IN THE SUPREME COURT OF THE STATE OF NEVADA

ARMANDO VASQUEZ-REYES, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 80293

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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	)	
Appellant,	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

A. Statute which grants jurisdiction to review the judgment: NRS 177.015.

B. Judgment of Conviction filed December 17, 2019; Notice of Appeal filed December 19, 2019.

C. This appeal is from a final judgment entered on December 17, 2019.

ROUTING STATEMENT

D. This case is not presumptively assigned to the Court of Appeals under NRAP 17(b)(1) because appellant was convicted of Category A felonies.

ISSUES PRESENTED FOR REVIEW

I. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting defense jury instructions and by providing prejudicial jury instructions.

II. The State committed misconduct, violating the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

III. The trial court violated Armando's federal and state constitutional rights in denying suppression of all evidence related to Armando's illegal detention and subsequent statements to police.

IV. The Court violated appellant's federal and state constitutional rights by admitting irrelevant, inflammatory and prejudicial evidence and by excluding relevant and probative evidence.

V. The Court unreasonably restricted the defense case and limited cross-examination in violation of the Fifth, Sixth, and Fourteenth the Sixth Amendment.

VI. The trial court erred in denying the defense motion to strike the testimony of an unqualified expert, violating Armando's rights under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

VII. The court erred in admitting improper rebuttal testimony.

VIII. The State failed to prove beyond a reasonable doubt that appellant committed these crimes.

IX. Cumulative error warrants reversal of these convictions.

STATEMENT OF THE CASE

The State filed a complaint on April 19, 2016, alleging one count of Lewdness with a Child under 14, one count of Sex Assault on a Minor under 14, one count of Lewdness with a Child under 16, and one count of Sex Assault on a Minor under 16. (I 2). On May 19, 2016, the State filed an Amended Criminal Complaint alleging two counts of Lewdness with a Child under 14 and seven counts of Sex Assault on a Minor under 14. (I 3). On July 12, 2016, the defendant was bound over after the preliminary hearing. The State filed a Second Amended Criminal Complaint alleging an additional count of Sex Assault on a Minor under 14. (I 6). On July 14, 2016, the State filed an Information alleging two counts of Lewdness with a Child under 14 and eight counts of Sex Assault on a Child under 14. (I 124).

On August 2, 2016, Armando Vasquez-Reyes was arraigned and entered a plea of not guilty in District Court. (III 704). On January 8, 2018, the defense filed a motion to suppress the defendant's statements to police. (I 201). On May 9, 2018, the court denied the defense motion to suppress. (II 276). On May 11, 2018, the defense filed a second motion to suppress the defendant's statements. (II 278). After a hearing under *Jackson v. Denno* on October 7, 2019, the court denied the motion to suppress. (IV 750).

On July 17, 2018, Armando was referred for proceedings in competency court. (IV 735). On September 14, 2018, the District Court deemed Armando not competent and ordered Armando committed for mental health treatment. (II 382; IV 737). On November 16, 2018, Armando was deemed competent to proceed. (II 384).

On October 1, 2019, the State filed a motion in limine regarding Armando made on April 26, 2018. (III 569). On October 7, 2019, the State filed a motion to present propensity evidence. (III 602). The court overruled the defense objection and granted the motion after a hearing. (IV 751, 754-55).

On October 15, 2019, after a seven-day trial, jurors convicted Armando on all counts. (III 661). The State filed the Judgment of Conviction on December 17, 2019. (III 696). The court sentenced Armando to ten years to life on Count 1; ten years to life on Count 2, concurrent; 35 years to life on Count 3, consecutive to Count 2; 35 years to life on Counts 4, 5, 6, 7, 8, 9, and 10, concurrent, for an aggregate sentence of 45 years to life in prison, in addition to lifetime supervision and registration as a sex offender. (III 697). Armando filed a timely notice of appeal on December 19, 2019. (III 699).

STATEMENT OF THE FACTS

In 2007, G.A and her sister S.A. lived with their mother, Rosalba Cardenas-Moreno, in Las Vegas. Rosalba moved from Mexico in 2005 and the children subsequently joined her. (VII 1605). G.A. was about five when she moved to Las Vegas; S.A. was ten; their brother Mael was thirteen. (VII 1610). Armando Vasquez-Reyes began dating Rosalba in 2006 and moved in soon after the two started dating; he was living with Rosalba when the children arrived from Mexico. (VI 1432; VII 1605). Armando worked as a welder from early morning until early afternoons. (VII 1607). Rosalba usually worked nights. (VII 1607). The family moved to several different houses over the years. Mael got married and his wife lived intermittently with the family over the years. (VI 1433-34). S.A. also got married and her husband also lived with the family for a period of time. (VI 1434).

G.A. testified that when she was five or six years old and the family lived in a Las Vegas apartment, she was sexually abused multiple times by Armando. (VI 1436). She stated that Armando invited her to join him in the bedroom he shared with Rosalba, and that he removed her clothes and touched her breasts, vagina, and buttocks. (VI 1437). She testified that the bedroom door was closed and that Armando told her not to tell anyone what had happened. (VI 1438, 1441). She testified that at other times, Armando

told her to grip his exposed penis and to move her hand up and down. She saw him ejaculate. (VI 1443-45). She testified that these events occurred in Rosalba's and Armando's bedroom with the door closed and locked. (VI 1444). She claimed that these events occurred from once a week up to three times a week, and that the acts continued after the family moved from the apartment to a house with a pool. (VI 1447-48).

At one of the residences, G.A. claimed that Armando penetrated her anus with his penis. (VI 1451). G.A. testified that she did not tell anyone because she feared that her mother would judge her and hate her. (VI 1452). She testified that anal penetration occurred several times, including one time when she was on her back on Armando's bed, and another time when she was kneeling on the floor. (VI 1453-54). G.A. testified that these acts also occurred when the family moved into a second three-bedroom house in Las Vegas, including at least twice in her mother's room. (VI 1455). She testified that one time Armando tried to penetrate her vagina in her mother's bedroom but she pushed him away because of the pain, and that another time she had fallen asleep in her mother's room while folding laundry; she testified that she woke up and Armando penetrated her anally with his penis. (VI 1457). She testified that Armando also touched her, kissed her, and

penetrated her anus with his penis on an occasion in the laundry room. (VI 1461).

The family moved into a two-story four-bedroom house when G.A. was nine or ten years old. She testified that the sexual assaults continued during this time. (VI 1461). She testified that she kept her bedroom door locked but that it could be opened from the outside, and that Armando would unlock the door and enter her room. She testified that Armando penetrated her anus in her bedroom. (VI 1463). She testified that these acts also occurred in her mother's bedroom when Armando would invite G.A. and S.A. to watch a movie. G.A. testified that S.A. left the room one night and went to sleep in her own bedroom, after which Armando touched G.A. and anally penetrated her. (VI 1465). G.A. testified that the last time Armando penetrated her was in his bedroom in a white house, and that this assault occurred before Thanksgiving of 2015. (VI 1466).

G.A. stated that by the fall of 2015, she had learned about sexual abuse from classes at school and from a friend; she realized that she was experiencing this type of abuse. (VI 1467-71). She testified that she started cutting herself and attempted suicide by taking pills she had been prescribed. (VI 1472-73). When the last event occurred in November of 2015, G.A. testified that she pushed Armando away and threatened to call the police.

(VI 1475). After this event, G.A. testified that Armando stopped touching her and stopped abusing her for several months. (VI 1476). The family then moved to a house on Bruce Street in Las Vegas. About two weeks before Armando was arrested on April 16, 2016, G.A. testified that he grabbed her butt as he passed her in the kitchen. (VII 1477-78).

On April 16, 2016, G.A. testified that a family disagreement occurred over rent money and that her mother called the police. (VII 1481-82). G.A. testified that her older sister S.A. was planning on moving out soon with her husband, and that her brother Mael was also planning on moving out soon with his wife and child. (VII 1480-81). G.A. testified that she was afraid that when her siblings moved out, she would be left alone in the house with Armando and that the abuse might begin again. (VII 1482). When police arrived, G.A. testified that she decided to tell the police about the abuse and informed a patrol officer that she was being raped. (VII 1483).

Officer Murray testified that he arrived in response to call about a family disturbance. After speaking with various family members about the dispute, he was approached by G.A. (VII 1574). She asked if she could speak to him outside the presence of the other family members. (VII 1575). Based on G.A.'s disclosures of sexual abuse, Murray called in a detective from Metro's sexual assault unit. (VII 1580).

When Detective Pretti arrived at the scene, he spoke with G.A. and Rosalba, and he decided to continue the interviews at Metro headquarters. (VIIII 1782). Pretti claimed that Armando agreed to go to headquarters and was transported while handcuffed in a patrol car. (VIII 1785). Armando ultimately gave a statement to Pretti at Metro headquarters in which he made admissions to an act of lewdness and an act of sexual assault. (II 246; 265-68).

Subsequently, at a pretrial meeting at the District Attorneys' office, Rosalba and G.A. interviewed with Ruth Leon, the D.A. investigator assigned to the case. S.A. also attended the meeting. Leon testified that as a result of disclosures made by S.A. at this meeting, additional investigation was requested from Metro. (VIII 1693). At trial, S.A. testified that when she was twelve years old, she was playing outside with her siblings and went into the house to use the bathroom. She testified that Armando called her into his and Rosalba's bedroom and that he threw her on the bed. (VIII 1712). She testified that Armando got on top of her, touched her, and removed her shorts. (VIII 1713-14). She testified that Armando put his penis in her vagina. She did not believe he ejaculated. (VIII 1715). S.A. testified that she felt pain and a burning sensation. When it was over, she went

outside and watched her siblings play; S.A. did not continue playing and did not tell anyone what had happened. (VIII 1716).

The State presented testimony from G.A., Metro Officer Murray, Rosalba, D.A. investigator Ruth Leon, S.A., interpreter Maria Corral, Metro Det. Pretti, and Dr. Sandra Cetl. The defense presented testimony from EMT James Duke and Dr. Greg Harder. The State presented rebuttal testimony from Dr. Lia Roley. After a seven-day trial, jurors convicted Armando on all counts. (III 661-664).

SUMMARY OF THE ARGUMENT

In the absence of any physical evidence, this Court should reverse these convictions based on insufficient evidence, prosecutorial misconduct, multiple erroneous rulings by the trial court, and a confession that resulted from an illegal detention and inherently coercive police tactics.

ARGUMENT

I. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting defense instructions and by providing prejudicial instructions.

In reviewing jury instructions, this Court grants district judges broad discretion and will affirm unless the district court abused that discretion. *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005); *Hoagland*

v. State, 240 P.3d 1043, 1045 (Nev. 2010). In general, this Court "reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error." *Berry v. State,* 212 P.3d 1085, 1091 (Nev. 2009). Whether a jury instruction accurately states applicable law is a question subject to de novo review. *Id.* at 1091.

A. Instruction 13 is Irrelevant to these Charges and Minimizes the Burden of Proof

The defense objected to the "no corroboration" language of Instruction 13. (IX 1964; III 679). The defense offered Instruction I in response to the State's no corroboration instruction: "There is no law or requirement that you believe the testimony of an alleged victim beyond a reasonable doubt Whether you choose to do so is left to the sound discretion of you as the jurors after considering all the evidence." (III 647; IX 1976). The court rejected Instruction I. (IX 1978). As defense counsel argued, this instruction would have ameliorated the inherent prejudice of Instruction 13.

The defense objected to Instruction 13 on the grounds that it unfairly highlights the testimony of the complaining witnesses, contains confusing language, implies burden-shifting, contains the prejudicial word "victim," and contains an irrelevant reference to appellate standards of review. (IX 1964-66). The Court overruled the defense objection and provided the

instruction: "There is no requirement that the testimony of a victim of sexual assault be corroborated, and his/her testimony standing alone, if believed beyond a reasonable doubt, *is sufficient to sustain a verdict of guilty*." (III 679) (emphasis added).

"It is for the jury to determine the degree of weight, credibility and credence to give to testimony and other trial evidence . . ." *Hutchins v. State*, 110 Nev. 103, 109; 867 P.2d 1136, 1140 (1994) (*over'd on other grounds by Mendoza v. State*, 130 P.3d 176 (2006)). Two decades ago, the Nevada Supreme Court disapproved the "Lord Hale" instruction cautioning jurors about the difficulty of disproving an allegation of sexual assault. *Turner v. State*, 111 Nev. 403; 892 P.2d 579 (1995). This Court should similarly reject this instruction. Both instructions contain the same potential for prejudice: unwarranted assumptions regarding the veracity of the complaining witness. While the Lord Hale instruction assumes the complainant could fabricate a charge which the defendant would have difficulty disproving, the uncorroborated victim instruction implies that jurors should believe the victim, despite the lack of corroborating evidence. If one of these instructions is improper, this Court should similarly reject the other as improper.

Significantly, this instruction carried particular prejudice in the instant case, where no physical evidence existed and where many of the allegations were several years old. Other courts have rejected similar instructions. In rejecting an instruction stating "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt," the Supreme Court of Indiana noted that:

> ... [a]n instruction directed to the testimony of one witness erroneously invades the province of the jury when the instruction intimates an opinion on the credibility of a witness or the weight to be given to his testimony.

Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). Additionally, "[b]y training the jury's attention on the complaining witness's testimony, the instruction communicates the trial judge's apparent determination of credibility." *Carie v. State,* 761 N.E.2d 385, 386 (Ind. 2002). For these reasons, this Court should conclude that these instructions are improper and prejudicial.

B. The Cases Relied Upon by the Nevada Supreme Court Fail to Support this Instruction

Admittedly, the Nevada Supreme Court previously approved a similar instruction in *Gaxiola v. State*, 121 Nev. 638, 649, 119 P.3d 1225, 1233 (2005). However, in approving the instruction, this Court should note that the *Gaxiola* Court relied in part upon *People v. Gammage*, 2 Cal. 4th 693,

828 P.2d 682 (Cal. 1992), and *People v. Smith*, 385 N.W.2d 654 (Mich. Ct. App. 1986).

In *Gammage*, the trial court gave the following instruction, codified in CALJIC 10.6: "It is not essential to a finding of guilt on a charge of [rape] [unlawful sexual intercourse] [(sexual activity)] that the testimony of the witness with whom sexual relations is alleged to have been committed be corroborated by other evidence." *Gammage*, 2 Cal. 4th at 697, 828 P.2d at 684. On appeal, the California Supreme Court found it was not error to give CALJIC 10.60, *but only if the court also provides* CALJIC 2.27. *Id.* at 700, 828 P.2d at 686. CALJIC 2.27 states:

> You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.

Id. at 696, 828 P.2d at 684. Thus, the *Gammage* court recognized the problematic nature of no-corroboration instructions like CALJIC 10.60, and opined that CALJIC 2.27 strikes a balance "...which protects the rights of both the defendant and the complaining witness." *Id.* at 700, 828 P.2d at 686. Thus, *Gammage* only approved the "no corroboration" instruction in CALJIC 10.60 *when balanced by* CALJIC 2.27.

Further, just as *Gaxiola* failed to apprehend the entirety of the California Supreme Court's foundation for the *Gammage* decision, *Gaxiola*'s reliance upon *Smith* is also misplaced. *Smith* approved a "no corroboration" instruction based on Michigan statutory authority: the Court concluded that the instruction "accurately states the law as provided in M.C.L. § 750.520h." *Smith*, 385 N.W. 2d at 195. While *Smith* did not recite the text of M.C.L.A 750.520h, the statute currently provides, "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g."[3] Notably, the instruction in *Smith* apparently did not contain the phrase "sufficient to sustain a verdict of guilty," unlike the instant instruction and the *Gaxiola* instruction. Thus, the primary cases relied upon by the *Gaxiola* decision do not support the language ultimately approved in the instruction, and do not support the State's contention that this instruction is proper in all cases involving allegations of sexual assault.

The instruction approved in *Gaxiola* and provided to the instant jury fails to accurately track CALJIC 10.60, and lacks the balancing instruction found in CALJIC 2.27, as required by the *Gammage* court. Both the precise wording of CALJIC 10.60, and the simultaneous provision of CALJIC 2.27, comprised the foundation of *Gammage*'s approval of the no-corroboration instruction; *Gaxiola* entirely fails to recognize and apply this reasoning,

warranting another look at the decision and a rejection of the trial court's decision that *Gaxiola* supports the provision of this instruction.

C. The Instruction Improperly References an Appellate Standard of Review.

Significantly, CALJIC 10.60 also does not reference a post-conviction sufficiency of the evidence standard, as in the *Gaxiola* instruction. The *Gaxiola* instruction, as provided in the instant case and noted by trial counsel, specifically states that an alleged victim's testimony is sufficient to "sustain a verdict of guilty." *Gaxiola*, 121 Nev. at 648, 119 P.3d 1232. (III 679; IX 1965). Trial courts should not provide jury instructions that refer to appellate standards of review. Other courts recognize that the "no corroboration" rule is meant for appellate review, and not for jury instructions. *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010). At minimum, *Gaxiola* should be modified to require a no-corroboration instruction mirroring CALJIC 10.60, and to require the provision of a companion instruction, identical to CALJIC 2.27.

Based upon the aforementioned authorities, this Court should revisit *Gaxiola* and find error in the provision of "no corroboration" instructions. Continuing to approve the *Gaxiola* instruction would effectively place Nevada at odds with increasing national awareness that "no corroboration"

instructions are inherently biased, prejudicial, and unconstitutional. This Court should reverse these convictions because the *Gaxiola* instruction improperly referenced an appellate standard of review, failed to track CALJIC 10.60, and lacked the balance provided by an instruction like CALJIC 2.27. Essentially, this instruction impermissibly bolstered the credibility of G.A.'s and S.A.'s testimony and "effectively placed the judge's thumb on the scale to lend an extra element of weight to the victim's testimony." *Gutierrez*, 177 So.3d at 231-32.

D. The court erred in overruling defense objections

The defense objected to Instruction 5 on reasonable doubt. (IX 1961). The defense noted that the instruction fails to adequately define "reasonable doubt" and instead relies on negatively-worded phrases regarding what is not reasonable doubt. In addition, the use of the word "until" implies an inevitable finding of guilt. (IX 1961-62). This Court has noted that "[t]he rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence." *Haywood v. State*, 107 Nev. 285, 288 (1991). By implying that a finding of guilt is a foregone conclusion, this instruction minimized the presumption of innocence. The United States Supreme Court recognizes the significance of the presumption of innocence instruction. *Taylor v.*

Kentucky, 436 U.S. 478, 485 (1978). The use of the word "until," without modification by "if ever," or "and unless," suggests to jurors that the State would ultimately meet its burden to overcome the presumption of innocence and undermined the presumption of innocence.

The defense also objected to Instruction 6, and requested the defense proposed instruction A on circumstantial evidence be provided instead. (IX 1962; III 631, 672). In part, the defense instruction provided that if the evidence offered two reasonable conclusions, one of which points to the defendant's guilt the other to his lack of guilt, jurors must accept the conclusion leading to a lack of guilt. (III 631). Although this Court has held that similar instructions are not required, this Court agrees that this type of instruction is generally permissible. *Bails v. State*, 92 Nev. 95, 97 (1976). The Court rejected the instruction and provided Instruction 6 instead. (III 631, 672, IX 1962).

The defense also objected to Instructions 11 and 12 as irrelevant to the facts of the instant case. (III 676, 677; IX 1963). Instruction 11 advised jurors in part that there is no consent "where a person is induced to submit to the sexual act through fear of death or serious bodily injury." (III 677). The defense noted that there was no evidence of physical force being used and that this instruction was irrelevant. Similarly, the defense objected to

language in Instruction 12 on the grounds that it was confusing and irrelevant. (IX 1963-94; III 678). As the defense noted, these instructions had little application to this case where no allegation was made that physical force was used or that consent had been offered as a defense to the charges. The inflammatory language of these instructions prejudiced the defense and contained concepts irrelevant to the crimes charged.

The defense also objected to Instructions 17, 18, and 19 as irrelevant, cumulative, and confusing. (III 683-85; IX 1966-67). Instruction 17 provided that "The law does not require that the lust, passions or sexual desires of either of such persons actually be aroused, appealed to, or gratified." Instruction 18 provided, "To constitute a lewd or lascivious act it is not necessary that the bare skin be touched. The touching may be through the clothing of the child." Instruction 19 provided, "Consent in fact of a minor child under fourteen years of age to sexual activity is not a defense to a charge of Lewdness with a Child Under the Age of 14." (III 683-85). Again, the defense of consent had not been argued or presented by Armando, nor had the defense alleged that acts of touching had been inadvertent or non-sexual, making these instructions irrelevant and confusing.

The defense also objected to Instruction 21 on the grounds that Instruction 23 (Defense Instruction E) more accurately reflected the relevant language in *LaPierre v. State:* "However, the victim must testify with some particularity regarding the incident in order to uphold the charge." *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). (IX 1969-70; III 687, 689). The defense also objected to Instruction 22 and submitted proposed Instruction D in its place. (IX 1968; III 637, 688). The defense proposed instructions accurately reflected the law as provided in *LaPierre* and in *Crowley v. State*, 120 Nev. 30, 34, 83 P.2d 282, 285 (2004). The court erred in rejected accurate and relevant defense instructions and in providing instructions that implicitly favored the State. *Crawford v. State*, 121 Nev. 746, 754 (2005).

E. The court erred in rejecting proposed defense instructions

The defense submitted four jury proposed jury instructions based on extensive research conducted in the Western District of Washington regarding unconscious and implicit bias and modeled in part on Ninth Circuit model instructions. (XII 2485-2489). The State filed a bench brief and objected to the defense proposed jury instructions regarding implicit bias in part on the grounds that Nevada has yet to create similar instructions based on Nevada-specific research. (III 616-17; VI 1372). The defense

argued that the unconscious bias referenced in the instruction applied to the general stereotypes and underlying prejudices of which people may not even be aware, and that nothing in the proposed instructions was unique to circumstances in Western Washington. (VI 1374-75). These instructions simply reminded jurors that their verdict must be based on the facts and evidence of the case, and not on any unconscious bias they may harbor. (VI 1375; (XII 2485-2489)). The court rejected the instructions in part because the court was concerned that calling attention to the issue may be more harmful than beneficial. (VI 1380).

The court erred in rejecting these instructions. As the State admitted in its bench brief (III 617), the U.S. Supreme Court has recognized that jury instructions can play a significant role in protecting against juror bias. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871, 197 L. Ed. 2d 107 (2017). The Ninth Circuit has noted the importance of expansive voir dire as the primary vehicle for exposing conscious and unconscious bias: "As the Supreme Court recognized in *McDonough,* '*[v]oir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors."" *Fields v. Brown*, 503 F.3d 755, 766 (9th Cir. 2007), citing *McDonough Power Equipment v. Greenwood,* 464 U.S 548, 554, 104 S. Ct. 845 (1984). The U.S. Supreme Court has acknowledged, in the

context of *Batson* analyses, the presence of unconscious biases and stereotypes on the part of prospective jurors. *Miller-El v. Dretke*, 545 U.S. 231, 267–68, 125 S. Ct. 2317, 2341 (2005).

As noted by the Washington Supreme Court, the procedures articulated in *Batson v. Kentucky* have fallen far short of the goal of insuring that jury selection meets the requisite constitutional requirements:

> Twenty-six years later it is evident that *Batson,* like *Swain* before it, is failing us. *Miller–El,* 545 U.S. at 270, 125 S.Ct. 2317 (Breyer, J., concurring) ("[T]he use of race-and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."). A growing body of evidence shows that *Batson* has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges.

State v. Saintcalle, 178 Wash. 2d 34, 43, 309 P.3d 326, 334 (2013), *abrogated on other grounds by City of Seattle v. Erickson,* 188 Wash. 2d 721, 398 P.3d 1124 (2017). Partially in response to these concerns, the Western District of Washington established a bench-bar committee to research and address the issue. This research culminated in the proposed jury instructions submitted by the defense in the instant case: two preliminary instructions, a witness credibility instruction, and a closing instruction, all of which seek to raise awareness of unconscious bias and to warn jurors to avoid allowing these biases to affect their decisions. (XII 2485-89). These instructions would have protected the defendant, preserved the integrity of

the jury selection process, and minimized the inherent flaws of *Batson*'s three-part test. This court should rule that these instructions are relevant, necessary, and mandatory in all criminal cases.

The court erred in rejecting additional defense instructions. The defense requested a playback instruction. The court rejected the request. (IX 1972). Courts may grant jurors' requests for playbacks of testimony. In fact, this Court has implied a preference for courts to assent to requests for playbacks: "We do, however, agree with those courts which have held that it cannot be prejudicial to anyone to conduct a reasonable rereading of requested testimony." *Miles v. State*, 97 Nev. 82, 84, 624 P.2d 494, 495 (1981). The trial court gave no reason for the rejection of this requested instruction: "No, I don't ever give those. I don't give a playback instruction." (IX 1972). This Court should find that the judge abused her discretion in the blanket refusal to consider giving this instruction.

The defense also proposed Instruction B regarding evaluation of witness credibility based on Cal. Crim. 195 and Ninth Circuit Model Instruction 1.7 and addressing, in part, the avoidance of conscious and unconscious bias in evaluating witness credibility. (III 633; IX 1974; XII 2488). The defense instruction was far more complete and detailed than Instruction 7 and would have offered more specific guidance to jurors in a

case that rested completely on witness credibility. (III 673). The defense also proposed Instruction K, an inverse flight instruction. (III 651; IX 1978). This instruction was an accurate statement that simply reminded jurors they could consider Armando's lack of flight in their deliberations. (III 651). The defense also proposed Instructions L and M, both theory of the case instructions:

> If you find that [G.A.] made up the allegations against Armando Vasquez-Reyes in order to have him arrested and taken away from her family, you must find Mr. Vasquez-Reyes not guilty of the charges which relate to her. (III 653).

(III 653; IX 1979). Instruction M contained the same language applicable to S.A. (III 654; IX 1980).

All of the proposed defense instructions were tailored to the facts of the case and to the defense theory of the case, and the court erred in rejecting them. ". . . [T]he defense has the right to have the jury instructed on its theory of the case, ... as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Honea v. State*, 136 Nev., Adv. Op. 32, 466 P.3d 522 (2020) (quoting *Crawford*, 121 Nev. at 751, 121 P.3d at 586). The trial judge abused her discretion in rejecting these instructions: "specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request." *Crawford*, 121 Nev. at 753, 121 P.3d at 588. If the district court disagreed

with the precise language of these instructions, the court should have "assist[ed] the parties in crafting the required instructions or ... complete[d] the instructions *sua sponte.*" *Crawford*, 121 Nev. at 754-55, 121 P.3d at 589.

The Nevada Supreme Court has emphasized that trial courts should exercise diligence in ensuring that jury instructions fit the facts of the case: "[j]urors . . . should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." *Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005) (emphasis added). The proposed defense instructions would have defined relevant and necessary legal terminology and would have assisted jurors in their deliberations. *Honeycutt v. State,* 118 Nev. 660, 56 P.3d 362, 368 (2002), *rev'd in part on other grounds*, *Carter v. State*, 121 P.3d 592 (2005). A"district court *may not refuse* to give a proposed defense instruction simply because it is substantially covered by the other instructions given." *Guitron v. State,* 131 Nev. 215, 229, 350 P.3d 93, 102 (Ct. App. 2015) (emphasis added); *Crawford,* 121 Nev. at 753-54, 121 P.3d at 588.

Finally, the defense proposed a verdict form with "not guilty" as the first option. (III 657; IX 1982). As noted by trial counsel, the appearance of 'guilty' as the first option on the verdict form undermines the presumption

of innocence and suggests that guilt is the first option a jury should consider. Essentially, the placement of "guilty" before "not guilty" requires jurors to decide whether Armando committed a crime before considering whether he was innocent. The presence of "guilty" before "not guilty" on a document provided by the judge also implies that the court may have a preference for the first option over the second. Although subsequently rejecting arguments that this placement constitutes reversible error, the Georgia Supreme Court noted in dicta the potential implications of ordering verdict forms in this fashion: "While there is no such evidence in this case, some other jury might perceive the antecedence of the word 'guilty' over the words 'not guilty' to be expressive of the view of the court." *Smith v. State*, 249 Ga. 228, 232, 290 S.E.2d 43, 47 (1982).

Because the court improperly rejected appropriate defense instructions and provided instructions that improperly favored the State and minimized the burden of proof, this Court must reverse these convictions. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

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II. The State committed misconduct, violating the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

In determining whether prosecutorial misconduct deprived a defendant of a fair trial, the Nevada Supreme Court generally examines "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." *Rudin v. State*, 86 P.3d 572, 582 (2004); *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 477 (2008). In evaluating a claim for prosecutorial misconduct, appellate courts first determine "whether the prosecutor's behavior was improper." *Truesdell v. State,* 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). Here, the State engaged in numerous acts of misconduct that warrant reversal.

The defense objected to the State's explicit claims during Closing Argument that there was "no evidence" and "no testimony" regarding G.A.'s inconsistent allegation that vaginal intercourse had occurred the week prior to Armando's arrest. The defense objected that this argument and description of the "defense theory" constituted improper burden-shifting. The court sustained the objection. (IX 2102-03). The defense also objected when the prosecutor repeated this claim: "She never told the police that penetration occurred a week prior." The court overruled the defense objection to this misstatement of the testimony. (IX 2104). The characterization of "no

evidence" and "no testimony" constitutes an improper implication that the defense bore some burden of introducing evidence or testimony. Further, these statements misstate the evidence. In fact, at the very least, the evidence was in conflict regarding this issue, but Officer Murray's written report and the testimony of both Murray and Det. Pretti clearly constituted *some evidence and some testimony* to the contrary. Officer Murray admitted that in his contemporaneous report, he wrote that G.A. had told him, " ... Armando regularly puts his penis inside her vagina and had sex with her unwillingly, the last time being approximately one week ago from today." (VII 1589). Although Murray claimed at trial that he had meant a broader definition of any "unlawful sexual contact" when he referred to "the last time" in his report, he also admitted that his report does not specifically reference "unlawful sexual contact" but states only that "the last time" was a week prior to the disclosure, immediately after referencing G.A.'s claims of years of vaginal penetration. (VII 1595). Further, Detective Pretti also admitted that Murray told him when he arrived at the house that G.A. claimed Armando had sexually assaulted her a week prior to the arrest. (VIII 1838).

Thus, the State's argument that there was "no evidence" and "no testimony" of penetration a week prior to the arrest is a flagrant

mischaracterization of a hotly contested issue regarding G.A.'s consistency and credibility, and constitutes impermissible burden-shifting. The prosecutor also misstated Dr. Harder's testimony by arguing that Armando's IQ of 61 was "[w]ell below the 70 average." The court overruled the objection to this misstatement of the evidence; in fact, Dr. Harder had testified that the average IQ is 100, not 70. (IX 1988; 2108).

The prosecutor argued during rebuttal, " . . . that [Armando] generally got along with family. There was no evidence of violence in the household, regular police visits, none of that is in - *none of that has come into evidence*." (IX 2147; emphasis added). The defense objected that the argument implied that such evidence existed but had not been admitted into evidence, and moved for a mistrial. The court overruled the objection and denied the motion. (IX 2147). The State also misstated the evidence and introduced personal opinion during rebuttal argument:

> Now, if G.A. was making this up, the State submits that this 14-year-old G.A. has just described a lot of conduct that she didn't have to, and in so doing, she's pretty well described a course of grooming conduct that might make - not make a lot of sense to a 14-year old. But when you look at it in the totality, as we are, *it makes a heck of a lot of sense*, the State would submit.

(IX 2159) (emphasis added). The defense objected that no witness had testified as to "grooming conduct," and that the prosecutor was inappropriately referring to facts not in evidence and offering personal

testimony and opinion. The defense moved for a mistrial. The court sustained the objection and denied a mistrial. (IX 2159-61). The Nevada Supreme Court has recognized that "grooming" is a concept that generally implicates expert testimony:

> The term "grooming" describes when an offender prepares a child for victimization by " 'getting close to [the] child, making friends with the child, becoming perhaps a confidant of the child, [and] getting the child used to certain kinds of touching, [and] play activities.' " *State v. Stafford,* 157 Or.App. 445, 972 P.2d 47, 49 n. 1 (1998) (quoting trial expert testimony).

Perez v. State, 129 Nev. 850, 855, 313 P.3d 862, 866 (2013). No State expert offered this type of testimony in the instant trial. A prosecutor may not make statements unsupported by the evidence adduced at trial. *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992); *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987). By vouching for G.A.'s testimony and opining that her description "makes a heck of a lot of sense," and by characterizing her descriptions of the allegations as "grooming conduct," the prosecutor improperly injected personal assessments of the credibility of witnesses and interpretation of evidence into closing arguments. The State violated the Fifth, Sixth, and Fourteenth Amendments by engaging in implicit vouching for the credibility of a State witness. "It is improper for the prosecution to vouch for the credibility of a government witness." *Lisle v. State*, 113 Nev. 540, 553, 937 P.2d 473 (1997).

The State also elicited improper vouching testimony from a State witness. During direct examination, Officer Murray was asked about G.A.'s demeanor when she first approached him at the scene. The defense objected that this question called for speculation. The court overruled the objection and Murray described G.A. as "very genuine" in what she had told him. The defense objected again based on speculation and improper opinion. The court overruled the objection. (VII 1576-77). Murray again testified, "She was able to talk to me clearly, *and she seemed genuine in what she told me*" (VII 1577; emphasis added). The defense objected to this improper vouching, and the court struck the last statement. (VII 1578). Witnesses may not vouch for each other's testimony. *Marvelle v. State*, 114 Nev. 921, 931, 966 P.2d 151 (1998). "[A] lay witness's opinion concerning the veracity of the statement of another is inadmissible." *DeChant v. State*, 116 Nev. 918, 924 (2000). "Because credibility was the central issue in this case, eliciting opinions as to the veracity of the victim and arguing this to the jury could not have been harmless." *Lobato v. State*, 96 P.3d 765, 770 (Nev. 2004). Although the court sustained the defense objection, the damage had already occurred, and jurors heard two statements that explicitly vouched for G.A.'s credibility from a Metro officer who described her disclosures as "very genuine."

Further, the prosecutor improperly denigrated the standard of proof beyond a reasonable doubt. During rebuttal, the prosecutor stated, "And I just want to start by just talking about that because ladies and gentlemen reasonable doubt's *not something that's a mystical thing*." (IX 2141) (emphasis added). The Court sustained the defense objection. (IX 2141). The prosecutor then opined, "And I just [sic] making reference to the instruction, the instruction makes reference to the reasonable doubt is not beyond any doubt. It's not beyond mere possible doubt." Again, the defense objected and the court instructed the State to adhere to the language of the jury instruction. (IX 2141). The Nevada Supreme Court has repeatedly admonished prosecutors not to "supplement or rephrase the definition of reasonable doubt," and that courts should not "tolerate noncompliance with a simple obligation that helps ensure a fundamental component of this nation's criminal justice system—'the right to a jury verdict of guilt beyond a reasonable doubt.'" *Randolph v. State*, 117 Nev. 970, 982, 36 P.3d 424, 432 (2001). By suggesting that the standard of proof is "not something that's a mystical thing," the prosecutor minimized the burden of proof and implied to jurors that the standard could be easily satisfied.

The defense also objected when the prosecutor argued, "And this whole concept that her statements were going to be scrutinized, well, they

were scrutinized back then and three years later by good defense attorneys, they're scrutinized again." The defense objected that this argument disparaged the defense attorneys and moved for a mistrial based on this statement and on previous cumulative misconduct. The court denied the motion. (IX 2106-07). By suggesting that "good" defense attorneys were somehow unfairly "scrutinizing" the claims of the complaining witnesses as part of a manipulative defense strategy, the prosecutor sought to position the defense attorneys as antagonists of G.A. and S.A., and clearly intended to criticize them for performing the work all defense attorneys must undertake under the Sixth Amendment:

> And it is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics. Here, the State used many adjectives and analogies in these remarks that portrayed Butler's presentation of mitigating evidence and defense tactics as a dirty technique in an attempt to fool and distract the jury, implying that Butler's counsel acted unethically in his defense—this was a form of disparagement of counsel.

Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (internal citations omitted). As in *Butler*, the State committed misconduct by suggesting that Armando's lawyers were employing standard defense attorney tactics by excessively "scrutinizing" the allegations against him.

The defense renewed the motion for mistrial based on cumulative misconduct at the end of the State's Closing, noting that the State had shifted

the burden of proof, disparaged the defense, and mischaracterized the defense theory of the case. (IX 2114). The State had argued that the defense theory was that G.A. was motivated to lie about Armando because she blamed him for her siblings moving out of the house. (IX 2099-2100). Although the defense did not contemporaneously object to this misstatement of the defense theory, the defense subsequently noted that the State had entirely mischaracterized the defense theory. (IX 2102). The defense also incorporated this argument into the renewed motion for mistrial. (IX 2114-2115). The court denied the motion. (IX 2116).

"A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." *Rudin v. State*, 86 P.3d 572, 587 (2004). Because the prosecutor misstated the evidence, shifted the burden of proof, minimized the standard of proof, mischaracterized the defense theory of the case, offered baseless opinion during rebuttal, vouched for a State witness, and denigrated defense counsel, this Court must conclude that cumulative misconduct constitutes reversible error.

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III. The trial court violated Armando's federal and state constitutional rights in denying suppression of all evidence related to Armando's illegal detention and subsequent statements to police.

Because the totality of the circumstances indicates that Armando's waiver of his Fifth Amendment rights was not voluntary, that his detention was illegal, and that his statements were coerced, the Court should have suppressed the statements. Fourth Amendment suppression issues involve mixed issues of law and fact. *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002*), overruled on other grounds, Nunnery v. State*, 263 P.3d 235, 250–51 (Nev. 2011). The Nevada Supreme Court reviews findings of fact for clear error, but "the legal consequences of those facts involve questions of law" that appellate courts review de novo. *State v. Beckman*, 305 P.3d 912, 916 (Nev. 2013), *citing Cortes v. State*, 260 P.3d 184, 187 (Nev. 2011); *State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000); *also see Hayes v. State,* 106 Nev. 543, 550 n. 1, 797 P.2d 962, 966, n. 1 (1990). Before introducing a defendant's incriminating statement, the government must prove by a preponderance of the evidence that the accused voluntarily, knowingly, and intelligently waived his Miranda rights. *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986). To determine the validity of the waiver:

> ... [t]his court examines "the facts and circumstances of the case such as the background, conduct and experience of the defendant." Relevant considerations in determining voluntariness of a confession include the youth of the defendant, his lack of education or low intelligence, the lack of advise of constitutional rights, the length of detention, repeated and prolonged questioning, and physical punishment such as deprivation of food or sleep.

Floyd v. State, 118 Nev. 156, 171 (2002) (internal citations omitted); *Carroll v. State,* 132 Nev. 269, 279–80, 371 P.3d 1023, 1030–31 (2016).

On January 8, 2018, the defense filed a motion to suppress the defendant's statements to police on the grounds that the consequences of waiving these rights were not fully explained; the motion also requested a hearing under *Jackson v Denno* as to the voluntariness of the statement. (I 201-206). On April 26, 2018, the court held a hearing on this motion. On May 9, 2018, the court denied the defense motion to suppress. (II 276). The defense contemporaneously renewed the objection to the admission of Armando's statements during trial on grounds of lack of voluntariness and admissibility. (VIII 1773).

Here, the record reveals that Armando's statements were not voluntary and that his will was overborne when he confessed. Under the *Floyd* factors, Armando did not knowingly and intelligently waive his *Miranda* rights. A valid waiver "cannot be presumed . . . simply from the fact that a confession was ultimately obtained." *Miranda v. Arizona*, 384

U.S. 436, 475 (1966). At the first suppression hearing on April 26, 2018, Det. Pretti testified that he had been informed of a sexual assault allegation by a patrol officer. (XII 2322). He claimed that he spoke with Armando and asked if he would consent to an interview at Metro headquarters. (XII 2423-24). Pretti claimed that Armando consented to the interview and to being transported to headquarters while handcuffed in a patrol car. (XII 2423-24). Pretti testified that he escorted Armando to the interview room and removed his handcuffs. (XII 2425). At the same hearing, translator Maria Corral also testified that Armando agreed to go to the police station with Det. Pretti. (XII 2400). Corral testified that Pretti did not read Fifth Amendment rights to Armando at the scene. (XII 2413). She also testified that at the station, Armando stated that he was feeling lightheaded. (XII 2402). Pretti testified that he told Armando that he could get an EMT to examine Armando but could not administer medication to him. (XII 2426). Pretti testified that he read Armano his Miranda rights. (XII 2430; also see II 246-272).

Pretti admitted that Armando was kept waiting for over an hour in a ten-by-ten waiting room at the police station. (XII 2441). Pretti admitted that he did not explain to Armando what he meant when Pretti said he could get medical attention for Armando if he needed it. (XII 2443). Pretti admitted that he told Armando that G.A. had no reason to lie about the allegations.

(XII 2446; II 258). Pretti admitted that Armando responded, "I don't know" five times during the interview. (XII 2447). Armando did not answer a number of questions posed by Pretti during the interview. (II 262, 267). Initially, Armando repeatedly denied committing these acts. (II 251, 258, 261).

Armando testified at the hearing that he suffers from high blood pressure and diabetes. (XII 2456). When he arrived at the police station, he felt dizzy and had a rapid heartbeat. (XII 2456). He felt pressured by Pretti to answer questions. (XII 2458). He believed he had forgotten to take his medication for his blood pressure and diabetes, and did not recall Pretti offering him medical attention at any point at the station. (XII 2464, 2465-66). Armando believed that if he gave Pretti the answers he thought Pretti wanted to hear, he would be able to end the interview and get his medication. (XII 2460). The court denied the motion to suppress and found that Armando's statement was voluntary. (XII 2481).

At the second suppression hearing on the first day of trial, October 7, 2019, Armando again denied that he had consented to be interviewed at the police station. He testified that he did not want to go, but that Pretti handcuffed him and took him to the station without his consent. (V 992). Pretti admitted that he took Armando's wallet and cell phone from him when

they arrived at Metro headquarters, although he denied that Armando was under arrest. (VIII 1856). At trial, Pretti admitted that Armando told him that he felt lightheaded when he was at Metro headquarters. (VIII 1808). Pretti admitted that when Armando asked for his diabetes medication, Pretti told him that he wasn't going to give Armando the pills and that he did not want the medication to have an effect on him while they conducted the interview. (VIII 1858). Pretti admitted that he did not explain to Armando what "medical attention" meant when he told Armando that he could get medical attention if he needed it. (VIII 1858). James Duke was employed as an EMT at CCDC on April 16, 2016. (IX 1942). He testified that when he examined Armando on the day of his arrest, Armando's blood pressure was 180/116, an elevated reading. (IX 1944). Normally a patient with a reading that high would be referred for further care. (IX 1944).

Although Armando made some incriminating statements during this interview, the evidence reflects that Armando's statements were not voluntary and should not have been admitted. Dr. Harder testified that Armando has an IQ of 61, well below the average score of 100. He tested in the bottom .5 percentile. (IX 1988). He also scored a three on the Wechsler Adult Intelligence scale, with the average being a ten. (IX 1989). He scored a four, with an average score of ten, on a vocabulary test. (IX 1990). He

scored five, with an average score of ten, on a pattern recognition test, and well below average on a puzzle test. (IX 1990). Armando also scored well below average on reasoning, verbal intelligence, nonverbal intellectual ability, and memory tests. (IX 1991). He scored well below average on numerous memory tests. (IX 1992-93). His scores were consistent with a person with intellectual disabilities. (IX 1995). Dr. Harder testified that a person of low intellectual functioning could have difficulty in communicating with and understanding others. (IX 1998).

Thus, the testimony reveals that Armando, a native Spanish speaker with an IQ of 61, was experiencing significant medical distress after being taken in handcuffs from his home, and that, under *Floyd*, he did not knowingly and intelligently waive his *Miranda* rights, and his subsequent confession was not voluntary. *Jackson v. Denno* requires the trial court to make a full and independent determination of the voluntariness of the defendant's confessions. 378 U.S. at 390-94. The conclusion that the confession was voluntary must appear from the record "with unmistakable clarity." *Sims v. Georgia*, 385 U.S. 538, 544 (1967); *Wallace v. Hocker*, 441 F.2d 219, 221 (9th Cir. 1971). A confession is admissible only if it is freely and voluntarily made. *Steese v. State*, 114 Nev. 479, 488 (1998) (*citing Passama v. State*, 103 Nev. 212, 213 (1987)). In order to be voluntary, a

confession must be the product of a "rational intellect and a free will." *Blackburn v. Alabama*, 361 U.S. 199, 207-08 (1960).

The physical condition of the defendant at the time of his arrest is an important factor in determining whether his subsequent confession was voluntary. *Greenwald v. Wisconsin*, 390 U.S. 519, 520-521 (1968); *Stawicki v. Israel*, 778 F.2d 380, 382-383 (7th Cir. 1985); *United States ex rel. Adams v. Bensinger*, 507 F.2d 390, 394-395 (7th Cir. 1974), *certiorari denied*, 421 U.S. 921. Courts include analysis of a suspect's injuries in evaluating the voluntariness of custodial statements. *State v. Smith*, 409 So. 2d 271, 272 (La. 1982). Where a suspect exhibited confusion and lack of responsiveness in addition to physical injuries, a Virginia appellate court upheld the suppression of statements made en route to the hospital:

> The amount of coercion necessary to trigger the due process clause may be lower if the defendant's ability to withstand the coercion is reduced by intoxication, drugs, or pain, but some level of coercive police activity must occur before a statement or confession can be said to be involuntary.

Commonwealth v. Peterson, 15 Va. App. 486, 488 (Va. Ct. App. 1992) (internal citation omitted). Here, Armando testified that he was dizzy and experiencing a rapid heartbeat upon arrival at the station, and Pretti admitted that he refused to obtain Armando's medication. These inherently coercive circumstances warranted exclusion of Armando's statements to police.

The court also erred in refusing to exclude the confession based on illegal detention. The reasonableness of a seizure is a matter of law reviewed under a de novo standard. *Id.; United States v. Campbell*, 549 F.3d 364, 370 (6th Cir.2008); *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000). At the hearing on the second motion to suppress, Detective Pretti admitted that he could not remember which officer at the scene spoke to him about the allegations. (V 983). He admitted that he did not personally speak to the juvenile who made the allegations. (V 983). Pretti admitted that Armando had not confessed to any crimes when he was placed in handcuffs in the police car. Pretti testified that he believed he had probable cause to make an arrest, but that he simply chose not to do so at the scene. (V 985). Pretti admitted that he placed Armando in handcuffs. (V 986).

The defense argued that Armando was in custody and that under NRS 171.123, the detention qualified as an unlawful arrest after the detention period exceeded sixty minutes. (V 998). The defense noted that Pretti had not actually spoken to a complaining witness and lacked probable cause for an arrest. (V 999). The defense argued that Armando was unlawfully arrested at his home without probable cause, a warrant, or exigent circumstances. (V 999). The court denied the defense motion. (V 1002).

The Fourth Amendment provides for "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures." U.S. Const. Amend. IV. This provision generally prohibits government officials from engaging in searches and seizures absent individualized suspicion. *Chandler v. Miller*, 520 U.S. 305, 308, 117 S. Ct. 1295 (1997). However, the United States Supreme Court has noted that "mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382 (1991). Similarly, the Nevada Supreme Court has held that "[t]he police may randomly—without probable cause or a reasonable suspicion—approach people in public places and ask for leave to search." *State v. Burkholder*, 112 Nev. 535, 538, 915 P.2d 886, 888 (1996); *State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000).

Under NRS 171.123(1), a police officer may detain a person under circumstances which reasonably indicate that the person has committed a crime. However, "[a] person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested." Nev. Rev. Stat. Ann. § 171.123(4). Although the State disputes that Armando was "detained," the evidence reveals that he

was handcuffed and transported in a police car to the station where his belongings were taken away. (V 986, VIII 1855). Armando testified under oath that he did not consent to this detention. (V 992). Trial courts review detentions for objective reasonableness in light of the totality of the circumstances. *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S. Ct. 1801, 114 L.Ed.2d 297 (1991); *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412 (1990).

Once an individual is seized, "no subsequent events or circumstances can retroactively justify the 'seizure.'" *State v. Lisenbee*, 116 Nev. 1124, 1129, 13 P.3d 947, 950 (2000); *State v. Stinnett*, 104 Nev. 398, 401, 760 P.2d 124, 127 (1988) (*citing United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870 (1980)).

> So long as a reasonable person would feel free "to disregard the police and go about his business," California v. Hodari D., 499 U.S. 621, 628, 111 S. Ct. 1547, 1552, 113 L.Ed.2d 690 (1991), the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.

Florida v. Bostick, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991). "... [T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police

presence and go about his business.'" *Bostick*, 501 U.S. at 429 (internal citations omitted).

In *Mendenhall*, the U.S. Supreme Court articulated factors for analyzing whether a police intervention constitutes a seizure or a consensual encounter:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.[6] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980) (internal citations omitted). Here, the first factor clearly favors a finding that this encounter was not consensual: multiple officers were present at the scene, some in uniform. Pretti admitted that if Armando had stated that he would not consent to the interview and instead had indicated that he was going to leave the country, Pretti would not have permitted him to do so. (V 986). Based on Det. Pretti's admission that Armando was a named suspect and that Pretti believed he had probable cause to arrest, a reasonable conclusion is that Pretti's tone of voice and the language he used

would have communicated to Armando that compliance was required and that Armando was not free to leave. (V 985).

Here, the undisputed facts support a finding that Armando was not free to leave, and that this was not a consensual encounter but a seizure that required objective justification under *Terry* and its progeny. These circumstances " . . . indicate that a reasonable person in his position would not have felt at liberty 'to decline the officers' requests or otherwise terminate the encounter.'" *Orhorhaghe v. I.N.S.,* 38 F.3d 488, 494 (9th Cir. 1994), *citing Bostick*, 501 U.S. at 436, 111 S.Ct. at 2387. In determining whether a seizure was reasonable, the court must determine whether the officer's action was justified at its inception, and whether the action was reasonably related in scope to the circumstances which justified the interference in the first place. *Gama v. State*, 112 Nev. 833, 837 (1996). "...[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1 (1968). An investigative detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). An investigative detention ripens into an arrest requiring probable cause "if, under the circumstances, a reasonable person would conclude that he was not free to leave after brief questioning." *U.S. v.*

Del Vizo, 918 F.2d 821, 824 (1990) (citations omitted). Here, Pretti had not personally spoken to G.A. about her allegations and had no information related to the claims of abuse at the time he detained Armando. (V 983).

In contrast, the officers in *Lisenbee* articulated a far more credible basis for their Terry stop – yet, the Nevada Supreme Court found no objective justification for the stop in *Lisenbee*: " … [W]e do not conclude that reasonable suspicion has been eroded to the point that merely matching a description, producing a prison card, and possessing a legal pocketknife and cellular phone rises to the level necessary for Lisenbee's detention." *State v. Lisenbee*, 116 Nev. 1124, 1128, 13 P.3d 947, 950 (2000). If matching the description of a burglary suspect, carrying prison identification and a pocket knife, and peering into the windows of a residence do not constitute reasonable objective grounds for a stop on suspicion of commission of burglary, then the hearsay allegations of a teenager who did not even summon police to the scene cannot satisfy the requirements for a legal detention:

> Unreasonable detention equates to an unlawful seizure. See State v. Ramos, 93 Hawai'i 502, 6 P.3d 374, 383 (Haw.Ct.App.2000). This court has held that a person is seized if, in view of all the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave. See State v. Stinnett, 104 Nev. 398, 401, 760 P.2d 124, 127 (1988) (citing United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

State v. Lisenbee, 116 Nev. 1124, 1129, 13 P.3d 947, 950 (2000). This Court should deem this detention unconstitutional and illegal and order suppression of all evidence obtained after the initial illegal seizure.

In sum, this Court should find the admission of Armando's statements amounts to reversible error on the grounds that these statements were involuntary and resulted from an illegal seizure and inherently coercive police tactics. Because the State used these statements extensively in closing argument and rebuttal to convict Armando of these crimes, this Court cannot deem their admission harmless error. (IX 207879; X 2165-2171).

IV. The Court violated appellant's federal and state constitutional rights by admitting irrelevant, inflammatory and prejudicial evidence and by excluding relevant and probative evidence.

Whether evidence is relevant lies in the discretion of the trial court, and this Court will review for abuse of discretion. *Sterling v. State*, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992). Absent some substantial connection between the inflammatory evidence and the State's theory of the case, the trial judge should exercise caution in admitting prejudicial evidence with no relevance to the charges in the case. *Abram v. State*, 95 Nev. 352, 355 (1979). "[E]vidence is not admissible if its probative value is substantially

outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

A. The court erred in admitting evidence of uncharged bad acts

In 2015, the Nevada Legislature added a subsection to NRS 48.035 to clarify that "nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense." NRS 48.045(3). The State sought to admit propensity evidence under NRS 48.045(3) regarding G.A.'s newly-disclosed allegations of additional offenses by Armando. (XI 2202-03). The State cited *Franks v. State* for support of the position that these acts were relevant to Armando's propensity to commit the crimes alleged. (XI 2205). In *Franks,* the Nevada Supreme Court adopted a balancing test that district courts must conduct prior to the admission of this evidence:

> In order to address the highly probative yet prejudicial nature of this evidence, the Ninth Circuit Court of Appeals set forth a modified balancing analysis, stating that the district court must consider several nonexhaustive factors prior to allowing its admission: (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Franks v. State, 135 Nev. 1, 6, 432 P.3d 752, 756 (2019) (internal citations omitted). The State argued that this evidence satisfied the preponderance of the evidence standard enunciated in *Franks*, and that it was more probative than prejudicial. The State argued that these acts were contemporaneous and frequent and established a course of conduct. The State argued that the evidence was necessary for G.A. to be able to discuss the full context of the allegations. (XI 2207).

The defense opposed introduction of the evidence on the grounds that these claims had never been previously mentioned in any previous hearing, despite the fact that the State had conducted several pre-trial interviews of the complaining witness. (XI 2209). The defense also objected under NRS 174.125 and EDCR 3.20. The defense noted that the complaint had been filed in April of 2016 and that the first day of trial was an exceptionally untimely moment to seek introduction of this evidence. (XI 2210). The court granted a hearing prior to the commencement of trial on the issue of admissibility of this evidence. (XI 2215).

At the *Franks* hearing, G.A. testified that Armando touched her breasts and buttocks and vagina in her mother's bedroom at an apartment. (VI 1296). She testified that Armando told her to touch his penis. (VI 1297). She testified that acts of abuse occurred one to three times a week until she

was about thirteen years old. (VI 1299). G.A. testified that Armando touched her breasts, butt, and vagina, and that he penetrated her anus with his penis in her mother's bedroom. (VI 1303-04). She testified that this happened multiple times. (VI 1305). She testified that he placed his mouth and hands on her vagina, and denied that his hands or fingers penetrated her vagina. (VI 1305). She testified that in the kitchen of the house on Berkeley Street, Armando grabbed her butt. (VI 1321-23).

G.A. denied telling the police that Armando had penetrated her anus a week prior to the arrest. (VI 1334). She could not remember the first time anal penetration occurred. (VI 1338). She could not remember how many times Armando ejaculated after she touched him with her hand. (VI 1346). She testified that Armando tried to penetrate her vagina with his penis on two occasions. (VI 1348).

At the end of the hearing, the State sought to introduce the following additional uncharged acts: the frequency of the acts of one to three times a week; the assault in the laundry room of the house near Jim Bridger; additional acts at the Ferguson Street house; and acts at the Berkeley Street house the week or two before the arrest. (VI 1353). The defense opposed admission based on the vagueness of G.A.'s descriptions, her inability to provide specific details regarding many of the incidents, and the complete

omission of many of these acts from her statement to police and her prior testimony. (VI 1354). The defense noted that G.A. had never mentioned acts of cunnilingus in her prior statements or testimony, although she claimed she had told detectives about these acts. (VI 1354). The defense noted the overwhelming likelihood that jurors would convict of the charged acts based in large part on the sheer volume and prejudice of the uncharged acts. (VI 1355-56). The court granted the State's motion to admit the evidence. (VI 1356). The defense noted that the State's motion had also referenced acts of digital penetration that G.A. had denied in the *Franks* hearing. (VI 1361-62).

The court erred in admitting this evidence. Although some of the acts were similar to the crimes charged, G.A. had never previously mentioned other acts, and the State failed to demonstrate the necessity of admitting these acts in light of the substantial danger of prejudice. *Franks v. State,* 135 Nev. 1, 6, 432 P.3d 752, 756 (2019). Further, based on the court's ruling, the defense ultimately referenced an act of cunnlingus in Opening Statement due to the reference in the State's res gestae motion. However, G.A. failed to mention this act during her direct testimony. The defense then moved for a mistrial on grounds of prejudice due to this reference to an additional act of sexual assault that the State ultimately failed to prove. The court denied the

motion. (VII 1525). G.A. later testified that she did not tell police that Armando had placed his mouth on her vagina. (VII 1543). G.A. had never mentioned this act during her voluntary statement to police, and had never mentioned this act during her preliminary hearing testimony. (VII 1570).

The court erred in admitting numerous additional counts of sexual assault that carried overwhelming prejudice and were not necessary to the State's case. *Franks v. State,* 135 Nev. 1, 6, 432 P.3d 752, 756 (2019). The court should have granted a mistrial under Article I, Section 3 of the Nevada Constitution and under the Fifth and Sixth Amendments. The failure to do so on these facts warrants reversal of these convictions. *Rudin v. State*, 120 Nev. 121, 86 P.3d 572, 587 (2004); *Hylton v. Eighth Judicial District Court*, 103 Nev. 418, 421, 743 P.2d 622 (1987); *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

B. *The court erred in excluding relevant and probative evidence*

On May 29, 2018, the State filed a motion in limine to exclude reference and evidence to the fact that G.A. had tested positive for a sexually transmitted disease under NRS 50.090. (II 354). On June 19, 2018, the court granted the motion. (II 375; IV 872). On May 3, 2019, the defense filed a motion to reconsider this issue. (II 444). On October 7, 2019, the court denied the motion to reconsider. (IV 751). During argument on the motion to

reconsider, the defense noted that in light of the fact that the witness claimed to have had sexual contact with Armando a week prior to his arrest, the defense was entitled to inform jurors that the State had elected not to test Armando for the same disease. (V 1017). The defense noted that if the witness had engaged in sexual activity with another person, then that activity could constitute an alternate source of the findings in the SANE exam, and that the defense was entitled to explore this issue because evidence of an alternate source of findings is exculpatory evidence. (V 1021-22). The court denied the motion. (V 1022).

The court erred in excluding this evidence:

> Nevada's rape shield law limits the degree to which a defendant may inquire into the victim's past sexual history. NRS 50.090; *Summitt v. State,* 101 Nev. 159, 161, 697 P.2d 1374, 1375 (1985). But, due process affords defendants the right to present evidence in support of their arguments, *Vipperman v. State,* 96 Nev. 592, 596, 614 P.2d 532, 534 (1980), and the rape-shield law does not bar such evidence where its admission is necessary to protect the defendant's fundamental rights under the Sixth and Fourteenth Amendments, including where the evidence is used to show the victim's prior independent knowledge. *Summitt,* 101 Nev. at 162–64, 697 P.2d at 1376–77. Thus, where the defense uses such evidence *not to advance a theory of the victim's general lack of chastity,* but to show knowledge or motive, it may be admissible. *Id.* at 163–64, 697 P.2d at 1377.

Guitron v. State, 131 Nev. 215, 225, 350 P.3d 93, 100 (Nev. App. 2015) (emphasis in original). Here, the defense sought to use this evidence to attack the thoroughness of the State's investigation and to offer an alternate

explanation for the SANE examination findings. Thus, the defense was not using the evidence to advance a theory of "lack of chastity," but for entirely different purposes, and the court erred in granting the State's motion.

C. *The court erred in admitting hearsay evidence*

The defense objected on hearsay grounds to the introduction of G.A.'s statements to Pretti at Metro headquarters and argued that the State had not satisfied the requirements of the prior consistent statement hearsay exception. The defense noted that G.A.'s statements to Pretti were subsequent, not prior, to her statements to Officer Murray, and that the motive to fabricate was identical at the time she spoke to Pretti. The defense noted that allowing Pretti to summarize G.A.'s statements amounted to witness vouching. (VIII 1791-1797). The Court overruled the defense objection and allowed Pretti to testify regarding G.A.'s statements to him at Metro headquarters. The defense posed a standing objection to the testimony. (VIII 1797-1799).

This testimony paralleled the dangers the Nevada Supreme Court noted in *Patterson v. State*:

> A former consistent statement helps in no respect to remove such discredit as may arise from a contradiction by other witnesses. When B is produced to swear to the contrary of what A has asserted on the stand, it cannot help us, in deciding between them, to know that A has asserted the same thing many times previously. If that were an

> argument, then the witness who had repeated his story to the greatest number of people would be the most credible.

Patterson v. State, 111 Nev. 1525, 1533, 907 P.2d 984, 989 (1995), *quoting* 4 John H. Wigmore, *Wigmore on Evidence* § 1127, at 267 (1972). This is precisely how the State tried this case: by presenting evidence that G.A. had repeated her story, the State improperly bolstered her credibility and implicitly vouched for a State witness. Where the alleged consistent statement is made with the same motive to fabricate, the prior consistent statement exception does not apply. *Runion v. State*, 116 Nev. 1041, 1053, 13 P.3d 52, 60 (2000). This Court must reach the same conclusion as in *Patterson*: this testimony "had little purpose other than to bolster the victim's testimony." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995).

D. ***The court erred in denying a hearing regarding potentially exculpatory evidence***

"Determining whether the State adequately disclosed information under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963), involves both factual and legal questions and requires de novo review by this court." *Lay v. State*, 116 Nev. 1185, 1193, 14 P.3d 1256, 1262 (2000) (internal citations omitted). On May 3, 2019, the defense filed a motion to dismiss based on the State's failure to preserve police body camera footage. (II 435). The court

conducted a hearing on this motion on the first day of trial. The defense noted that no body camera footage had been produced, conflicting with a Metro policy that may have gone into effect in April of 2016 requiring the wearing of body cameras. (V 1002). The State represented that no officer at the scene had worn a body camera, that one officer who had been issued a camera did not receive it until after this event, and that another officer had been issued a camera as part of a pilot program that had ended prior to this event. (III 498; V1004). The defense requested a hearing regarding Metro's precise policies in effect as of that date. (V 1002). The defense noted that the alleged victim's claims at the scene were inconsistent with her subsequent statements, making body camera footage relevant and material. (V 1007). The court denied the defense motion. (V 1009).

The court should have granted a hearing on this issue. "In Nevada, after a specific request for evidence, omitted evidence is material if there is a reasonable possibility it would have affected the outcome." *Lay v. State*, 116 Nev. at 1194. The defense had specifically requested this evidence. (I 167-200; 191). Here, a body camera recording containing G.A.'s potentially inconsistent disclosures to Officer Murray would have been highly material and relevant to G.A.'s credibility:

> Due process does not require simply the disclosure of 'exculpatory' evidence. Evidence also must be disclosed if it provides grounds for

> the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks.

Lay v. State, 116 Nev. 1185, 1198, 14 P.3d 1256, 1265 (2000), *citing Mazzan v. Warden,* 993 P.2d 25, 36 (Nev. 2000). Instead of relying on hearsay statements from a Metro official to the prosecutor, the court should have ordered an evidentiary hearing regarding this issue to determine whether the footage ever existed.

Similarly, the defense requested production of any and all counseling and therapy records to the court for an *in camera* review to determine whether the records contained discoverable evidence. (I 175; 198). The State conceded that these records existed but asserted that they were protected by privilege. (IV 829). As noted by the defense, these records could contain exculpatory and impeachment evidence. The court denied the motion. (IV 831). The defense did not suggest that these records should be turned over to defense attorneys without first being reviewed by the court. The defense request for an *in camera* review would have fully protected Armando's constitutional rights while balancing G.A.'s right to keep the records confidential under NRS 49.209. *Pennsylvania v. Ritchie,* 480 U.S. 39, 60, 107 S. Ct. 989, 1002–03 (1987); *Wyman v. State*, 125 Nev. 592, 607-08 (Nev. 2009). This Court recently held that counseling records are privileged

and that no exception applies without a showing that the records pertain to something more than treatment. *Bradley v. Eighth Judicial Dist. Court,* 133 Nev. 754, 757, 405 P.3d 668, 672 (2017). However, an *in camera* review would have revealed whether the records contained potentially discoverable and exculpatory evidence beyond the treatment aspects of the records, and the court should have granted the review. To the extent that *Bradley* forecloses this possibility, this Court should narrow *Bradley* and allow for judges to conduct these reviews to determine whether the materials contain discoverable evidence.

E. The Court erred in admitting clearly redacted video evidence

The defense moved for a mistrial on the grounds that the State's Exhibit 3, the video of Armando's interview with Pretti, had contained clear and obvious redactions. (VIII 1826). The defense noted that the video contained visibly redacted portions with obvious black lines. The court denied the motion. (VIII 1826-28). A defendant is entitled to the presumption of innocence as well as the indicia of innocence. *Haywood v. State,* 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). In evaluating the potential prejudice of the clear redaction of a defendant's name from a co-defendant's confession under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), the U.S. Supreme Court noted the inherent harm that can

arise from suspiciously obvious omissions: " . . . the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference." *Gray v. Maryland*, 523 U.S. 185, 193, 118 S. Ct. 1151, 1155–56, 140 L. Ed. 2d 294 (1998). Although the instant situation does not involve *Bruton*, the potential for similar prejudice exists where jurors would inevitably speculate about the obvious redactions. The court erred in denying the defense motion for a mistrial. *Rudin v. State*, 86 P.3d 572, 587 (2004).

V. The Court unreasonably restricted the defense case and limited cross-examination in violation of the Fifth, Sixth, and Fourteenth Amendments, and the Court's admission of remote testimony violated the Sixth Amendment.

Courts generally review decisions regarding the scope of cross-examinations for an abuse of discretion. *Bushnell v. State*, 95 Nev. 570, 572, 599 P.2d 1038, 1039–40 (1979); *Azbill v. State*, 88 Nev. 240, 495 P.2d 1064 (1972); *State v. Fitch*, 65 Nev. 668, 200 P.2d 991 (1948). The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *See Ramirez v. State*, 114 Nev. 550, 557, 958 P.2d

724, (1998), *quoting Pointer v. Texas*, 380 U.S. 400, 403, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). Courts may impose only reasonable restrictions on a defendant's right to present his defense. *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Jackson v. State*, 116 Nev. 334, 335, 997 P.2d 121, 121 (2000). While a trial court may apply the general rules of evidence to exclude evidence proffered by a defendant, this Court will review for an abuse of discretion in ascertaining whether limitations placed on the defense were "arbitrary" or "disproportionate to the purposes [the evidentiary rules] are designed to serve," *Scheffer*, 523 U.S. at 308.

A. The Court erred in limiting the defense cross-examination of Pretti.

Although the court allowed the State to inquire into some of G.A.'s statements to Pretti during Pretti's direct examination, the court refused to allow the defense to explore these statements on Pretti's cross-examination, sustaining the State's hearsay objection. The defense noted that the statements were not being offered for the truth of the matter asserted, but for impeachment of G.A.'s claims on her direct examination and as relevant to the scope of Pretti's investigation. (VIII 1837-40). During Pretti's cross-examination, the State made multiple hearsay objections the court sustained. (VIII 1833-38; 1839-40; 1841; 1842-43; 1844-46; 1847-49; 1850; 1868). The defense argued that the court's refusal to allow the defense to explore G.A.'s

inconsistencies with Pretti amounted to a denial of the right of confrontation and cross-examination. (VIII 1868-1871). The defense moved for a mistrial based on the cumulative limitations the court had placed on Pretti's cross-examination and the denial of Armando's confrontation rights and right to effective assistance of counsel. (VIII 1896-97). The defense noted that each question had not been designed to introduce the statements for the truth of the matters asserted, but rather for the effect on the listener and the effect on Pretti's investigative actions. (VIII 1898). The defense wanted to elicit information regarding Pretti's lack of follow-up questions or investigation into G.A.'s inconsistent statements. For instance, the defense wanted to ask Pretti about G.A.'s admission that she agreed to watch a movie with Armando right after a discussion about sexual abuse with an on-line friend that allegedly triggered her realization that she was being abused. Why Pretti chose not to follow up on this comment was relevant and significant to the thoroughness of his investigation and to his general credulity regarding G.A.'s allegations and credibility as a witness. (VIII 1898-99). The court denied the motion. (VIII 1901).

This ruling deprived Armando of the right to present a full defense. The right to cross-examine witnesses is implicit within the right to confrontation provided by the Sixth Amendment to the Constitution of the United States as

applied through the Fourteenth Amendment. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Dutton v. Evans*, 400 U.S. 74 (1970); *Bruton v. United States*, 391 U.S. 123 (1968); *Smith v. Illinois*, 390 U.S. 129 (1967); *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965). The court should have permitted the defense to explore Pretti's decisions and lack of investigation into G.A.'s inconsistent allegations. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Davis v. Alaska*, 415 U.S. 308, 317 (1974), *Washington v. Texas*, 388 U.S. 14, 19 (1967). Armando has the right "to defend against the State's accusations," and the right to a meaningful opportunity to present a *complete* defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("The Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense") (*internal citations omitted*).

B. The court erred in permitting remote testimony

The defense objected to the State's presentation of Dr. Cetl's testimony through remote means under the Sixth Amendment's Confrontation Clause. The defense requested that Dr. Cetl appear live for her testimony instead of through a remote appearance by video. (V 1013). The defense acknowledged that previously, the defense had agreed to remote presentation of this

testimony. However, upon further evaluation, the defense objected to this form of testimony. (V 1013-14). The court overruled the renewed defense objection. (VII 1529-30). "The elements that comprise the right of confrontation, i.e., 'physical presence, oath, cross-examination, and observation of demeanor by the trier of fact,' ensure 'the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *Lipsitz v. State*, 135 Nev. 131, 136, 442 P.3d 138, 143 (2019), *quoting Maryland v. Craig,* 497 U.S. 836, 845-46, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990).

Although in *Lipsitz,* the Nevada Supreme Court found there was no violation of the Confrontation Clause in permitting the complaining witness to testify through two-way remote testimony, the decision relied in large part on the unique circumstances that made the witness unavailable:

> First, the district court made the requisite finding of necessity. There is no dispute that the victim in this case was a patient at a residential drug treatment facility in Florida, and the victim's doctor opined that she "w[ould] not be available for a number of months." Admission into a treatment center for a prolonged period is a legitimate basis for the district court to find that a witness is medically unavailable to appear at trial.

Lipsitz v. State, 135 Nev. 131, 137, 442 P.3d 138, 144 (2019). Here, the State's representation was that the witness was "scheduled out" (VII 1526) and unavailable because of her professional commitments. This

representation does not satisfy the requisite showing of necessity, and the court erred in agreeing to allow remote testimony under these circumstances. (XII 1530).

The Sixth Amendment's Confrontation Clause provides criminal defendants the right to confront the witnesses against them and the right to cross-examine all witnesses who "bear testimony" against them. *Crawford v. Washington,* 541 U.S. 36, 51, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177 (2004) (internal quotation marks and citation omitted). This Court must reverse these convictions because the trial Court's rulings in these areas improperly restricted Armando's rights to fully present his defense and to confront the witness against him.

VI. The trial court erred in denying the defense motion to strike the testimony of an unqualified expert, violating Armando's rights under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

"In Nevada, criminal defendants who do not understand the English language have 'a due process right to an interpreter at all crucial stages of the criminal process.'" *Ouanbengboune v. State*, 125 Nev. 763, 768, 220 P.3d 1122, 1126 (2009), *quoting Ton v. State,* 110 Nev. 970, 971, 878 P.2d 986, 987 (1994). Whether an interpreter is competent or qualified as an

expert is a factual question for the trial court reviewed under an abuse of discretion standard. *Baltazar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006). NRS 50.275 provides for the admission of expert testimony that assists the trier of fact in understanding the evidence or determining a fact in issue. A qualified expert may testify to matters within the scope of their special knowledge, skill, experience, training or education. *Id.* However, expert testimony must be limited to findings, observations and conclusions within the framework of that expert's field of expertise. *Townsend v. State*, 103 Nev. 113, 117-118 (1987) (emphasis added).

At the first suppression hearing, the defense cross-examined Metro interpreter Maria Corral. Corral admitted that she does not have a degree. (XII 2409). She testified that she took a total of two college courses. (XII 2409). She had also attended about six eight-hour workshops, the most recent of which was three years prior to the suppression hearing on April 26, 2018. (XII 2410-11). She is not a certified court interpreter. (XII 2410). The defense moved to strike Corral as a witness on the grounds that she was not qualified as an expert. The court denied the motion and overruled the defense objection. (XII 2412).

The court erred in admitting Corral's testimony. *Baltazar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006). Corral did not have

the requisite qualifications for expert testimony, and the district judge abused her discretion in denying the defense motion. Corral testified at the suppression hearings and at the trial regarding Armando's conversations with Pretti and Armando's general demeanor during his interactions with Pretti. (XII 2400; IV 965-66; VIII 1762-64). Because this testimony contributed to the jury's determination that Armando's statements were voluntary, the admission of this evidence prejudiced the defense and warrants reversal.

VII. The court erred in admitting improper rebuttal testimony.

Appellate courts review decisions to admit rebuttal expert testimony for an abuse of discretion. A party in a criminal case must provide notice of intent to present expert rebuttal witnesses. Decisions on the timeliness and adequacy of these notices are reviewed for abuse of discretion. *Grey v. State,* 124 Nev. 110, 119–20, 178 P.3d 154, 161 (2008). NRS 174.234(3)(b) provides that both parties have a continuing duty of disclosure regarding expert testimony. Each side must file and serve, not less than 21 days before trial, a written notice containing "a brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his testimony." NRS 174.234(2)(a) (emphasis added).

The State sought to call two rebuttal witnesses in response to Dr. Harder's testimony. The State offered Dr. Kapel, who had performed a brief competency evaluation on Armando in 2018, and Dr. Roley, a clinician at Stein Diagnostic Center who had evaluated Armando over a two-month period. The State sought to introduce testimony from both doctors regarding their evaluations of Armando and their disagreement with Dr. Harder's conclusions. (IX 2012). The defense objected to both doctors on grounds of lack of notice. (IX 2014). The defense argued that the State's notice was insufficient and that it did not contain a specific statement regarding the 2018 testing that had been conducted. The defense also argued that competency evaluations are substantially different to cognitive functioning evaluations and that the testimony held no relevance to the issues before the jury. (IX 2016). The defense noted that neither doctor had actually conducted cognitive evaluations of Armando, and that their testimony would fall outside the proper scope of rebuttal testimony. (IX 2017). The defense noted that Harder had only testified regarding Armando's IQ and cognitive test results. (IX 2018).

The defense also objected that the State's notice had not contained any reference to Roley potentially criticizing Harder's testing methods, and that Roley had never prepared a report detailing these criticisms. (IX 2029-

30). The defense argued that the State's notice was vague and ambiguous regarding the substance of Roley's anticipated testimony and that the notice did not imply that she would offer specific criticisms of Harder's testing methods. (IX 2029). The defense also objected to any reference that Roley had observed Armando for two months on grounds of prejudice in light of the fact that Armando had been observed in a State facility when competency proceedings were pending. (IX 2038). The court excluded Dr. Kapel but permitted the State to call Dr. Roley regarding Dr. Harder's testing methods. (IX 2026, 2034).

Roley testified that Harder's methods deviated from standard testing by translating English questions and answers into Spanish. (IX 2042). The defense objected to the State's questions regarding "effort measure testing" on the grounds that this subject fell outside the scope of Harder's direct examination. The defense also noted that Roley's own conclusions found that Armando was not malingering, and that any suggestion that he had engaged in malingering would contradict her own observations. Thus, any cross-examination on this issue would unfairly open the door to Roley's other observations. (IX 2045-46). The court overruled the objections and allowed Roley to criticize Harder's testing methods on the basis that he did not conduct effort measure testing. (IX 2047). The defense subsequently

moved for a mistrial and noted that Roley had explicitly found that Armando had not engaged in malingering, but that the defense could not cross-examine her on this issue without opening the door to the reason why she was observing him. (IX 2060).The court denied the motion. (IX 2061).

In *Grey v. State*, this Court ruled that "[i]f a party fails to provide notice of an expert rebuttal witness, the court in its sound discretion may prohibit the expert witness from testifying..." *Grey v. State*, 124 Nev. 110, 119-120, 178 P.3d 154, 161 (2008). In *Grey*, the State had failed to notice an expert rebuttal witness in response to the noticed defense expert, and the Nevada Supreme Court held that "the State has not sufficiently shown why its intent to have Dr. Karagiozis testify as an expert rebuttal witness was uncertain before trial." *Grey*, 124 Nev. at 119. In the instant case, while the defense had notice of the State's intent to call Roley as a rebuttal witness, the defense had no notice that Roley would offer such explicit and damaging opinions in response to Harder's testimony, or that Roley would far exceed the scope of Harder's testimony by introducing the entirely new subject of effort measure testing in her testimony. The State's sixth supplemental notice of witnesses advised that Roley would testify in the following areas:

> Will testify as an expert as to the observations and psychological testing of Defendant on or about July 27, 2018 as well as Defendant's demonstrated and/or cognitive ability on or about that date, as well as limitations in ascertaining cognitive ability through observation and testing; will also testify in rebuttal as to Defendant's expert Dr. Greg Harder.

(III 565).

This Court must conclude that the trial Judge abused her discretion in admitting this testimony and in denying a mistrial. As noted by the defense, the State's notice was not specific enough to allow for adequate preparation for cross-examination. The expert witness disclosure must, at minimum, give "[a] brief statement regarding the subject matter on which the expert witness is expected to testify *and the substance of the testimony.*" NRS 174.234(2)(a) (emphasis added).

Here, the notice failed to provide the substance of the testimony, and the testimony improperly exceeded the scope of Harder's testimony, prejudicing Armando's substantial rights:

> The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case.

Taylor v. Illinois, 484 U.S. 400, 410-411 (1988). Armando suffered additional prejudice because the defense could not effectively impeach Roley's testimony regarding effort measure testing without opening the door to the circumstances underlying her observations of Armando. The State's notice contained no suggestion that Roley would testify as to effort measure testing or the standards for Engligh-to-Spanish translations, and this Court should deem the admission of this testimony reversible error. *Perez v. State,* 129 Nev. 850, 862–63, 313 P.3d 862,

870 (2013). This ruling violated appellant's due process rights, his right to a fair trial, and his right to present a defense under the Sixth and Fourteenth Amendments.

VIII. The State failed to prove beyond a reasonable doubt that appellant committed these crimes, and convictions based on insufficient evidence violate federal and state due process guarantees.

The standard of review when analyzing the sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Grey v. State*, 178 P.3d 154, 161 (Nev. 2008) (emphasis in original).

The State presented no physical evidence of abuse, and instead relied solely on the testimony of the accusers. However, the complaining witnesses offered inconsistent and unreliable descriptions of the crimes charged. G.A. could not remember many details of the alleged abuse. She could not remember the name of a friend whom she alleged was a witness to Armando lying down with G.A. during a sleepover. (VII 1495). She did not remember her prior testimony to the effect that her friend had said that Armando had just come over to give her a hug. (VII 1539). Although she said this person was a good friend, she could not remember the friend's name. (VII 1540).

Although at trial G.A. testified to multiple acts of touching on her breasts, vagina, and buttocks, she admitted that when Pretti first interviewed her she mentioned only that she had been anally penetrated at the age of five or six and that she did remember any other acts. (VII 1504, 1506-07). She admitted she could not remember testifying at the preliminary hearing that she had had a rectal exam at one point for constipation. (VII 1542).

A key discrepancy in the evidence revolved around G.A.'s initial claim of repeated vaginal penetration. Officer Murray admitted that in his contemporaneous report on the day police responded to the 911 call, he wrote that G.A. had told him, " ... Armando regularly puts his penis inside her vagina and had sex with her unwillingly, the last time being approximately one week ago from today." (VII 1589). Pretti admitted that Murray told him when he arrived at the house that G.A. claimed Armando had sexually assaulted her a week prior to the arrest. (VIII 1838). Det. Pretti admitted that although G.A. allegedly did not understand what Armando was doing to her until she was a couple of months before her fourteenth birthday, she had used expletives to describe body parts and acts during his interview with her. (VIII 1851).

On October 7, 2019, the first day of trial, the State filed a motion in limine to introduce evidence that Armando performed cunnilingus on G.A.

as relevant propensity evidence based on pre-trial interviews with G.A. on October 3, 2019. (III 602-615). However, Pretti admitted that although he asked her several times if anything else had happened, G.A. had never alleged to him that Armando had placed his mouth on her vaginal area. (VIII 1852). Further, G.A. never mentioned this act at the preliminary hearing, and G.A. testified at trial that she did not tell police that Armando had placed his mouth on her vagina. (VII 1543). G.A. also never mentioned this act during her voluntary statement to police, and she never mentioned this act during her preliminary hearing testimony. (VII 1570). Thus, G.A. offered multiple conflicting and inconsistent versions of her allegations, at times adding counts of sexual assault that she later failed to mention or completely denied.

S.A.'s account was similarly unreliable. S.A. described Armando was difficult to live with, and stated that her family members argued with him frequently. (VIII 1730-31). S.A. admitted that although at trial she had testified that Armando touched her "everywhere," she had previously testified that he had only touched her vagina. (VIII 1734). S.A. admitted that although at trial she had claimed she asked "why" during the assault, she had previously stated that she didn't speak during the assault, and that she had also stated that she asked Armando to stop. (VIII 1735). S.A. admitted that

although she testified at trial that she was twelve during the assault, she had previously stated that she was thirteen. (VIII 1738). She admitted that when detectives had asked her in April of 2016 if Armando had done anything to her, she denied that anything had happened. (VIII 1741). Although she claimed that Armando had assaulted her, S.A. denied being suspicious of his interactions with G.A. and denied seeing anything unusual happen at her house. (VIII 1743). Pretti admitted that he did not conduct any further questioning of S.A. regarding the motives for and the timing of her disclosures of abuse. (VIII 1873). Thus, the only evidence in support of this charge is an inconsistent and long-delayed disclosure by a witness who had explicitly denied to police that she had been a victim of this type of conduct.

Significantly, there was no physical evidence to support these charges. Dr. Cetl testified that she saw no evidence of vaginal or anal injury during G.A.'s examination. She also did not see any type of cuts or evidence of self-harm on G.A.'s person. (IX 1925). Although multiple family members had always lived with Armando and the complaining witnesses during the relevant time periods, no one suggested that Armando had spent unusual amounts of time alone with the complaining witnesses. Rosalba admitted that she never saw Armando spending time alone with either of her

daughters. (VII 1622). Rosalba admitted that at all times, at least four people lived in the family's residences, and that at certain times six people lived together. She admitted that all the residences were small. (VII 1650-52). The parties stipulated that the Berkely residence had 1098 square feet. (IX 1951). Rosalba admitted that she never saw anything inappropriate. (VII 1653). Rosalba admitted that she never saw blood stains in her bed or in her daughters' underclothes. Despite G.A.'s testimony that she had injured herself, Rosalba never saw any self-inflicted injuries on G.A. (VII 1656-57).

Although Armando made some incriminating statements, the evidence reflects that Armando's statements were not voluntary in light of Armando's IQ of 61 and low scores on a myriad of tests for reasoning, verbal intelligence, nonverbal intellectual ability, and memory. (IX 1988-91). His scores were consistent with a person with significant intellectual disabilities. (IX 1995). Dr. Harder testified that a person of this type of low intellectual functioning could have difficulty in communicating with and understanding others, rendering his confession involuntary (IX 1998).

Finally, the police investigation was inadequate. D.A. investigator Leon admitted that that she did not conduct any investigation into G.A.'s allegation that she had a rectal examination by a doctor when she was nine or ten years old. She admitted that she did not speak to Rosalba about this

allegation. (VIII 1699-1700). Pretti admitted that he was never asked to investigate whether G.A. had had this type of examination. (VIII 1876). Pretti admitted that he conducted no further investigation into the name of G.A.'s friend to whom she had spoken regarding the friend's knowledge of a sexual abuse victim. (VIII 1842-43).

In order to sustain a sexual assault or lewdness conviction, the alleged victim must testify with some particularity regarding the crime. *LaPierre v. State*, 108 Nev. 528, 836 P.2d 56, 58 (1992). The alleged victim must "describe in general terms when or where those incidents occurred." *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2008). A conviction will be reversed when, as in *LaPierre*, the alleged victim cannot explain substantive inconsistencies in her previous statements. *Id.* at 204. With no supporting physical evidence, multiple different versions of events, and years passing before the disclosures were made, this Court should conclude that the State failed to prove these counts beyond a reasonable doubt.

IX. Cumulative error warrants reversal of these convictions under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). In evaluating cumulative error, this Court must

consider whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* Viewed as a whole, the combination of errors in this case warrants reversal of these convictions.

CONCLUSION

Based on the foregoing argument, this Court should reverse these convictions and dismiss the charges for insufficient evidence, or remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

2. I further certify that this brief does not comply with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 17,591 words which exceeds the 14,000 word limit and the appropriate motion to exceed the limitations has been submitted.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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

DATED this 27 day of August, 2020.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27 day of August, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY *_/s/ Carrie M. Connolly_*
Employee, Clark County Public Defender's Office