "So that commonsense instruction again tells you that you can draw these reasonable inferences from the evidence." (IX:2154).

- "So Ladies and Gentlemen, there was some confusion from [M.M.] about the order of events . . . We'd submit, Ladies and Gentlemen, that the State's proven beyond a reasonable doubt, even if she's now not certain on the order. So I want to talk to you about that because that goes to your common sense, Ladies and Gentlemen. Common sense is absolutely important in every single case, but particularly in a case like this. The reason for that, Ladies and Gentlemen, is that your common sense is going to apply to absolutely everything. It applies to witness testimony, it applies to items of evidence, for instance the videos that you saw in this particular case, and it applies to the arguments of the attorneys, all of the information that you could have. So the information you have in this case, again Ladies and Gentlemen, is that the events and how the events were described is the same, it's just the order that has changed." (IX:2175).

- "You know. . . if people tell stories differently over time, use your common sense on that one, right?" (IX:2176).

- "So, Ladies and Gentlemen, when you use your common sense and you take everything together in this case, the State has proven to you beyond a reasonable doubt that the Defendant did all of these things to [M.M.]." (IX:2176)

- "And, ladies and gentlemen, when you apply your common sense and you listen to the things that [M.M.] said time after time after time, we ask you, when you go back to deliberate, to take those things into consideration, to find the Defendant guilty of each and every count with which he's charged." (IX:2177).

Notably, when the district court originally agreed to hold an evidentiary hearing on the jury misconduct, the court recognized that "common sense" was central to both side's closing arguments to the jury. As the court explained, "I mean everybody – both sides were, you know, heavily emphasizing common sense." (X:2241). Yet, the district court ignored the centrality of the parties "common sense" arguments when it found the unlawful Google search not to be prejudicial.

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This was not a case of overwhelming evidence. Not only were there multiple inconsistencies[4] in M.M.'s story, but she had both motive and opportunity to fabricate her claims. (IX:2186-87). M.M. admitted that Gustavo would berate her for not working and even testified that she did not want to live with him anymore. (VII:1695,1700). M.M. had just learned about sexual intercourse in health class and recently discovered that a classmate got rid of her own stepfather by making abuse allegations. (VII:1686,1688). As to the two sexual assault counts, Gustavo established on cross examination that M.M. never alleged *any* digital or oral penetration until *after* officer-in-training Kravetz and forensic examiner Espinoza put those ideas into her head. (IX:1972-74, 2187). Finally, we know that jurors

[4] The biggest inconsistency involved the timing of the alleged abuse and M.M.'s initial disclosure of that abuse to her mom and the police. When M.M. called her mom on July 11, 2016, she claimed that Gustavo had kissed her on the mouth that day and told her she was going to "be with him" the following day. (VIII:1862). On July 12, 2016, M.M. told this same story to officer-in-training Kravetz and forensic examiner Espinoza. (VIII:1931,1944). At preliminary hearing, M.M. reiterated that Gustavo's kiss and threat to have sex with her was what prompted her to tell her mom about the abuse on July 11, 2016. (IX:2016-2018). Yet, at trial, M.M. claimed that the reason she called her mom on July 11, 2016 was because on that day, Gustavo had orally and digitally penetrated her and said he would force her to have sex with him the following day. (VII:1574-78). At trial, M.M. claimed that the kiss had occurred "a couple of weeks" earlier. (VII:1578). Other inconsistencies and embellishments are set forth in Gustavo's Statement of Facts at pp. 8-14, supra.

were deadlocked as to the two sexual assault counts prior to the juror misconduct. (X:2231).

Considering the totality of the circumstances, "there is a reasonable probability or likelihood that the juror misconduct affected the verdict" by coercing the holdout juror(s) to use their "common sense" to convict Gustavo of the two counts of sexual assault. See **Meyer**, 119 Nev. at 566, 80 P.3d at 456. Although the definition of "common sense" may seem obvious – indeed, it may seem to be a matter of common sense – the act of Googling this "obvious" term and then sharing it with the entire jury panel in order to prove a point could certainly be seen as be coercive to the average hypothetical holdout juror or jurors. See **Meyer**, 119 Nev. at 566, 80 P.3d at 456. Again, it is undisputed that the term was searched "toward the end of deliberation" *after* the jury reached an "impasse" on the sexual assault counts. For that reason, the court abused its discretion when it found the jury misconduct to be "harmless beyond a reasonable doubt." (X:2284).

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Accordingly, Gustavo's two sexual assault convictions must be reversed and remanded for a new trial.[5]

II. Violation of the fair cross section requirement is structural error requiring reversal.

Gustavo's state and federal constitutional rights were violated when the district court improperly denied his fair-cross-section challenges after he established prima facie fair-cross-section violations, without requiring the State to demonstrate that the disparities were justified by a significant state interest, and without holding any evidentiary hearing. **U.S. Const. Amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; NRS 6.010; NRS 6.045(3)**. Gustavo contends that the district court's error in failing to hold the State to its burden was structural and requires a new trial. See **U.S. v. Rodriguez-Lara**, 421 F.3d 932 (9th Cir. 2005) ("selection of a grand or petit jury in violation of . . . the fair cross-section guarantee is

[5] Citing **NRS 50.065**, the State argued that the district court could not consider the "jury foreperson's statement to this Court's marshal that 'it took googling common sense to get [the jury] to reach a verdict." (II:449) (alteration in original). As a result, the district court did not reference this statement in its decision. (II:457-58). Yet, in **Bowman v. State**, 132 Nev. 757, 387 P.3d 202 (2016), this Court found prejudice based, in part, on the fact that "jurors later disclosed to counsel that they relied on [their] experiments – either by swaying them to change their votes or by reinforcing their previously held positions before rendering a verdict." Therefore, under **Bowman**, the district court could arguably have considered the court marshal's testimony that "it took googling common sense . . . to reach a verdict" as additional evidence of prejudice.

structural error that entitles a defendant to relief without a demonstration of prejudice").[6] Yet even if this Court does not find a structural error, at a minimum, Gustavo is entitled to a remand so that the district court can hold an evidentiary hearing pursuant to **Valentine v. State**, 135 Nev. Adv. Op. 62, 454 P.3d 709 (2019).

This Court "applies a de novo standard of review to constitutional challenges" such as the one at bar. **Grey v. State**, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008); **US v. Torres-Hernandez**, 447 F.3d 699, 703 (9th Cir. 2006) (reviewing Sixth Amendment fair-cross-section challenges de novo).

A. Procedural History Related to Fair-Cross-Section Challenges

Prior to trial, Gustavo made two fair-cross-section challenges to the venires, arguing that two distinctive groups in the community (African Americans and Hispanics) were not fairly representative in the venires as compared to their representation in Clark County, which violated the Sixth and Fourteenth Amendments. (III:713-725; IV:853-54).

On the first day of trial, Gustavo provided the district court with then-current U.S. Census figures for Clark County:

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[6] **Rodriguez-Lara** was overruled on other grounds by **U.S. v. Hernandez-Estrada**, 749 F.3d 1154 (9th Cir. 2014) (rejecting the absolute disparity test for fair cross-section challenges). However, it remains good law for the propositions cited herein.

Race and Hispanic Origin

White alone, percent	70.3%
Black or African American alone, percent (a)	12.5%
American Indian and Alaska Native alone, percent (a)	1.2%
Asian alone, percent (a)	10.5%
Native Hawaiian and Other Pacific Islander alone, percent (a)	0.9%
Two or More Races, percent (b)	4.7%
Hispanic or Latino, percent (b)	31.3%
White alone, not Hispanic or Latino, percent	42.7%

(III:713 & Court's Exhibit 1). Gustavo asked the court to take judicial notice of these figures, which the court made "part of the court record". (III:714).

As to the first venire, Gustavo primarily argued that African Americans were not fairly and reasonably represented in the venire as compared to their representation in the community because, out of 82 jurors in the venire, only 4 were African American,[7] which demonstrated a "61 percent comparative disparity." (III:715). Because no one in the venire had self-identified as Hispanic or Latino, Gustavo determined that, of the 17 jurors who self-identified as "other", 10 had Hispanic or Latino-sounding surnames. (III:716). Estimating that 10 of the 82 jurors were potentially Hispanic or Latino, Gustavo advised the court that this too demonstrated a "61 percent comparative disparity." (III:716).

[7] Gustavo obtained his information about the racial/ethnic composition of the jury from the "reporting section on the bio form attorney's list that is provided as part of the jury selection process that does have race as one of the questions." (III:713).

Gustavo argued that the reason African Americans and Hispanic jurors were being systematically excluded from the venire was because the jury commissioner was not currently complying with the jury selection requirements set forth in **NRS 6.045(3)**. Since 2017, that statute has required potential jurors to be selected from four (4) sources, including from a list of individuals receiving unemployment benefits from the Employment Security Division of the Department of Employment Training and Rehabilitation ("DETR"). (III:717-18). However, the jury commissioner was not complying with that requirement. Therefore, Gustavo asked the district court to dismiss the venire for violation of the Sixth and Fourteenth Amendment's fair-cross-section requirements. (III:718). Gustavo also asked to question the jury commissioner about her failure to comply with the jury selection statute. (III:718).

The district court advised that it was aware that the jury commissioner was not complying with **NRS 6.045(3)**. (III:718). The district court further expressed its understanding, based on testimony given in previous cases, that the jury commissioner "can't comply" with the statute, and was not currently selecting jurors from the list of individuals receiving unemployment benefits as required by **NRS 6.045(3)**. (III:724-26). The district court also advised that in a prior case, it had "issue[s]" where a juror self-identified on the

questionnaire as white but when questioned in court, he said he was African American. (III:722). As a result of the court's experience in that prior case, the court was reluctant to rely on the bio form attorneys list as evidence in this case. (III:722). Ultimately, the court denied Gustavo's fair-cross-section challenge without an evidentiary hearing, telling him:

> So based on what testimony I have previously heard from the commissioner, I don't think that certainly any – bringing her in again to reiterate what she does, since we're all aware of what criteria she takes, and the fact that this doesn't – it doesn't statistically meet it, but on the other hand, the most serious criteria is that we draw from a population, if you will, using a cross section that doesn't discriminate in any manner, and that's what we certainly want to do, and do our best to do. So I'm denying the motion for a new panel.
>
> And again, just for the record, a new panel we could be doing this all day, because the next panel, even though that may be closer, would still have the flaw, if you will, regarding the statute passed by the legislature, and so – okay.

(III:725).

The following day, the court granted a motion by the State to dismiss the first venire based on improper statements that were made by one of the veniremembers during jury selection. (IV:844,846). As a result, a second venire was brought in.

After reviewing the new bio form attorney's list of jurors in the second venire, Gustavo made a second fair-cross section challenge. (IV:853). Gustavo argued that Hispanic or Latino jurors were not fairly and

reasonably represented in the venire as compared to their representation in the community. (IV:853). There were 84 people in the second venire. (IV:853). Gustavo indicated that, just as before, **zero people** self-identified as Hispanic or Latino. (IV:854). Yet, as before, some of the jurors who self-identified as "other" had Hispanic-sounding last names. (IV:854). However, even if all 10 of the people who self-identified as "other" were actually Hispanic or Latino, there would still be a 61% comparative disparity between the number of Hispanic or Latino people in the venire and the community at large. (IV:854). Gustavo then incorporated by reference all of his other fair-cross-section arguments from the first day of trial and requested an evidentiary hearing with the jury commissioner. (IV:854). The court denied Gustavo's motion, incorporating by reference, its reasoning from the previous day. (IV:854). As set forth herein, the district court erred when it denied Gustavo's fair cross-section challenges after Gustavo established prima facie violations, without requiring the State to justify the disparities and without holding an evidentiary hearing.

B. Gustavo is Entitled to a New Trial to Remedy the Fair-Cross-Section Violation.

An accused "[i]s entitled to a venire selected from a fair cross section of the community under the Sixth and Fourteenth Amendments of the United States Constitution." **Williams v. State**, 121 Nev. 934, 939, 125 P.3d 627,

631 (2005) (citing **Evans v. State**, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996)). To satisfy the Sixth and Fourteenth Amendments, "'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" **Id.** at 939-40, 125 P.3d at 631 (citing **Taylor v. Louisiana**, 419 U.S. 522, 538 (1975)).

To demonstrate a prima facie violation of the fair-cross-section requirement, a defendant must show:

> "(1) that the group alleged to be excluded is a *'distinctive' group* in the community; (2) that the *representation of this group in venires* from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is *due to systematic exclusion* of the group in the jury-selection process."

Williams, 121 Nev. at 940, 125 P.3d at 631 (quoting **Evans**, 112 Nev. at 1186, 926 P.2d at 275) (emphasis in original); see also **Duren v. Missouri**, 439 U.S. 357, 364 (1979). To determine whether the representation of a distinctive group in venires is "fair and reasonable", Nevada courts will compare "the absolute and comparative disparity between the actual percentage in the venire and the percentage of the group in the community." **Williams**, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9. To determine whether systematic exclusion has been shown, Nevada courts consider whether "the underrepresentation of a distinctive group is 'inherent in the particular jury-

selection process utilized.'" **Valentine**, 454 P.3d at 713-14 (quoting **Evans**, 112 Nev. at 1186-87, 926 P.2d at 275).

Once the defendant has established a prima facie violation of the fair-cross-section requirement, the burden shifts to the State "to show that the disparity is justified by a significant state interest." **Evans**, 112, Nev. at 1187, 926 P.2d at 275. In this case, Gustavo established a prima facie violation of the fair-cross-section requirement for both the first and second venires and the district court committed a structural error by failing to require the State to carry its burden, requiring reversal.

As to the first element, it is undisputed that African-Americans and Hispanic-Latinos are distinctive groups in the community. **Valentine**, 135 Nev. Adv. Op. 62 at __, 454 P.3d at 714.

As to the second element – whether the representation of those groups in the venires was fair and reasonable – Gustavo established that in both the first and second venires, these groups were not fairly and reasonably represented. **Id**. (citing **Williams**, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9 (recognizing that comparative disparities over 50% indicate that representation is likely not "fair and reasonable"). Using the bio form attorney's lists provided by the court, Gustavo demonstrated a 61% comparative disparity for *both* African Americans and Hispanic or Latino

jurors in the first venire. (III:715-716). Using the same source, Gustavo demonstrated a *minimum* 61% comparative disparity for Hispanic or Latino jurors in the second venire. (IV:854). Because no one on the bio form attorneys list in the second venire self-identified as Hispanic or Latino, Gustavo's calculations were based on the assumption that every single person who self-identified as "other" was actually Hispanic or Latino. As a result, if Gustavo's assumption was incorrect, the comparative disparity for the second venire would have been even higher than 61% for Hispanic or Latino jurors. Therefore, Gustavo satisfied the second element as well.

As to the third element – systematic exclusion – Gustavo "did more than make a general assertion of systematic exclusion." **Valentine**, 135 Nev. Adv. Op. 62 at __, 454 P.3d at 714. Gustavo made specific allegations that the jury commissioner from the Eighth Judicial District Court was failing to comply with **NRS 6.045(3)** and the district court even agreed that the jury commissioner was violating that statute. (III:717-18).

As **NRS 6.045(3)** provides,

> The jury commissioner shall, for the purpose of selecting trial jurors, compile and maintain a list of qualified electors from information provided by:
>
> (a) A list of persons who are registered to vote in the county;
> (b) The Department of Motor Vehicles pursuant to NRS 482.171 and 483.225;

(c) **The Employment Security Division of the Department of Employment, Training and Rehabilitation pursuant to NRS 612.265**[8]; and
(d) A public utility pursuant to NRS 704.206.

NRS 6.045(3) (emphasis added).

The jury commissioner's failure to comply with **NRS 6.045(3)** was prima facie evidence of systematic discrimination. In 2017, Nevada's Legislature passed Assembly Bill 207, which amended **NRS 6.045** to require that jury commissioners maintain a list of qualified electors from *four different sources*, including a list of individuals receiving unemployment benefits from the DETR. See Legislative Counsel's Digest to Assembly Bill 207, 79th Leg. (Nev. 2017), as enrolled.[9] Before AB 207 was enacted, Clark County's jury commissioner would only select jurors from the Department of Motor Vehicles (DMV) and from Nevada Energy records. See Minutes of

[8] See **NRS 612.265(10)** ("Upon the request of any district judge or jury commissioner of the judicial district in which the county is located, the Administrator shall, in accordance with other agreements entered into with other district courts and in compliance with 20 C.F.R. Part 603, and any other applicable federal laws and regulations governing the Division, furnish the name, address and date of birth of persons who receive benefits in any county, for use in the selection of trial jurors pursuant to NRS 6.045. The court or jury commissioner who requests the list of such persons shall reimburse the Division for the reasonable cost of providing the requested information.").

[9] Available online at: https://www.leg.state.nv.us/Session/79th2017/Bills/AB/AB207_EN.pdf (last accessed 5/18/2020).

the Assembly Committee on Judiciary, 79th Leg. (Nev., March 3, 2017) at p. 6.[10] Assembly Bill 207 was designed to "expand the pool to include registered voters, the DMV, the Employment Security Division of the Department of Employment, Training and Rehabilitation, and a public utility, which is currently NV Energy." Id.

When Robert T. Eglet testified in support of AB 207 on behalf of the Nevada Justice Association, he explained that the purpose of the bill was to remedy the systematic exclusion of minorities in jury pools throughout Nevada. See Minutes of the Assembly Committee on Judiciary, 79th Leg. (Nev., March 3, 2017) at pp. 7-9. As Mr. Eglet testified:

> In the last census completed, the population of Clark County was 11 percent African American and 29 percent Hispanic. Yet the number of African Americans and Hispanics we see in our jury pools are not representative of these percentages. Many jury panels I have seen over the past 30 years had virtually no African Americans in the panels and those that had some representation had nowhere near the percentages that represent Clark County's African-American population. In my experience, African Americans in the jury pools are closer to 2 to 4 percent of their population. It is the same for the Hispanic community.

Id. at p. 7. Mr. Eglet went on to explain that, "By passing this bill and requiring jury commissioners to draw from multiple and expressly defined

[10] Available online at: https://www.leg.state.nv.us/Session/79th2017/Minutes/Assembly/JUD/Final/344.pdf (last accessed 5/18/2020).

source pools, this increases the likelihood of a jury pool that is reflective of its own community." Id. at p. 8.

Without question, Gustavo established a prima facie violation of the fair-cross-section requirement. The State was, therefore, required to demonstrate that the "disparity [was] justified by a significant state interest." **Valentine**, 135 Nev. Adv. Op. 62 at __, 454 P.3d at 714. Yet, the district court did not require the State to present any evidence to justify the disparity. Instead, the court relied on its own prior experiences with the jury commissioner to determine that she "can't comply" with the statute requiring her to select jurors from the list of individuals receiving unemployment benefits. (III:724-26). This was error. Whether the jury commissioner "could" or "could not" comply with the statute is legally irrelevant – what matters is whether a "*significant state interest*" existed to explain why the jury commissioner could not comply with the statute two years after it was enacted. As set forth in **Duren**, reversal is required if the State is unable to identify a "significant state interest" to warrant the systematic exclusion of a distinctive group of jurors. See **Duren**, 439 U.S. at 358 (reversal required where women were systematically excluded from jury pool because they were exempted from jury service if they did not wish to serve, and the state failed to identify a "significant state interest" to justify

the blanket exemption). Here -- after finding that the jury commissioner was in violation of a statute designed to prevent the systematic exclusion of minority jurors from the jury pool -- the court failed to require the State to identify a "significant state interest" to justify that violation. The court also failed to dismiss the second venire.[11] Reversal is required to remedy this structural error. See, e.g., **Cooper v. State**, 134 Nev. 860, 864, 423 P.3d 202, 206 (2018) (holding in the analogous **Batson** context that "when a Batson objection is erroneously rejected at step one and the record does not clearly reflect the State's reasons for its peremptory strikes . . . this court cannot proceed to steps two and three for the first time on appeal" and reversal is required).

*C. In the Alternative, Gustavo is Entitled to a Remand and Evidentiary Hearing Pursuant to **Valentine v. State**.*

Gustavo contends that, since the burden had already shifted to the State to justify the prima facie fair-cross-section violation, a post-hoc evidentiary hearing cannot remedy the district court's structural error. See, e.g., **Cooper**, 134 Nev. at 865, 432 P.3d at 207 (where "district court clearly erred when it terminated the Batson analysis at step one and . . . the record

[11] Generally, the remedy for a fair-cross-section violation is a new venire. **Williams**, 121 Nev. at 943, 125 P.3d at 633. However, Gustavo was not given a new venire and his jury was empaneled from the second venire.

does not clearly support the denial of Cooper's objection, we reverse the judgment of conviction and remand to the district court for a new trial").

However, if this Court disagrees that Gustavo established a prima facie case, then he is entitled to an evidentiary hearing. For instance, it appears that the district court may have denied Gustavo's fair-cross-section challenge, in part, because it did not believe the bio form attorneys lists were accurate, based on the court's prior experience with one juror in an earlier case. (III:722). However, this was no basis to deny Gustavo's challenges outright, particularly where documentary evidence showed that there were no individuals in either venire who self-identified as Hispanic or Latino, and the court could easily have asked the jurors once they came into the courtroom to confirm whether anyone was Hispanic or Latino. Plainly, an evidentiary hearing was necessary before the court could deny Gustavo's fair-cross-section challenges on that basis. See, e.g., **Valentine**, 135 Nev. Adv. Op. 62 at __, 454 P.3d at 714 ("an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair cross section requirement").

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III. The district court failed to properly instruct the jury.

Gustavo is entitled to a new trial because jury instruction errors violated his state and federal constitutional rights to due process of law, a fair trial and the right to present a defense. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.**

The district court is required to ensure that a jury is fully and correctly instructed on the law. **Crawford v. State**, 121 Nev. 744, 755, 121 P.3d 582, 589 (2005); **NRS 175.161**. This Court generally reviews a district court's decision regarding jury instructions "for abuse of discretion or judicial error." **Nay v. State**, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007)). However, this Court conducts de novo review when determining whether a particular instruction is a "correct statement of the law". **Id**. If this Court finds that the district court erred in settling jury instructions, it applies harmless error analysis. See **Barnier v. State**, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003); **Crawford**, 121 Nev. at 756, 121 P.3d at 590 (applying constitutional harmless error standard).

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A. Jury Instruction No. 9 – the "non-contact" instruction

Over Gustavo's objection, [12] the court gave Jury Instruction No. 9, which read as follows: "A lewd or lascivious act does not require any physical contact between the perpetrator and the victim." (II:408).

Instruction No. 9 (the "non-contact" instruction) was premised on **State v. Catanio**, 120 Nev. 1030, 1036, 102 P.3d 588, 592–93 (2004), a case where the defendant had "no physical contact" with the alleged victims, but grand jury testimony indicated that he "offered the boys money to masturbate in his presence" and brought two boys "separately to his apartment where he gave them alcohol, played pornographic videos and invited the boys to masturbate." In **Catiano**, the district court initially dismissed the lewdness charges because Catiano never actually touched the boys. However, the Nevada Supreme Court reinstated the charges, because the defendant had allegedly *instigated* the lewd act of masturbation:

> the Nevada statutory language providing that a lewd act be done "upon or with" a child's body clearly requires specific intent by the perpetrator to encourage or compel a lewd act in order to gratify the accused's sexual desires, but does not require physical contact between the perpetrator and the victim. Thus, a perpetrator who threatens, coerces or otherwise instigates a lewd act but has no physical contact with the victim may nevertheless satisfy the elements of NRS 201.230.

Catanio, 120 Nev. at 1036, 102 P.3d at 592.

[12] See generally (IX:2069-74), including objection, argument and ruling.

Gustavo objected to Instruction No. 9 because it highlighted and vouched for M.M.'s testimony, was overly prejudicial and confusing, and was "not relevant to these proceedings" because there were no allegations that M.M. was forced to "masturbate" herself. (IX:2069-72).

Although forced masturbation was not at issue in this case, the State argued that the "non-contact" instruction was proper because "[j]ust instructing the minor to disrobe would be enough" to constitute a lewd or lascivious act. (IX:2069). The district court agreed. While recognizing that the factual scenario in **Catiano** was "different than this case" the district court claimed that "it applies, and I believe [**Catiano**] even gave examples of all kinds of non-contact, which still violates the statute." (IX:2073).

However, the **Catiano** "non-contact" instruction was improper because the State did not charge any "non-contact" as lewdness in this case. (II:387-88). As set forth in the Amended Information filed June 12, 2019, Gustavo was charged with the following physical acts:

> COUNT 1 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14
>
> Did on or between August 1, 2015 and August 31, 2015 willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, of a child, to wit: M.M., a child under the age of fourteen years, **by touching the said M.M.'s genital area**, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of Defendant, or M.M.

. . . .

COUNT 4 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14

Did on or between June 1, 2016 and July 11, 2016 willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, of a child, to wit: M.M., a child under the age of fourteen years, **by kissing the said M.M.**, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of Defendant, or M.M.

(II:387-88) (emphasis added).

When Gustavo advised the district court that, as charged in this case, lewdness did require a physical act (*e.g.*, touching the genital area for Count 1 and kissing for Count 4), the district court disagreed: "There is testimony, he told her [to] and in fact, he did take her clothing off." (IX:2073). At that point, the State conceded, "[w]e do not have that charged as a lewdness, Your Honor." (IX:2074). Yet, the district court responded, "that's what I'm giving, counsel." (IX:2074).

As this Court explained in **Runion v. State**, 116 Nev. 1041, 1050–51, 13 P.3d 52, 58 (2000), "superfluous language in the instructions addressing factual scenarios . . . irrelevant to this case" can confuse the jury and should not be given. Where the nature of the lewdness charges required proof of physical contact in the form of both touching and kissing, it was reversible

error for the district court to give a **Catiano** instruction telling jurors that physical contact was not required.

The **Catiano** instruction lowered the State's burden of proof on the two lewdness counts and cannot be deemed harmless beyond a reasonable doubt, given the many credibility issues in the case. As Gustavo argued at trial, M.M.'s testimony about the two acts of lewdness changed significantly over time. (IX:2189-92). As to Count 4, after initially and repeatedly claiming that the reason she divulged Gustavo's abuse to her mom was because he kissed her on July 11, 2016 and demanded sex, M.M. changed her story at trial, claiming that the kiss actually occurred two weeks earlier. (VII:1582;VIII:1931,1944;IX:2018). As to Count 1, M.M. originally claimed that Gustavo used her surgery as an excuse to check her wounds, then put his hand under her underwear and touched her vagina. (VIII:1946). At trial, however, M.M. claimed Gustavo touched her vagina over her underwear after asking her to sit on his lap. (VII:1546,1549-50). Where Gustavo pointed out M.M.'s motive and opportunity to fabricate, and where M.M.'s stories of abuse changed significantly over time, the State cannot show that the instructional error was harmless beyond a reasonable doubt.

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B. Jury Instruction No. 12 – Flight Instruction

Officer-in-training Kravetz testified that on the morning of July 12, 2016, while he was on the street in front of M.M.'s house with M.M. and her mother, he observed Gustavo's blue truck pull into the neighborhood. (VII:1520,1522). According to Kravetz, Gustavo's vehicle appeared to "recognize" him and his partners, and it made a U-turn and exited Pine Drive. (VII:1522). Kravetz and his partners ran to their vehicles and got inside, then attempted to get behind Gustavo's vehicle to initiate a stop. (VII:1523). When Kravetz initiated the lights and sirens behind the blue truck, Gustavo stopped his vehicle and was cooperative, coming out of the truck with no issues and permitting officers to take him into custody. (VII:1525).

Over Gustavo's objection,[13] the district court gave the following flight instruction as Instruction No. 12:

> The flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence. If flight is not proved, then it may not be considered in determining guilt or innocence.
>
> The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which

[13] See generally (IX:2085- 94), including objection, argument and ruling.

> such circumstance is entitled is a matter for the jury to determine.

(II:411). The court erred by giving this instruction. "Flight instructions are valid only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." **Jackson v. State**, 117 Nev. 116, 121, 17 P.3d 998, 1001 (2001). "Because of the possibility of undue influence by [a flight] instruction, this court carefully scrutinizes the record to determine if the evidence actually warranted the instruction." **Weber v. State**, 121 Nev. 554, 582, 119 P.3d 107, 126 (2005).

Gustavo objected to the flight instruction because the State had failed to establish the necessary unbroken chain of inferences to establish "flight". (IX:2085). As defense counsel argued, regardless of whether Gustavo may have turned away from the house after seeing officers,

> We do know definitively [that] when the police officers turned on their lights and sirens, the truck stopped and had gone no more than a block and a half. Given the evidence that's been introduced in this case [his car] never even left the development. And when officers ask them to get out of the car, they got out of the car.
>
> So I don't believe they[ve] proven flight.

(IX:2085).

In addition, Gustavo argued that the second paragraph of the instruction was misleading based on the facts of this case. (IX:2089). The

second paragraph read: "The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution." (IX:2089). However, any flight in this case may have been completely unrelated to the crimes charged. For instance, Gustavo may have wanted to avoid police officers in this case for immigration reasons, since he was born in Honduras. (IX:2089-90). In this regard, Juror No. 15 submitted several immigration-related questions following J.J.M.'s testimony. See (X:2296) (including the following questions: "Is your stepfather a legal or illegal citizen? Was your stepfather afraid of being deported if he had any contact with the police when you worked with him? Was your step dad always afraid of having any contact of any kind with the police?"). Although J.J.M. did not know the answer to these questions, the questions remained. (XIII:1847).

In its current form, Jury Instruction No. 12 told jurors they could consider flight as circumstantial evidence of guilt, *regardless of the reason Gustavo was trying to avoid apprehension or prosecution.* To ameliorate this concern, Gustavo asked for an inverse instruction advising that, "If the State fails to prove the alleged flight was done with the consciousness of guilt and for the purpose of avoiding apprehension or prosecution ***in this matter***, it should not be considered as circumstantial evidence." (IX:2092)

(emphasis added). The court refused to clarify that the flight had to be for the purpose of avoiding apprehension or prosecution in this matter – as opposed to avoiding apprehension or prosecution for something else. (IX:2092-94).

The misleading flight instruction should never have been given. Where Gustavo may have wanted to avoid police for purely immigration reasons, the State failed to establish "a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." **Jackson**, 117 Nev. at 121, 17 P.3d at 1001. The court's instructional error was not harmless beyond a reasonable doubt, particularly where the evidence against Gustavo was not overwhelming. See, e.g., pp. 23 & 43, supra.

IV. Court Undermines the Presumption of Innocence

A criminal defendant has a fundamental right to a fair trial secured by the United States and Nevada Constitutions." **Hightower v. State**, 123 Nev. 55, 57, 154 P.3d 639, 640 (2007); see also **U.S. Const. amend. VI, XIV; Nevada Const. Art. I, Sec. 8.** A defendant's constitutional right to a "fair trial" necessarily includes the right to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not

adduced as proof at trial.'" **Holbrook v. Flynn**, 475 U.S. 560, 567 (1986) (quoting **Taylor v. Kentucky**, 436 U.S. 478, 485 (1978)). The "fair trial" right also includes the "presumption of innocence." **Estelle v. Williams**, 425 U.S. 501, 503 (1976).

In this case, the district court undermined Gustavo's presumption of innocence by insinuating, during its initial admonitions to the jury, that Gustavo must have done something criminal or else he would not have been arrested and prosecuted:

> You ask yourselves, your friends, or anyone else what do you really mean by presumption of innocence when we know that the Defendant has been arrested by the police department and we know that the District Attorney is prosecuting the Defendant. And we also know that the police department didn't go out and select somebody at random to prosecute.
>
> So we know that you know these things, and you could legitimately ask well, how can we maintain this presumption of innocence when we know that he's been arrested for something and we know that the District Attorney is prosecuting him.

(VII:1469-70) (emphasis added).

The district court's "innocuous conduct in some circumstances may constitute prejudicial conduct in a trial setting[.]" **Parodi v. Washoe Med. Ctr., Inc.**, 111 Nev. 365, 367, 892 P.2d 588, 589 (1995). In particular, a trial judge's words and actions "are likely to shape the opinion of the jury members to the extent that one party may be prejudiced." **Rudin v. State**, 120 Nev. 121, 140, 86 P.3d 572, 584 (2004). Because trial counsel may be

"loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case[]", this Court will review judicial misconduct on appeal even absent an objection. **Parodi**, 111 Nev. at 369, 892 P.2d at 591 (permitting plain error review of judicial misconduct and reversing).

Although Gustavo did not object, the district court's instruction to the jury at the outset of the case was plainly erroneous because it predisposed the jurors to believe that Gustavo had done something wrong or he would not have been arrested and prosecuted. See **Parodi**, 111 Nev. at 369, 892 P.2d at 591. The Legislature defined the burden of proof needed to overcome the presumption of innocence as proof beyond a reasonable doubt. See **NRS 175.211(1)**. Here, by advising jurors that the police did not "random[ly]" arrest and prosecute Gustavo, the district court undermined Gustavo's absolute and fundamental right to the presumption of innocence. The district court's comments are particularly egregious because, in many cases, police and prosecutors do, indeed, arrest and prosecute innocent persons. See generally Jon B. Gould, Richard A. Leo, One Hundred Years Later: Wrongful Convictions after a Century of Research, 100 J. Crim. L. & Criminology 825 (2010).

Based on the district court's comments that Gustavo was not "random[ly]" arrested or prosecuted, jurors were predisposed to find him guilty before seeing a single piece of evidence. The district court's error was compounded when the State reminded the jury in its opening statement, "We're here because the Defendant committed these crimes. He committed sexual abuse against [MM]." (VII:1488). This comment reinforced the district court's prior instruction that Gustavo was not "random[ly]" arrested or prosecuted. The judicial misconduct requires reversal for plain error because it "had a prejudicial impact on the verdict" and/or "seriously affect[ed] the integrity or public reputation of the judicial proceedings." See **Parodi**, 111 Nev. at 368, 892 P.2d at 590.

V. Prosecutorial misconduct requires reversal.

Prosecutorial misconduct violated Gustavo's state and federal constitutional rights to a fair trial by an impartial jury and to due process of law. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8; Johnson v. Sublett**, 63 F.3d 926, 929 (9th Cir. 1995) (determining "whether prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process"). "When considering claims of prosecutorial misconduct, this [C]ourt engages in a two-step analysis. First, [it] must determine whether the prosecutor's conduct was improper. Second,

if the conduct was improper, [it] must determine whether the improper conduct warrants reversal." **Valdez v. State**, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

When the defense objects to prosecutorial misconduct, this Court applies a harmless error standard of review on appeal. **Id**. For constitutional errors, this Court applies **Chapman v. California**, 386 U.S. 18 (1967), and reverses unless the State shows beyond a reasonable doubt that the error did not contribute to the verdict. **Valdez**, 124 Nev. at 1189, 196 P.3d at 476.

Gustavo is entitled to a new trial because, whether considered individually or collectively, the following instances of prosecutorial misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" **Id.** at 1189, 196 P.3d at 477; **Darden v. Wainwright**, 477 U.S. 168, 181 (1986)).

A. Improper Leading Questions.

Leading questions are generally prohibited during direct examination. **NRS 50.115(3)** ("Leading questions may not be used on the direct examination of a witness without the permission of the court."). A question is leading when it is framed in a way that suggests the desired answer to the witness. 98 C.J.S. Witnesses § 473 (2019). Leading questions are restricted to prevent counsel from testifying through a witness "as to material facts in

dispute and to prevent shaping and creating evidence – whether inadvertently or intentionally – that conforms to the interrogator's version of the facts." 98 C.J.S. Witnesses § 472 (2019).

Although the district court does have discretion to allow leading questions and an abuse of that discretion is not "ordinarily a ground for reversal . . . the improper allowing of leading questions may be so prejudicial as to require a reversal." **Anderson v. Berrum**, 36 Nev. 463, 470-71, 136 P. 973, 976 (1913); see also **McDavid v. State**, 594 So.2d 12, 17 (Miss. 1992)) (reversible error for a court to repeatedly allow the state to ask leading questions about a key factual issue); see also **Rowland v. State**, 118 Nev. 31, 40, 39 P.3d 114, 119-20 (2002) (leading questions improper where prosecutor was effectively arguing the case to the jury through his questions).

Over Gustavo's objection, the State was permitted to use leading questions to elicit testimony from M.M. that the dates the 3 incidents occurred were unimportant. (VIII:1706-07). Over Gustavo's objection, the State was permitted to use leading questions to elicit testimony from J.J.M. to insinuate that M.M. had made more than one complaint about Gustavo. (VIII:1803). Over Gustavo's objection, the State was permitted to use leading questions to elicit testimony from J.J.M. that M.M. was "afraid

something more could happen" in the bedroom with Gustavo. (VIII:1806-07). The leading questions unfairly bolstered M.M.'s credibility, which was the central issue in this case. See **Anderson**, 36 Nev. at 470-71, 136 P. at 976; see also **Rowland**, 118 Nev. at 40, 39 P.3d at 119-20.

B. Improper Closing Arguments.

The Fifth Amendment prohibits prosecutors from directly commenting on a defendant's decision not to testify at trial. **Griffin v. California**, 380 U.S. 609, 615 (1965). The Fifth Amendment also prohibits prosecutors from making certain "indirect" comments about a defendant's failure to testify. See **Harkness v. State**, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991). An "indirect" comment violates a defendant's Fifth Amendment rights when it was "manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." **Id**. (internal citations omitted).

As this Court explained in **Harkness**, 107 Nev. at 804, 820 P.2d at 761, "[p]ointing out discrepancies or gaps in the evidence and suggesting that appellant is responsible for them is something the jury would 'naturally and necessarily' take to be a comment on the accused's failure to testify." Likewise, "[t]he tactic of stating that the defendant can produce certain evidence or testify on his own behalf is an attempt to shift the burden of

proof and is improper." **Id**. (quoting **Barron v. State**, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989)).

During rebuttal closing, the State argued, "There really are two people who know exactly what happened in that living room and that bedroom that can talk about it. And that's [MM] and the --" (X:2219). Gustavo immediately objected to the State's burden shifting comment on his right to remain silent. (X:,2219). Although the court sustained Gustavo's objection, the State continued to remind the jury that Gustavo had not testified: "There's two people that know what happened, and [MM] told you what happened. She told you what he did to her." (X:2219). Then, the State asked the jury to find Gustavo guilty and "tell him you know what happened too." (X:2219). The State's argument reminded jurors that M.M. had testified while Gustavo had not, and improperly shifted the burden of proof to the defense. This was the very final argument made by the State and the last thing the jury heard before retiring to deliberate. The jury would naturally and necessarily have understood the State's argument to be a comment on Gustavo's failure to testify. Reversal is required. See, e.g., **Harkness**, 107 Nev. at 804 (prosecutor's reference to comments asking whose fault it was "if we don't know the facts in this case" were improper references to defendant's failure to testify, requiring reversal").

VI. Cumulative error requires reversal.

The cumulative effect of trial errors may violate a defendant's state and federal constitutional right to due process and a fair trial, although the errors are harmless individually. **Valdez**, 124 Nev. at 1195-96, 196 P.3d at 481; **Parle v. Runnels**, 505 F.3d 922, 927 (9th Cir. 2007) (citing **Chambers v. Mississippi**, 410 U.S. 284 (1973). This Court considers the following factors when evaluating a cumulative error claim: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." **Valdez**, 124 Nev. at 1195-96, 196 P.3d at 481.

In this case, the issue of guilt was exceedingly close and certainly not "overwhelming". See, generally, pp. 8-15, 23, 43, supra. M.M.'s allegations of abuse changed so significantly over time that the State had to file an Amended Information mid-trial to conform to her testimony. (II:387-88). M.M. never disclosed any penetration until after law enforcement officers fed that concept to her during questioning. (IX:2187). And M.M. had both motive and opportunity to fabricate her claims against Gustavo, admitting that she did not want to work as Gustavo demanded and that a classmate had recently gotten rid of her own stepfather by making similar abuse allegations. (VII:1686,1688).

The quantity and character of the errors in this case also favor reversal. Initially, the jury that tried Gustavo was selected from a venire that was not representative of a fair cross section of the community because it systematically excluded Hispanic/Latino jurors, like Gustavo, from service. Then, before jurors heard a shred of evidence, the district court undermined Gustavo's presumption of innocence by insinuating that he must have done something criminal or else he would not have been arrested and prosecuted in the first place. Although the State had to prove that Gustavo kissed M.M.'s mouth and touched M.M.'s vagina to convict him of lewdness, the district court improperly instructed the jury that lewdness did not require any physical contact. The district court also gave an inaccurate flight instruction in a case where Gustavo may have sought to avoid police solely for immigration reasons. The State engaged in prosecutorial misconduct throughout trial and closing argument, asking the jury to hold Gustavo's constitutional right to remain silent against him. Finally, the jury's misconduct during deliberations was not harmless beyond a reasonable doubt where it resulted in Gustavo's conviction on two sexual assault counts that were previously deadlocked. These errors, at all stages of trial, worked together to deprive Gustavo of fundamental fairness and resulted in a constitutionally unreliable verdict.

The crimes charged – lewdness with a child and sexual assault of a minor – are extremely grave charges, resulting in an aggregate sentence of 35-years-to-life. (III:513). The State cannot show, beyond a reasonable doubt, that the cumulative effect of these constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of constitutional violations substantially and injuriously affected the fairness of the proceeding requiring reversal.

CONCLUSION

For all the foregoing reasons, Gustavo respectfully requests the reversal of his convictions.

Respectfully submitted,

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

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

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

DATED this 19 day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19 day of May, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY *_/s/ Carrie M. Connolly_*
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