IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD MICHAEL ADAMS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 55494

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUE(S)

1. Whether the doctrines of multiplicity, redundancy, or double jeopardy preclude Defendant's multiple convictions for Sexual Assault, Battery with Intent to Commit Sexual Assault, and Open or Gross Lewdness.
2. Whether the State committed misconduct requiring reversal of Defendant's convictions.

STATEMENT OF THE CASE

On October 28, 2009, Edward Michael Adams, hereinafter "Defendant," was charged by way of Amended Information with First Degree Kidnapping with Use of a Deadly Weapon, Battery with Intent to Commit a Crime with Use of a Deadly Weapon, nine (9) counts of Sexual Assault with a Minor under Fourteen Years of Age with Use of a Deadly Weapon, and Open or Gross Lewdness. I AA 96-101. Defendant's jury trial began on November 2, 2009. I AA 176. On November 4, 2009, Defendant was found guilty of First Degree Kidnapping, Battery with Intent to Commit Sexual Assault, seven (7) counts of Sexual Assault with a Minor Under Fourteen Years of Age, and Open or Gross Lewdness. I AA 137-140.

On January 13, 2010, Defendant was sentenced to a total of Life with a Minimum parole eligibility of Eighty (80) Years. I AA 141-144. A special sentence of Lifetime Supervision was also imposed to commence upon release from any term of imprisonment, probation, or parole. I AA 144. Defendant was additionally ordered to register as a Sex Offender after any release from custody. Id. A Judgment of Conviction was filed on February 2, 2010. I AA 141-144. Defendant filed a timely Notice of Appeal on February 22, 2010. I AA 145-147.

STATEMENT OF THE FACTS

On December 14, 2007, thirteen-year-old A.V. was released from school at 2:15 p.m. II AA 435. After plans to spend the night at a friend's house had fallen through, she decided to walk home. II AA 438. Her house was only a few blocks from the school. II AA 439. At some point between the school and her house, A.V. came into contact with Defendant. II AA 442. He was sitting on a wall across the street from A.V. smoking a cigarette when she first noticed him. II AA 443. A.V. did not consider him to be attractive. Id. She described Defendant as mostly bald with a goatee, crooked teeth, and a band-aid over his eyebrow. II AA 446, 481. He was wearing a black hooded sweatshirt and blue pants. II AA 445.

A.V. crossed the street but did not walk towards Defendant. However, he began to walk to her side of the street and started following behind her. II AA 444-45. A.V. felt scared and continued to walk. II AA 444. Defendant came up behind her, put his arm on her shoulder and turned her towards him. II AA 446. He told her not to scream or yell because he had a gun. Id. A.V. complied because she was afraid he would kill her. Defendant's left hand was in his pocket, and it appeared as if he had a gun. II AA 447. He then grabbed A.V. by the hand and started leading her back towards the school. II AA 449.

As Defendant was taking A.V. down the street, they passed two of A.V.'s schoolmates. Jonathan C. saw Defendant dragging A.V. up the street by her wrist. III AA 532. A.V. had a scared look on her face. III AA 533. Defendant's hand was in his pocket holding something. III AA 534. Jonathan thought it may have been a gun. III AA 536. As they passed by A.V. mouthed the words "help me" to Jonathan. III AA 450. Angela A. also

saw Defendant holding A.V.'s hand and thought it looked as if they were trying to avoid her as they walked by. III AA 560.

Defendant took A.V. to an abandoned apartment unit on the second floor of the building. II AA 453-54. The apartment had been damaged by a fire and all utilities had been disconnected. II AA 582. Defendant had never leased the apartment. III AA 583. A.V. noticed a black couch, several lit candles, a black bag, and a pair of Nike shoes. II AA 455-56. After locking the apartment door, Defendant told A.V. to sit on the black couch. II AA 455. He also took the battery out of A.V.'s cell phone so she could not call for help. II AA 457. A.V. also saw Defendant take something out of his pocket and wedge it underneath the couch cushions. II AA 459.

Defendant made A.V. remove her clothes and get on the floor. II AA 458, 460. He then removed his own clothes, got on top of her, and digitally penetrated her vagina. II AA 460. A.V. had never had any kind of sexual contact before. II AA 458. She told Defendant that what he was doing was causing her pain. However, he told her to shut up. II AA 461. Defendant then penetrated A.V.'s vagina with his penis, which caused her further pain. Id.

Defendant stopped having intercourse with A.V. and made her sit on the couch again. II AA 461. As she was sitting up, he digitally penetrated her. II AA 462. She again told him that it was painful and asked him to stop. Id. Defendant then penetrated A.V.'s vagina again. Id. He then stopped and made A.V. move back to the floor. Id.

Defendant placed himself on top of A.V. again and penetrated her vagina with his penis. III AA 463. He also digitally penetrated her vagina. Id. Defendant then proceeded to force A.V. to bend over the couch. Id. As she was bent over, he digitally penetrated her anus while standing behind her. III AA 463-464. Defendant had also rubbed his penis in front of A.V. and put lotion on to his penis as he was touching himself. III AA 487. Defendant put lotion on his penis both while he was touching himself and prior to penetrating her. Id. Defendant had also used blue painter's tape to bind A.V.'s hands and to tape her mouth shut. III AA 468. Defendant did not use a condom. III AA 466. A.V. continually told Defendant that he was hurting her and asked him to stop throughout the ordeal. III AA 470.

After Defendant was finished sexually assaulting A.V., he told her to get dressed. III AA 465. He then went into the kitchen and retrieved a damp towel which he told A.V. to use to wipe herself off. III AA 467. Defendant told her she could leave and threw her phone back at her. III AA 474. He also warned her not to call the police and to wait until she got to a nearby McDonald's restaurant before she called for someone to pick her up. III AA 473-74.

A.V.'s mother, Louise, had been trying to call A.V. when she noticed that she was late. III AA 545. A.V. finally answered and asked her to come pick her up. III AA 547. A.V. was crying, her hair was messy, and she did not have all of her clothing on. Id. A.V. told her mother what had happened, and Louise called 911. Id.

A.V. was taken to the hospital and was given a sexual assault exam. IV AA 764. A.V. had abrasions in her vagina consistent with how she described the encounter and her hymen was lacerated. IV AA 778-79. A.V. had experienced bleeding from her vagina which stained the crotch of her pants. IV AA 786. There was also a discharge from her anus and injuries to her anus. IV AA 787.

A.V. could not remember exactly where the apartment was located, however eventually the correct apartment was found. III AA 659-661. When crime scene analysts arrived at the apartment they found the opened package of hand lotion, candles, blue painter's tape, and the shoes A.V. had described. III AA 586-602. Defendant was eventually identified as the perpetrator because his fingerprints were found in the apartment. III AA 665. Defendant's prints were found on an open lotion packet, two glass candle jars, and the interior sliding glass door. IV AA 757. A.V.'s prints were found on the interior front door. Id. A gun was not found. III AA 609.

A DNA analysis was conducted on the sexual assault kit. IV AA 717. Defendant's sperm was detected on the vaginal and cervical swabs. IV AA 718-719. Defendant's sperm was also detected on the rectal and anal swabs. IV AA 720-721. Both A.V.'s and Defendant's DNA were found on the towel located in the apartment. IV AA 724. Defendant's DNA was also located on A.V.'s pants and shirt. IV AA 728-729. Finally, both A.V.'s and Defendant's DNA was found on the couch cushions. IV AA 730.

Defendant's defense at trial was that this was a consensual sexual encounter. AA 413-414. He elicited testimony from Jonathan C. that A.V. had not said anything to him as she passed by with Defendant and that he had not called the police. III AA 538. Defendant also elicited testimony from Angela A. that she had previously told police that A.V. appeared to be chasing after Defendant and that she had also not called the police. III AA 570. Witness Andre Randle testified that he saw A.V. and Defendant walk into the vacant apartment. AA 738-739. He testified he thought it was strange, but A.V did not appear to be angry, crying, or screaming. IV AA 739-742. Defendant also presented several character witnesses who testified that he was not a violent person. IV AA 821-826.

ARGUMENT

I
THE DOCTRINES OF MULTIPLICITY, REDUNDANCY, AND DOUBLE JEOPARDY DO NOT PRECLUDE DEFENDANT'S CONVICTIONS

Defendant claims the doctrines of multiplicity, redundancy, and double jeopardy preclude his convictions for Sexual Assault, Battery with Intent to Commit Sexual Assault, and Open or Gross Lewdness. However, as discussed below, Defendant's arguments are misplaced.

A. Overview of the Doctrines of Multiplicity, Redundancy, and Double Jeopardy.

Multiplicity is the appropriate analysis when the issue is multiple counts of a single statutory offense. 1A Charles Alan Wright & Andrew D. Leipold, Federal Practice and Procedure § 142 (4th ed. 2008); 1 LaFave & Isreal, Criminal Procedure § 19.2(3) (1984). Multiplicity is a pleading doctrine. Id. The term was not traditionally applied to counts charging crimes under separate statutes, since nothing prohibits the state from charging multiple statutory offenses. If a count is multiplicitous, it is stricken.

Although the multiplicity doctrine arose as a pleading issue, over time the term has also been used to challenge multiple sentences or convictions under the same statute and arising from a single event or occurrence. As such cases sometimes refer to such convictions as redundant; it would appear that Nevada case law may have developed the term redundancy to distinguish pre-trial pleading challenges from post-trial conviction allegations.

See generally, U.S. v. Borello, 766 F.2d 46, 52 (2nd Cir. 1985) (using the term redundant coverage). Or Nevada cases, which usually involve whether the legislature intended multiple punishments under two separate statutes, not interpretation of a single statute, may use the term "redundancy" to distinguish between single statute and multiple statute issues, since multiplicity has traditionally applied only to single statute situations. Borello at 53, fn. 13. Essentially, the same analysis is used when dealing with pre-trial or post-trial multiplicity issues – what did the legislature intend as the "unit of prosecution" – a course of conduct or individual acts?

This concept of the "unit of prosecution" is more fully developed in United States v. Chipps, 410 F.3d 438 (8th Cir. 2005). In Chipps, the Eighth Circuit was faced with two counts of simple Assault. One count involved a kick with a boot and the other a blow with a baseball bat. They occurred on the same day and within minutes of each other: one beginning inside a house and the second concluding outside the house in one continuous time sequence. The Eight Circuit said:

> To determine whether this indictment is multiplicitous, we must decide whether Congress intended to punish assault as a course of conduct, such that the first bit of assaultive conduct (which took place in the house) is of a piece with the second bit (which took place outside), or whether Congress sought to punish separately individual acts within an assaultive episode. We look to the statutory language, legislative history, and statutory scheme to ascertain what Congress intended the unit of prosecution to be. *United States v. Kinsley*, 518 F.2d 665, 668 (8th Cir. 1975).

Chipps at 448. The court was unable to determine clearly and ambiguously, the intent of Congress from the statutory language, scheme or legislative history. Consequently, it concluded that assault was a course of conduct offense under the rule of lenity and that would be the unit of prosecution. Chipps at 448-49.

When a defendant's conduct violates more than one criminal statute, multiplicity is never an issue at pre-trial, since the government is free to charge more than one offense. Upon conviction, however, two questions can arise. First, even though two different statutes are involved, are they the "same offense" for double jeopardy purposes? Second, even if they are not the same offense, did the legislature intend for the same conduct to be subject to two punishments? It is this second question that involves what Nevada usually refers to as

redundancy and other states and federal courts refer to as multiplicity. Multiplicity or redundancy is solely a matter of statutory interpretation and is not a constitutional doctrine.

Defendant has erroneously attempted to intermingle the doctrines of multiplicity/redundancy with double jeopardy. Double jeopardy only applies to prosecution under multiple statutes. The United States Supreme Court established the test for determining when two criminal statutes presumptively violate the Double Jeopardy Clause in Blockberger v. United States, 364 U.S. 299 (1932) and United States v. Dixon, 509 U.S. 688 (1993). Under the "elements" test set forth in these cases, and their prodigies, so long as each statute requires proof of an element the other does not, it is presumed the legislature intended two separate punishments for two separate statutes and no double jeopardy violation occurs. Missouri v. Hunter, 459 U.S. 359, 366 103 S.Ct. 673, 678 (1983). On the other hand, if the elements of one offense are entirely included within the other, it is presumed the legislative body did not intend two separate punishments and they are the same offense for purposes of the Double Jeopardy Clause. Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003). That presumption can only be overcome by an explicit statute. Missouri v. Hunter at 366.

A multiplicity or redundancy analysis goes beyond the elements test and has nothing to do with double jeopardy. Salazar, 119 Nev. at 227, 70 P.3d at 751. The analysis is frequently confused with double jeopardy because it starts in the same manner – an analysis of the elements under Blockberger. Every offense that meets the Blockberger same elements test will also be presumptively multiplicitous or redundant because Blockberger establishes a presumption that the legislative body did not intend double punishments for the statutory violations. But the presumption goes the other way when the same elements test is not met. It is presumed that the legislative body intended multiple punishments and absent clear intent to the contrary, a conviction will not be multiplicitous or redundant. The rule of lenity does not apply because two distinct statutes are involved.

B. Defendant's Sexual Assault Convictions.

First, Defendant's description of the acts he committed upon A.V. as a "continuous act of sexual assault" does not comport with the facts. As described above, Defendant forced

A.V. to move from the floor to the couch and back and penetrated her seven distinct and separate times. These separate acts constituted distinct and separate sexual assaults. Furthermore, Defendant uses both the terms "redundant" and "multiplicitous" in describing the sexual assault convictions. However, since Defendant was convicted of multiple counts of the same statutory offense, the doctrine of multiplicity is the appropriate analysis and double jeopardy does not apply.

Under Nevada law, every sexual penetration committed during a single sexual encounter is considered a separate offense, rather than one course of conduct. Deeds v. State, 97 Nev. 216, 626 P.2d 271 (1981). Deeds does not mention multiplicity or redundancy, but that was the issue, and this Court used the analysis outlined in Chipps. The only relevant question is whether or not the legislature intended the sexual assault statute to punish separate and distinct penetrations that are part of a single criminal encounter. "The great weight of authority supports the proposition that separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon." Deeds v. State, 97 Nev. at 217, 626 P.2d at 272 (citations omitted); see also Townsend v. State, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987); Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990).

In Wright, the defendant attempted to sexually assault his victim and stopped for a matter of seconds when a car passed by. The defendant then resumed the assault. The Defendant was convicted of the attempted sexual assault that occurred before the car drove by and the sexual assault that occurred after the car had passed. This Court upheld both convictions. Wright, 106 Nev. at 650, 799 P.2d at 549. In Townsend, the defendant fondled the victim's breasts and then digitally penetrated her vagina. This Court held that since the defendant stopped fondling the victim's breasts before proceeding to digitally penetrate her separate acts of lewdness occurred. Townsend, 103 Nev. at 121, 734 P.2d at 710.

Defendant has cited to Chipps and indicated that an "impulse test" is used in determining legislative intent on what constitutes a "unit of prosecution" in an effort to argue that Deeds was decided incorrectly. However, Defendant's arguments are misplaced. That

language does not apply to determining what unit of prosecution is intended by the statute, i.e. course of conduct or individual acts. Chipps, 410 F.3d at 448. That determination is based solely on the statutes and legislative history, not the individual facts. In Chipps, the Eighth Circuit had already determined the rule of lenity applied and the unit of prosecution was a single course of conduct before it discussed the "impulse test". Id. The next question was whether, under the facts of that case, the government had proven more than one course of conduct, i.e. separate units of prosecution, that would support multiple convictions of assault. Id. at 448-49.

In answering that question, the Circuit Court applied the "impulse test." A singleness of thought, purpose or action was deemed a single course of conduct because it arose from a single impulse. Id. at 449. Under the facts, the kicking was immediately followed by defendant chasing the victim out of the house and as they reached the outside, the victim was hit with the bat. The short time between each strike and the continuous action indicated this was one impulse – not two separate courses of conduct. As there was only one unit of prosecution, the second assault was multiplicitous. Id.

Similarly, this Court also recognized that double punishments could arise from the same exact factual scenario if that was what the legislature intended in Skiba v. State, 114 Nev. 612, 959 P.2d 959 (1998). Although the Court used the term redundancy, instead of multiplicity, the Court noted redundancy/multiplicity does not arise solely from multiple charges based on the same exact facts. Skiba, 114 Nev. at 616, 959 P.2d at 961, fn. 4. However, Skiba did not deal with the exact same scenario as the instant case because it dealt with two separate crimes set forth in separate sections of the same act.

In Skiba, the defendant was charged with Battery with Use of Deadly Weapon and Battery with Substantial Bodily Harm arising out of a single blow with a bat. These are separate offenses under different subsections of the Battery statute. Id. The Court, quoting the "gravamen" language of Albitre v. State, 103 Nev. 281, 738 P.2d 1307 (1987), concluded the Legislature did not intend separate punishment when the same physical act violated both subsections. Presumably the Court felt "injury" was the main gravamen of both subsections

in reaching this conclusion, and the level of punishment depends on the severity of the injury inflicted.

In the instant case, each count pertains to a separate and distinct penetration. Defendant attempts to rely on Townsend, *supra*, in support of his arguments. However, the facts of that case are of no help to his position. The Townsend Court vacated a second count of sexual assault because it found that the defendant's actions of lubricating the victim's vaginal area, taking his hand away to put more lubrication on his finger, and then penetrating the child's vagina was a single act. Id. There are no "hyper technical divisions" of a single act in the instant case. Id.

First, Defendant forced A.V. from the couch to the floor and inserted his fingers into her vagina. II AA 460. He then took his fingers out and performed a second penetration by inserting his penis. II AA 461. Obviously, this is an entirely different part of the body and Defendant had to stop one act before committing the subsequent act. As such, the notion that it is one continuous, interrupted act is incongruous.

After he was finished sexually assaulting A.V. on the floor and had removed his penis from her vagina, Defendant moved A.V. to the couch. II AA 461. Clearly, Defendant had to stop the sexual assault in order to reposition A.V. from the floor to the couch. As such, there was a sufficient break for the third penetration which occurred on the couch to be a separate sexual assault. Moreover, this penetration was also with a separate part of Defendant's body since it was a digital penetration. II AA 462. The fourth penetration also occurred on the couch. Again, Defendant stopped digitally penetrating A.V. before repositioning his body to penetrate her with his penis. Id. As such, this was also a separate sexual assault.

Defendant then moved A.V. from the couch back on to the floor. II AA 462. Defendant sexually assaulted her a fifth time with his penis, and then a sixth time with his finger. II AA 463. Again, these actions clearly constituted separate and distinct sexual assaults. Defendant had to stop one action before he was able to proceed with the next and used separate parts of his body. Finally, Defendant sexually assaulted A.V. a seventh time

when he repositioned A.V. to be bent over the couch and penetrated her anus from behind. II AA 463-464.

Defendant's reliance on Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004) is also unpersuasive. Since each separate and distinct penetration constitutes a separate sexual assault, one sexual assault cannot be incidental to another. Moreover, this Court was specifically addressing the fact that the crimes of Sexual Assault and Lewdness are mutually exclusive. Id. at 33, 83 P.3d at 285. Since the rubbing of the victim's penis outside his pants was a prelude to touching the victim's penis inside his pants and performing fellatio, it was held to be incidental to the sexual assault. Id. at 34, 83 P.3d at 285. The argument that a digital penetration is merely a prelude to a penile penetration and not a separate and distinct act is absurd. Crowley is also distinguishable because he had never "interrupted his actions." Id. As discussed above, such is not the case here.

C. Defendant's Conviction for Lewdness.

Since Defendant's lewdness conviction is based upon a separate statute than his sexual assault conviction, Chipps does not apply. Moreover, since lewdness is not a lesser-included offense of sexual assault, double jeopardy does not apply. See Moore v. State, 109 Nev. 445, 447, 851 P.2d 1062, 1063 (1993). Defendant's lewdness conviction is also not precluded by Crowley. In Crowley, "by touching and rubbing the male victim's penis, Crowley sought to arouse the victim and create a willingness to engage in sexual conduct." Crowley, 120 Nev. at 34, 83 P.3d at 285. The Court in Crowley was discussing whether or not the touching of the victim's penis prior to the sexual assault was incidental to the sexual assault. Id. This is a completely separate doctrine.

Here, Defendant was touching and rubbing himself as the victim was forced to watch. Moreover, he rubbed lubrication on his penis both when he was touching and rubbing himself and prior to penetrating A.V. III AA 487. While the rubbing of the lotion on his penis prior to penetrating her is arguably incidental to the sexual assault, the rubbing of the lotion while masturbating is not. It was clearly a separate and distinct act and not incidental to the sexual assault.

D. Defendant's Battery with Intent to Commit Sexual Assault and First Degree Kidnapping Convictions.

Defendant also claims that his convictions for Battery with Intent to Commit Sexual Assault and First Degree Kidnapping violate double jeopardy and/or are redundant. Again, the State is free to charge more than one offense arising from the same conduct. Thus the issues become even though two different statutes are involved, are they the "same offense" for double jeopardy purposes and, even if they are not the same offense, did the legislature intend for the same conduct to be subject to two punishments? It is this second question that involves what Nevada usually refers to as redundancy, which is solely a matter of statutory interpretation and is not a constitutional doctrine.

As discussed above, convictions under two criminal statutes do not violate the Double Jeopardy Clause so long as each statute requires proof of an element the other does not. It is presumed the legislature intended two separate punishments for two separate statutes and no double jeopardy violation occurs. Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673 (1993). If the elements of one offense are entirely included within the other, it is presumed the legislative body did not intend two separate punishments and they are the same offense for purposes of the Double Jeopardy Clause. Salazar, 119 Nev. at 227, 70 P.3d at 751.

Battery is the "willful and unlawful use of force or violence upon the person of another." NRS 200.400(1). First Degree Kidnapping is defined in relevant part as, "A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain…" NRS 200.310(1). First Degree Kidnapping requires the "intent to hold or detain" and Battery does not. Battery requires the "use of force or violence," and First Degree Kidnapping carries no such requirement. As such, each crime requires proof of an element the other does not. It is clear the legislature intended two separate punishments for two separate statutes, and double jeopardy is not implicated.

Since both are separate offenses under the Blockberger test, this Court will only reverse if they are "redundant convictions which do not comport with legislative intent." Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003). In Salazar this Court reversed

the defendant's conviction for Battery with Use of a Deadly Weapon with Substantial Bodily Harm because it found it to be redundant to his conviction for Mayhem. Id. The Court found that the factual basis for the mayhem was scarring left by razor slashes. That same scarring was the basis for the substantial bodily harm. As such, both offenses had the same "gravamen," and the legislature did not intend multiple convictions. Id.

The instant case is clearly distinguishable from Salazar. Kidnapping is an asportation. The legislature intended to protect against the harm of unlawfully removing an individual from a place of safety. In this case, the kidnapping charge arose from Defendant's removal of A.V. from her walk home to an abandoned apartment building by saying he had a gun and then restraining her with the blue tape. I AA 97. The Battery, however, arose from the actual physical contact of grabbing A.V. by the neck and then by her arm. I AA 97. As such, both convictions do not have the same gravamen and should be affirmed.

II
THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT

The standard of review for prosecutorial misconduct rests upon Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). A prosecutor's statement alone cannot be a basis for overturning a criminal conviction.

> [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statement or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.' In addition, should this court determine that improper comments were made by the prosecutor, 'it must be…determined whether the errors were harmless beyond a reasonable doubt.' The constitution guarantees a fair trial, not necessarily a perfect trial. It is not enough that the prosecutor's remarks are undesirable. Thus, the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process.

Green v. State, 113 Nev. 157, 169-170, 931 P.2d 54, 62 (1997) (modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 200 (2000)) (internal citations omitted).

Where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error. See Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64

(1997). Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054. In determining prejudice, this Court considers whether the comment had: 1) A prejudicial impact on the verdict when considered in the context of the trial as a whole; or 2) Seriously affects the integrity or public reputation of the judicial proceedings. Rose v. State, 123 Nev. 194, 208-209, 163 P.3d 408, 418 (1997). In this instance Defendant cannot make the requisite showing.

A. The Prosecutor Did Not Shift the Burden of Proof.

Defendant alleges that the prosecutor committed misconduct when he argued that the evidence presented at trial did not support the claim that this was a consensual sexual encounter between a thirteen-year-old girl and an adult, male stranger in an abandoned apartment building. The prosecutor has the right to comment on testimony, to ask the jury to draw inferences from the evidence, and to state fully his views as to what the evidence shows. State v. Green, 81 Nev. 173, 176, 400 P.2d 766 (1965). That is simply what the prosecutor was doing in this instance.

In Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 514 (2001), the prosecutor, in response to defense counsel's argument that another person committed the murder, asked "where's the evidence?" This Court held that since the prosecutor had not called attention to the defendant's failure to testify no misconduct occurred. In U.S. v. Lopez-Alvarez, 970 F.2d 583, 595-596 (9th Cir. 1992), the defendant claimed that he had lied about his role in an abduction. The prosecutor argued in closing that there was "no evidence presented in this particular case that [the defendant] did not mean what he said." Id., fn. 10. The prosecutor then made two additional, similar statements. Id. The Court rejected the argument that this amounted to misconduct and stated:

> We do not agree with this contention. The defense itself attempted to show that he had lied in order to impress Agent Reynoso, by introducing circumstantial evidence consistent with that theory. Thus, the prosecutor's statement likely referred to the inadequacy of that evidence…

U.S. v. Lopez-Alvarez 970 F.2d 583, 596 (C.A.9 (Cal.),1992).

Prosecutors may "attack the defense case and argument. Doing so is proper and is, indeed, the essence of advocacy." Lamb v. State, 127 Nev. Adv. Op. No. 3 p. 21 (2011) citing People v. Thornton, 41 Cal.4th 391, 455, 161 P.3d 3, 4, 61 Cal.Rptr.3d 461, 513 (2007). Here, the prosecutor argued that there was no evidence presented that this was a consensual encounter. IV AA 866-868. This was in response to defense counsel's arguments which focused entirely on consent. IV AA 851-864. Defendant argues that since A.V. did not attempt to escape an adult male she believed was armed with a gun, there was evidence that she consented to being repeatedly penetrated in both her vagina and anus by someone she had never met. Such an argument is folly, and the prosecutor was within the parameters of acceptable argument when he referred to the inadequacy of this so-called "evidence."

B. The Prosecutor Did Not Comment on Defendant's Right to a Defense.

Defendant argues that the prosecutor improperly commented on his right to a defense.[1] IV AA 875-878. First, both objections were sustained. As such, Defendant did not suffer prejudice. Furthermore, these were proper comments on the evidence produced at trial and in response to defense counsel's closing argument.

During defense counsel's closing argument, he disparaged the State's admission of the identification evidence. Specifically he stated:

> Do you need to see a photo line up over and over and over to tell you yeah, that guy number five, that's Ed Adams when three days ago we already told you that guy, Ed Adams, was there? Do you need experts to come in and talk about how they lifted fingerprints, how they analyzed fingerprints, how they took swabs for DNA, and then we send them to the labs? And all it goes to show one great big point that it's Ed Adams. Big surprise. We already knew all of that.

IV AA 852-853. Defense counsel then focused all of his arguments on consent. In response, the prosecutor explained the necessity of that evidence and how it corroborated A.V.'s version of events. IV AA 876. The prosecutor could not simply rely on defense counsel's admission of identity during opening statements as that was not evidence. He was explaining

[1] Defendant also claims that the prosecutor injected his personal opinion or belief about Defendant and his defense into his argument. However, Defendant has failed to substantiate this claim with any case law, argument, or citations to the record.

to the jury that the State was still obligated to prove beyond a reasonable doubt that Defendant was the perpetrator.

The prosecutor then explained that it was the State's burden to prove the charges beyond a reasonable doubt and that the defense had no obligation to prove anything. IV AA 877. He also referenced defense counsel's disparaging comments concerning the identification evidence. Id. The prosecutor then explained had the State not presented such evidence, defense counsel would be able to argue that no sexual encounter occurred, and since the evidence of sexual intercourse was so overwhelming that left the defense of consent. IV AA 878. When viewed in context, this was clearly proper argument in response.

C. Even if This Court Finds the Prosecutor's Arguments to be Improper, Any Such Error is Harmless.

Claims of prosecutorial misconduct are subject to harmless error analysis. Jones, *supra*. Even if the prosecutor's comments in this case were improper, Defendant's convictions should still be affirmed due to the overwhelming evidence against him. Identity or sexual intercourse was clearly not an issue in this case since the DNA, fingerprint, and eyewitness evidence corroborated those facts. Moreover, the "evidence" of consent was simply nonexistent.

There was overwhelming evidence that this was not a consensual encounter. A.V. testified that Defendant came up behind her, put his arm on her shoulder, and told her not to scream or yell because he had a gun. II AA 446. She complied with his demands because she was afraid he may harm her. II AA 447. A.V. made an unsuccessful attempt to alert her schoolmates by mouthing the words "help me." II AA 450. As Defendant repeatedly sexually assaulted her, A.V. told him that she was in pain and asked him to stop, and he ignored her. II AA 461, III AA 470. When her mother finally picked her up, A.V.'s hair was in disarray, she was crying and upset, and she did not have all of her clothing on. III AA 547. A.V.'s testimony alone was more than sufficient to uphold the conviction. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225 (2005).

Furthermore, this was clearly not a pre-planned rendezvous since A.V. had previously planned to spend the night at a friend's house. III AA 574. A.V. received physical injuries

from the multiple sexual assaults which she described as painful. IV AA 778-787. When she was picked up by her mother she did not have all of her clothing on and was extremely distraught. III AA 547. A.V. could no longer sleep in her own bed afterwards, rolls up the windows in the car if someone passes on the street, and would not go anywhere by herself. III AA 551.

The evidence of consent consisted of alleged inconsistencies in A.V.'s story, testimony that she did not appear to be afraid or was following Defendant, and that she did not call for help or try to get away. However, this evidence is extremely weak and substantially outweighed by the overwhelming evidence that this was not a consensual encounter. The fact that A.V. was too frightened to flee Defendant during the abduction is not evidence of a thirteen-year-old virgin's consent to be penetrated several times by a stranger in an abandoned apartment several minutes later. Defendant's insinuation that none of the eyewitnesses felt that A.V. was distressed is simply not true. Jonathan C. testified that she appeared to be scared and was being dragged up the street. III AA 532-533. As such, any alleged error is harmless due to the overwhelming evidence of guilt.

CONCLUSION

Based on the foregoing arguments, Defendant's conviction should be affirmed.

Dated this 24th day of May, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 24th day of May, 2011.

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 24th day of May, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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