IN THE SUPREME COURT OF THE STATE OF NEVADA

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ARMANDO VASQUEZ-REYES,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80293

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(b)(2) because it is a direct appeal from a Judgment of Conviction for category A felonies.

STATEMENT OF THE ISSUES

1. Whether the district court violated Appellant's constitutional rights by providing proper jury instructions.
2. Whether the State committed prosecutorial misconduct and whether the district court properly denied Appellant's requests for a mistrial.
3. Whether the district court erred in denying Appellant's Motions to Suppress.
4. Whether the district court erred in its evidentiary decisions.
5. Whether the district court unreasonably restricted Appellant's defense, properly limited cross-examination, and properly allowed for remote testimony.
6. Whether the district court erred in denying Appellant's Motion to Strike Expert Testimony.

7. Whether the district court erred in allowing Dr. Roley to testify as a rebuttal witness.
8. Whether there was sufficient evidence to support the convictions for Lewdness With a Child Under the Age of 14 and Sexual Assault With a Minor Under Fourteen Years of Age.
9. Whether there was cumulative error.

STATEMENT OF THE CASE

On April 19, 2016, the State filed a Criminal Complaint charging Armando Vasquez-Reyes, aka Armando Vasquiezreyes, ("Appellant") with: Count 1 – Lewdness with a Child Under the Age of 14; Count 2 – Sexual Assault With a Minor Under Fourteen Years of Age; Count 3 – Lewdness with a Child Under the Age of 16; and Count 4 – Sexual Assault With a Minor Under Sixteen Years of Age. I Appellant's Appendix ("AA") 01-02. The alleged victim was G.A. Id. On May 19, 2016, the State filed an Amended Criminal Complaint charging Appellant with two (2) counts of Lewdness with a Child Under the Age of 14, and with seven (7) counts of Sexual Assault With a Minor Under Fourteen Years of Age. I AA 03-05.

A Second Amended Complaint was filed on July 12, 2016, where Appellant was charged with two (2) counts of Lewdness with a Child Under the Age of 14, and with eight (8) counts of Sexual Assault With a Minor Under Fourteen Years of Age. I AA 06-09. The victims alleged in the Complaint were G.A. and D.A. Id. That same day, the preliminary hearing was held and both victims testified. I AA 15.

On July 14, 2016, the State filed an Information charging Appellant with two (2) counts of Lewdness with a Child Under the Age of 14, and with eight (8) counts

of Sexual Assault With a Minor Under Fourteen Years of Age. I AA 121-24. On August 2, 2016, Appellant pled not guilty and invoked his right to a speedy trial. III AA 704. Appellant waived his right on September 20, 2016, and a status check was set to reset the trial date. III AA 705-06. At the status check on October 4, 2016, the trial date was set for March 14, 2017. III AA 707. On March 7, 2017, defense counsel's Motion to Continue the trial was granted, and trial was set for June 20, 2017. III AA 713. On June 13, 2017, trial was again continued to January 16, 2018. III AA 714-15.

On January 13, 2017, Appellant filed a pro per Motion to Dismiss Counsel and Appointment of Alternate Counsel. I AA 137-41. A second Motion was filed on August 17, 2017. I AA 153-64. On September 21, 2017, the district court filed an Order Denying Defendant's Pro Per Motion to Dismiss Counsel and Appoint Alternate Counsel. I AA 165-66.

On January 8, 2018, Appellant filed a Motion to Compel Production of Discovery & Brady Material and a Motion to Suppress. I AA 167-200, 201-32. On January 12, 2018, the State filed an Opposition to the Motion to Suppress. II AA 232-72. On April 26, 2018, a Jackson v. Denno hearing was held, and the district court denied Appellant's Motion to Suppress Statement. III AA 728-30. On May 9, 2018, the district court filed an Order Denying Appellant's Motion to Suppress. II AA 276-77.

On January 11, 2018, the trial was reset to January 22, 2018. III AA 719. On January 22, 2018, defense counsel's motion to continue trial was granted, and the trial was reset to May 29, 2018. III AA 724-25.

On May 11, 2018, Appellant filed a Motion to Suppress Defendant's Statement. II AA 278-82. The State filed an Opposition on May 31, 2018. II AA 362-69. On October 7, 2019, a Jackson v. Denno hearing was held, and Appellant's Motion was denied. IV AA 750.

On May 29, 2018, the State filed a Motion in Limine to Preclude Evidence that Victim G.A. Tested Positive for Sexually Transmitted Disease Chlamydia. II AA 354-61. Appellant filed an Opposition on June 18, 2018. II AA 370-74. On June 19, 2018, the district court granted the motion. II AA 375-76. On June 25, 2018, the district court filed an Order granting the State's Motion in Limine. II AA 375-76.

On July 17, 2018, a Request for Competency Evaluation was provided to the court, and the matter was referred to competency court. IV AA 735. On September 14, 2018, an Order of Commitment was filed after Appellant was found to be not competent. II AA 379-81; IV A 737. On November 9, 2018, an Order to Transport Defendant from Southern Nevada Adult Mental Health Rawson-Neal Psychiatric Hospital was filed. II AA 382-83. On November 16, 2018, the Findings of Competency was filed after Appellant was found to be competent pursuant to the Dusky standards, with no challenges, and was referred back to the originating

department. II AA 384-85; IV AA 738. On November 27, 2018, the trial was set for March 19, 2019; trial was later reset to May 28, 2019. IV AA 739.

On May 3, 2019, Appellant filed a Motion to Dismiss for Failure to Preserve Exculpatory Evidence, a Motion to Reconsider Admissibility of Evidence Victim G.A. Tested Positive for Chlamydia, and a Motion to Exclude Improper Expert Opinion. II AA 435-60. On May 9, 2019, the State filed three (3) Oppositions in response to the pleadings. II AA 475-80; III AA 481-509. On October 7, 2019, the Court denied the Motion to Dismiss and Motion to Reconsider. IV AA 750-51. As to the Motion Exclude, the Court ordered that the "expert is not to testify as to a box that was checked; however, the doctor can testify as to the findings of the medical examination." IV AA 750.

On May 9, 2019, the State filed a Motion in Limine. III AA 510-42. On October 7, 2019, Appellant filed an Opposition. III AA 586-91. The district court ultimately deferred the issue to the time of trial as to when the information would become relevant. IV AA 751.

On May 14, 2019, the matter was referred and set in Competency Court. IV AA 743. On June 7, 2019, defense counsel advised that he had a challenge to the findings; on June 21, 2019, counsel advised that there was an independent evaluation completed and was waiting on reports. IV AA 744-45. On July 16, 2019, Appellant had returned from Competency and the matter was set for trial. IV AA 747.

On October 1, 2019, Appellant filed a Motion in Limine to Preclude or Permit Evidence of Specific Statements in Defendant's Statement to Police on April 26, 2018. III AA 569-80. On October 7, 2019, the Court granted the Motion. IV AA 751.

On October 7, 2019, jury trial began; that same day, the State filed a Motion to Present Propensity Evidence and/or Res Gestae Evidence and Appellant filed an Opposition. III AA 592-601, 602-15; IV AA 749. The district court granted the Motion to Present Propensity Evidence. IV AA 755. On the first day of trial, the State also filed an Audiovisual Transmission Equipment Appearance Request. III AA 583-85. Although defense counsel initially agreed to video testimony, counsel reneged and requested live testimony. IV AA 750. The district court directed counsel to ask the expert to be present, and then inform the court of her response. Id. On October 10, 2019, the State advised that Dr. Cetl was unavailable to testify in person; accordingly, the district court ordered that Dr. Cetl could testify remotely. IV AA 765. On October 11, 2019, Appellant filed an Audiovisual Transmission Equipment Appearance Request for Dr. Harder to testify remotely. III AA 622-29.

On October 15, 2019, the jury returned a verdict of guilty as to all counts. IV AA 764.

On December 10, 2019, the district court sentenced Appellant as follows: Count 1 – Life with a minimum parole eligibility of ten (10) years; Count 2 – Life

with a minimum parole eligibility of ten (10) years, concurrent with Count 1; Count 3 – Life with a minimum parole eligibility of thirty-five (35) years, consecutive to Count 2; Count 4 – Life with a minimum parole eligibility of thirty-five (35) years, concurrent with Count 3; Count 5 – Life with a minimum parole eligibility of thirty-five (35) years, concurrent with Count 3; Count 6 – Life with a minimum parole eligibility of thirty-five (35) years, concurrent with Count 3; Count 7 – Life with a minimum parole eligibility of thirty-five (35) years, concurrent with Count 3; Count 8 – Life with a minimum parole eligibility of thirty-five (35) years, concurrent with Count 3; Count 9 – Life with a minimum parole eligibility of thirty-five (35) years, concurrent with Count 3; and Count 10 – Life with a minimum parole eligibility of thirty-five (35) years, concurrent with Count 3, with one thousand three hundred thirty-four (1,334) days credit for time served. IV AA 766-67. The aggregate total sentence is Life with a minimum parole eligibility of forty-five (45) years. IV AA 767. The district court also ordered a special sentence of lifetime supervision upon release, and Appellant is ordered to register as a sex offender within forty-eight (48) hours after his release. III AA 698. The Judgment of Conviction was filed on December 17, 2019. III AA 696-98.

Appellant filed a Notice of Appeal on December 19, 2019. III AA 699-701. On August 27, 2020, Appellant filed his Opening Brief.

STATEMENT OF THE FACTS

A. Sexual Abuse of Victim G.A.

G.A. testified that she moved to Las Vegas when she was approximately five (5) or six (6) years old. VI AA 1429. When she arrived, she met Appellant, who was her mother's, Rosalba Cardenas-Moreno ("Rosalba"), partner. VI AA 1430-32. According to Rosalba[1], she first met Appellant in 2006 and her children arrived in 2007. VII AA 1604-05. While Rosabla typically worked in the afternoon and evening, Appellant, who was a welder, worked in the morning, approximately 6:00 or 7:00 a.m. until 2:00 p.m. VII AA 1602-03, 1606-07. Rosalba was not aware of Appellant having any health issues until 2014, when he was diagnosed with diabetes; Appellant would take one (1) pill a day in the morning. VII AA 1607-08.[2]

The first incident of sexual abuse G.A. recalled occurred when she was living in an apartment with Appellant, her mother, and her two (2) siblings. VI AA 1432,1435-37. Appellant instructed her to come into his bedroom, the one he shared with the victim's mother. VI AA 1436-37. Only G.A. and Appellant were in the bedroom with the door closed and locked. VI AA 1437-38. Appellant proceeded to take off her clothes, and he touched her breasts, vagina, and buttocks with his hand.

[1] Rosalba testified with the assistance of an interpreter. VII AA 1665.

[2] Rosalba testified that she knew this because she would accompany Appellant to his medical appointments. VII AA 1608. She also testified that she was not aware of Appellant having any issues with high blood pressure. Id. Furthermore, through her contact with Appellant, she never had any concerns with his physical or mental well-being. VII AA 1609.

Id. At trial, G.A. described the way Appellant touched her breast as she made a motion with her hand to show that there was squeezing back and forth. VI AA 1438-39. Appellant also gripped her buttocks and would squeeze it. VI AA 1439-40. When Appellant touched her vagina, G.A. described it with additional hand motions, she made a fist with one hand and her other hand, which was opened at the palm, would move under the fist and upward. VI AA 1440-41. Appellant told G.A. to tell nobody; G.A. thought this was normal as she trusted Appellant. VI AA 1441-42.

G.A. further described when Appellant instructed her to touch his exposed penis while she was in her mother's bedroom, alone, with the door closed and locked. VI AA 1442-44. With Appellant's instruction, by showing and telling, G.A. gripped and stroked Appellant's penis; she described her actions by curving her hand and moving it back and forth. VI AA 1445. Appellant proceeded to ejaculate on her chest. VI AA 1445-46.

The sexual abuse happened regularly, approximately one (1) or three (3) times a week; as G.A. explained, the frequency varied based on whether her and Appellant were alone. VI AA 1447. The sexual abuse continued when G.A., Appellant, and her family moved to a new apartment with a pool,[3] shortly after she arrived to Las Vegas. VI AA 1448; VII AA 1611. The sexual acts would occur in her mother's and

[3] There were two (2) bedrooms so Rosalba and Appellant shared one (1) while the three (3) children shared the other bedroom. VII AA 1613.

Appellant's bedroom, with the door closed and locked. VI AA 1449. Appellant continued his course of conduct as he would remove G.A.'s clothing and touch her body. VI AA 1450.

While residing at the apartment with the pool, Appellant sexually assaulted G.A. by placing his penis in her anus. VI AA 1450. Alone, in her mother's bedroom, with the door closed and locked, Appellant removed her clothing and proceeded to touch her body. VI AA 1451-52. As G.A. laid on her back, on the bed, Appellant lifted up her legs and placed his penis in her anus. VI AA 1452. Again, Appellant would tell her to tell nobody and that everything was all right. Id. G.A. had no choice but to believe him, and never thought to tell anyone, especially her mother as she feared that her mother would judge and hate her. Id.

The sexual assaults continued as the G.A. moved to a house on Stanford Street, that she referred to as the green house. VI AA 1450-51, 1453. G.A. testified about a time where her body was positioned in a different way than normal when Appellant penetrated her anus. VI AA 1453. G.A. was facing the wall, with her knees on the floor, as Appellant penetrated her anus from behind. VI AA 1454.

The next house G.A. moved too was another green colored house with three (3) bedrooms located near Jim Bridger. VI AA 1454-55; VII AA 1615. The sexual assaults continued at that house with the same frequency as before. VI AA 1455. G.A. recalled several specific incidents. During one (1) incident, Appellant

continued his course of conduct where he would instruct G.A. to come into her mother's bedroom, removed her clothing, and touched her body before penetrating her anus with his penis while G.A. was on her back, on the bed, as Appellant lifted up her legs. VI AA 1456-57. There was also a time when Appellant penetrated her vagina with his penis. Id. Additionally, on a separate occasion, G.A. was in her mother's bedroom doing laundry when she fell asleep. VI AA 1458. When she woke up, Appellant was in the room and he removed her clothing; he then penetrated her anus with his penis. Id. During a different incident, G.A. was in the laundry room when Appellant came into the room and sexually assaulted her. VI AA 1461. Appellant touched her body, removed her clothing, kissed her, and then placed her leg on top of the laundry so that he could penetrate her anus. Id.

When G.A., her family, and Appellant moved to a two-story home, the sexual abuse continued. VI AA 1461.[4] This was a four (4) bedroom house, so G.A. had her own room. VI AA 1462. Her room had a lock on it, which she would utilize every day. Id. However, the lock could easily be opened from the outside with a knife or their fingernail. VI AA 1463; VII AA 1622. One night, Appellant unlocked her door, went into the room, and relocked the door before he proceeded to touch and anally assault G.A. VI AA 1463. Appellant also removed her clothing prior to assaulting

[4] By this time G.A. was in the fifth grade and was approximately nine (9) or ten (10) years old. VI AA 1461.

her. VI AA 1464. The conduct would also occur in her mother's bedroom. During one incident, Appellant had G.A. and her sister, D.A., in the bedroom to watch a movie. Id. When her sister got tired, she left the room. Id. Appellant proceeded to close and lock the door. Id. He then removed G.A.'s clothing, touched her body, and anally assaulted her with her back on the bed and legs raised up. VI AA 1465.

While next residing at a house on Ferguson street, which had three (3) bedrooms, the sexual assaults continued. VI AA 1465-66. Around the time that G.A. moved to the Ferguson house, she started to realize what Appellant was doing was wrong. VI AA 1469. She made this realization after talking to a friend, whose sister was sexually abused, and through school projects. VI AA 1470-72. G.A. did not make a report at that time because she was scared of losing her mother under the belief that her mother would hate and judge her. VI AA 1470-71.

G.A started to cut herself on her arms as she felt disgusted with herself. VI AA 1472-73. G.A. also testified that she took prescribed pills, over the recommended dosage, in order to kill herself. VI AA 1473. G.A. personally knew that she was more aggressive, and that she would avoid Appellant. VI AA 1474. Rosalba also testified that while her daughters were initially "laid back" with Appellant and would call him dad, they became more rebellious towards him. VII AA 1621. Rosalba noted that G.A. would dress in all black, was reserved and quiet. VII AA 1628. G.A. would spend her time playing video games and she was not

talkative. VII AA 1629. D.A. also testified that initially G.A. was a nice little girl, but she noticed a change in G.A.'s personality as she got older; G.A. was more aggressive and wanted to be left alone. VIII AA 1725. She also noticed that G.A. would cover herself by wearing long-sleeved shirts. VIII AA 1727-28.

The last incident occurred in her mother's bedroom, some time before Thanksgiving in 2015. VI AA 1466-67. Appellant invited her into his room to watch a movie and promised that he was not going to do anything. VI AA 1467. Appellant proceeded to remove her clothing, touched her body, and placed his penis in her anus. Id. However, this time, G.A. tried to push Appellant off her, and told him that if he did not stop, she would call the police. VI AA 1475.

Temporarily, the abuse stopped and G.A. was convinced that it would not happen anymore. VI AA 1476. However, after she moved to a house on Bruce St., she was in the kitchen when Appellant passed by her and grabbed her buttocks with her hand. VII AA 1477-78. G.A. thought to herself that this touching meant the abuse would happen again. VII AA 1479.

On April 16, 2016, Officer Thomas Murray, from the Las Vegas Metropolitan Police Department ("LVMPD") received a call to respond to Berkley Avenue; the nature of the call was that there was a family disturbance. VII AA 1570-72. Officer Theobald also responded to the scene. VII AA 1572. According to Rosalba, D.A. and D.A.'s husband had used a tool of Appellant's which caused an argument; she

as of a result of the argument had to call the police. VII AA 1632. When officer Murray arrived, there were approximately five (5) or six (6) people, out on the front yard and on the sidewalk. VII AA 1572-73. Officer Murray made contact with the caller, Rosalba, through the help of family members that could interpret for him. VII AA 1572-73.[5] Although the details of the call stated that there was a possible battery, it was apparent that there was no battery and only a dispute involving money. VII AA 1573-74.

While working though the issue, Officer Murray was approached by G.A. VII AA 1574. G.A. knew that the police had arrived over a dispute between her family and Appellant, and that Appellant did not want to give the rent money. VII AA 1481-82. Around that time, G.A. also knew that her sister and her brother-in-law was planning on moving out to start their own family. VII AA 1480-81. According to Rosalba, the plan was her son and daughter-in-law would move to their own residence, her daughter and son-in-law would move to a separate residence, and she would reside with Appellant and G.A. in their own residence. VII AA 1618. When the police arrived, G.A. was scared about the idea of being alone with Appellant because she was afraid that the sexual abuse would start again. VII AA 1482-83. So, G.A. went up to Officer Murray, who agreed to speak with her, and told him that she

[5] Officer Murray also requested the assistance of a Spanish interpreter. VII AA 1574.

was being raped. VII AA 1483, 1575. She told the officer that Appellant would anally assault her. VII AA 1483. Officer Murray testified that G.A. seemed nervous. VII AA 1577.

Officer Murray then contacted sexual assault Detectives, because, as a patrol officer, it is not his responsibility to fully investigate claims of sexual abuse. VII AA 1580. Officer Murray did draft a police report. Id. Officer Murray remembered that he was trying to determine if this abuse was ongoing and when the last type of sexual contact occurred. VII AA 1591-92. Officer Murray further noted that he was not trained and was not in a position to interview a victim of sexual assault. VII AA 1597. Maria Corral, an interpreter for LVMPD, testified that she arrived to Berkley Avenue to translate for Detective Pretti. VIII AA 1757, 1759. She initially made contact with Officer Murray and another Officer before making contact with Appellant. VIII AA 1760.

Detective Mark Pretti[6] testified that when he responded at the scene, he spoke with patrol officers. VIII AA 1780-81. Based upon the situation, Detective Pretti believed that it was best to move everyone to headquarters. VIII AA 1782. Detective Pretti further explained that headquarters was a more sterile environment with audio

[6] At the time of the incident, Pretti was a Detective. VIII AA 1780. He is now a Sergeant with LVMPD. VIII AA 1779-80.

and video recording capabilities; additionally, due to the sensitive nature of the allegations it was best to not talk outside in public. VIII AA 1782-83.

Detective Pretti made contact with G.A. at the scene and asked if she would be okay with moving to headquarters, which she agreed. VIII AA 1783. Detective Pretti also met with Appellant, with the assistance of Maria Corral. VIII AA 1784. He explained that allegations had been made against Appellant, and asked if he would participate in an interview to tell his side of the story; Appellant responded that he did and agreed to an interview at LVMPD headquarters VIII AA 1785. Detective Pretti also explained that since Appellant would be transported in the patrol vehicle, it is LVMPD policy that he is handcuffed[7]; Appellant agreed to be transported. VIII AA 1785. At that time, Detective Pretti noticed that, from his observations, Appellant understood everything. VIII AA 1786. Ms. Corral translated everything, verbatim. VIII AA 1762.

Detective Pretti arrived at headquarters at approximately 5:00 p.m. VIII AA 1787. He proceeded to remove Appellant's handcuffs and asked him to take a seat at the interview table. VIII AA 1787; AA 2413. Based on his observations, Appellant understood what was going on. VIII AA 1788. Detective Pretti then left to begin his interview with G.A. VIII AA 1787.

[7] The policy is in place for any potential safety issues. VIII AA 1787.

The interview with G.A. was approximately thirty (30) minutes long. VIII AA 1788. According to G.A., the last time something happened was approximately one (1) week before where Appellant grabbed her buttocks. VIII AA 1798-99. She also stated that the last act of sexual penetration occurred in November 2015. VIII AA 1799. During the conversation with G.A., Detective Pretti learned about a time when G.A. had a friend sleep over, but that friend never observed anything sexual between Appellant and G.A.; Detective Pretti was not given a name of this friend. VIII AA 1803. G.A. also disclosed that she had a conversation with a friend online about what occurred, but she did not disclose that any sexual abuse nor did she provide a name. VIII AA 1804.

Dr. Sandra Cetl met with G.A. on April 16, 2016 to complete an examination. VIII AA 1901, 1908. G.A.'s examination was normal; Dr. Cetl examined her body and looked for any discharge, unusual fluids, bleeding, bruising, or any sign on injuries. VIII AA 1911-12. G.A. was then referred to Children's Assessment Center for a more extensive examination and counseling. VIII AA 1912. G.A. was also seen by employees of Sunrise Hospital. VIII AA 1916. Base on her review of the records and conversation with G.A., Dr. Cetl provided discharge instructions for suicidal ideations and for sexual assault. IX AA 1917.

Dr. Cetl also met with G.A. on April 21, 2016. IX AA 1917. Another examination was completed including a genital examination; her examination was

normal with some noted discharge. IX AA 1918. According to Dr. Cetl, 90 to 95% of examinations are normal. IX AA 1920-21. This is due to the nature of the healing process; the fact that an examination is normal does not rule out inappropriate sexual contact. IX AA 1921. As Dr. Cetl explained, vaginal and anal tissue is made to stretch; because the skin is stretchy, it can heal quickly resulting in injuries that are not visible to the naked eye. IX AA 1921-22. Moreover, scar tissue is not apparent in those areas. IX AA 1922-23.

B. **Interview of Appellant at LVMPD Headquarters.**

Upon arriving at headquarters, Ms. Corral made contact with Appellant who she noted was calm and cooperative. VIII AA 1763. Around 6:10 p.m., Detective Pretti spoke with Appellant to see if he was willing to turn over the rent money to Rosalba. VIII AA 1807. Appellant agreed, so Detective Pretti retrieved Appellant's wallet so that the rent money could be counted out. VIII AA 1808, 1814. There was also a conversation about Appellant feeling lightheaded because of his diabetes. VIII AA 1808-09. Appellant requested his medication, which was at the house; however, Detective Pretti informed him that since he is not medical personnel, he could not provide him with any medication. VIII AA 1809. Instead, Appellant was told that an ambulance would be called. VIII AA 1809, IX AA 1951. Appellant agreed to those terms, and at no point did he request medical attention. VIII AA 1809.

The formal interview began before 6:30 p.m. with the assistance of the Spanish interpreter. VIII AA 1809. Appellant's handcuffs remained off for the entirety of the interview. VIII AA 1810. At one point, Appellant did tear up during the interview. VIII AA 1828-29. When Detective Pretti asked Appellant if we would tell him what really happened, Appellant responded that he did touch the victim. AA 259. Appellant claimed he did not remember exactly, but it was approximately one (1) or two (2) times. AA 259. Appellant admitted that he touched G.A.'s body, by touching her breasts and her legs. AA 261. Appellant further admitted to penetrating G.A. with his penis, into her anus, on one (1) occasion. AA 263,265-66. According to Appellant, this occurred when G.A. was approximately eight-years-old, and he went into her bedroom and found her masturbating. AA 265-67. Appellant's exact statement was, "it's a rape, but not forced". AA 265. Appellant admitted that he felt embarrassed by his conduct, and that he felt terrible. AA 264. Appellant was also the first person to introduce the words "touch", "breasts", "penetration", "masturbation", "embarrassed", and "rape". VIII AA 1829-30. Appellant also was the first to bring up his sexual conduct. VIII AA 1829.[8]

[8] At trial, Ms. Corral testified that she reviewed the entire transcription in its entirety, and there were only two issues with translations. VIII AA 1766. On page 4 of the transcript, Appellant used the word "mad", but the transcriber wrote "upset". VIII AA 1767. On page 17, Ms. Corral used the word "abuse", but the correct word was "rape". VIII AA 1768. State's Exhibit 5 was the advisement of rights that was given to Appellant and signed by him. VIII AA 1770-72.

B. Sexual Abuse of Victim D.A.

Ruth Leon, an investigator with the District Attorney's Office, testified that she contacted Rosalba to have G.A. brought into the office. VIII AA 1684, 1686. When G.A. and Rosalba arrived, she was surprised to see D.A. in attendance. VIII AA 1687. As Investigator Leon spoke with G.A. and Rosalba, she could see that D.A. was tense and that she was tearing up. VIII AA 1687-88. At one point, the prosecutor and Investigator Leon had a conversation with Rosalba; when she returned Rosalba to the waiting room, D.A. was clearly teary eyed. VIII AA 1689. Leon asked her if she was okay and if she wanted to speak with her and the prosecutor; D.A. agreed without hesitation. VIII AA 1689-91. Rosalba also testified that D.A. was crying, and that this was unusual for her. VII AA 1637. While in the prosecutor's office, D.A. broke down crying and they had a conversation; as a result of the conversation, Leon advised that she would contact LVMPD. VIII AA 1692-93. On May 27, 2016, Detective Pretti was made aware that D.A. disclosed that Appellant sexually abused her. VIII AA 1804-05.

When D.A. was around the age of twelve (12), and residing at the house on Stanford Street, she testified that Appellant sexually assaulted. VIII AA 1709. It was summertime, so D.A. was playing soccer outside. VIII AA 1711. She went inside to get some water, when Appellant called her to his room. Id. Appellant was the only one inside the house at this time. VIII AA 1712. When D.A. went into the room,

Appellant threw her on the bed and started touching her with his hand, while saying that he wanted her. VIII AA 1713. Appellant then got on top of D.A., removed her shorts and his work pants. VIII AA 1713-14. With her back on the bed, Appellant penetrated her vagina with his penis; he was not wearing a condom, nor did he ejaculate. VIII AA 1715. She also testified that she told Appellant to stop and did not want this to happen. VIII AA 1716. D.A. remembered that Appellant just stopped, so she went to the bathroom as her vagina hurt and was burning. Id. D.A. testified that she went back outside but did not resume playing with the children. Id. D.A. never told anyone because she was afraid that no one would believe her; instead, she would try to stay away from Appellant. VIII AA 1717.

C. Witnesses for the Defense and State's Rebuttal Witness:

For the Defense, James Duke was called. IX AA 1940. Mr. Duke worked an EMT at the Clark County Detention Center for NaphCare and later Wellpath. IX AA 1941-42. On April 16, 2016, Mr. Duke completed a vital sign check and a brief medical history; Mr. Duke noted that Appellant's blood pressure was elevated. IX AA 1944. Mr. Duke did not observe that Appellant was hallucinating, delusional, nonsensical, confused, unresponsive, or had any altered mental state. IX AA 1946. Mr. Duke also testified that Appellant did not have any slurred speech nor was he disoriented; if Appellant did, this would have been noted. IX AA 1947. Appellant also had no history of dementia or CNS impairment; additionally, during the

interaction, there was no indication of a history of mental health or of developmental disability. IX AA 1948. Finally, Mr. Duke testified that it is not unusual for a person who has just been arrested to have high blood pressure. IX AA 1949.

Dr. Gregory Harder, a psychologist, testified that he performed an IQ test on Appellant. IX AA 1985-87. Appellant was made aware that the results would be shared with multiple parties. IX AA 2001-02. Dr. Harder was clear that Appellant's score was only an estimate, as the entire IQ test was not completed; Appellant's estimated score was approximately 61 while the average score is 100. IX AA 1988. As Dr. Harder stated, this was only a brief exam. IX AA 2000. An incomplete Wechsler memory scales test was also conducted, revealing a lower than average performance. IX AA 1992-93. Appellant further denied any history of mental health or learning problems. IX AA 2003.

Despite being familiar with individuals not putting forth full effort in these examinations, Dr. Harder testified that he believed Appellant was putting forth his best effort. IX AA 2003. Finally, Dr. Harder testified that people with intellectual disabilities could still walk, talk, and take care of themselves. IX AA 2004.

In rebuttal, Dr. Lisa Roley testified. IX AA 2040. Dr. Roley reviewed Dr. Harder's report regarding Appellant. IX AA 2041. Dr. Roley noted that one (1) deviation was that Dr. Harder used a Spanish interpreter to translate the English version into Spanish, and this is not the way the test should be utilized. IX AA 2042.

For example, one of tests was a verbal knowledge which would be difficult to conduct with an interpreter. IX AA 2043.

SUMMARY OF THE ARGUMENT

Appellant is not entitled to a reversal of his convictions or a new trial for the following reasons. First, the district court did not violate Appellant's constitutional rights by providing proper jury instructions that were correct statements of the law. Moreover, the district court did not err in declining to provide Appellant's improper, confusing, and misleading proposed instructions.

Next, the State did not commit prosecutorial misconduct. To the extent that certain arguments are deemed to constitute misconduct, any error was harmless as the State did not comment on an exercise of Appellant's constitutional rights, nor did any alleged misconduct infect the trial with unfairness.

Third, the district court did not err in denying Appellant's two (2) Motions to Suppress. Although Appellant attempts to muddle the issue, by arguing outside the scope of the hearing for the first Motion to Suppress, the district court properly found that the jury could hear the statements. As to the second Motion to Suppress, Appellant merely attempted to circumvent the district court's first order by raising a meritless argument.

Fourth, the district court did not err in its evidentiary decisions by 1) allowing the State to present uncharged bad acts, 2) by granting the State's Motion in Limine

to preclude evidence that G.A. tested positive for a sexually transmitted disease, 3) by allowing for hearsay testimony to be presented under an applicable exception, 4) by declining to hold a hearing on the issue of body worn cameras, since the State adequately explained the circumstances, and 5) in admitting the properly redacted video that Appellant had an opportunity to review prior to showing the jury.

Moreover, the district court did not restrict Appellant's defense as the district court did not improperly limit his cross-examination of Detective Pretti, and properly allowed the presentation of remote testimony by the State's expert. Furthermore, the district court did not err in denying Appellant's Motion to Strike Ms. Corral, the LVMPD translator; additionally, Ms. Corral provided proper testimony during the trial. As to the State's rebuttal expert, the State provided sufficient notice of the scope of this witness's testimony and cured any alleged defect at trial. Accordingly, the district court did not err in permitting Dr. Roley to testify.

Finally, there was sufficient evidence to support Appellant's convictions, as both victims testified about Appellant's repeated acts of sexual abuse. Further, testimony was introduced at trial as to why there would be a lack of physical findings, and Appellant confessed to committing at least one (1) act of sexual assault against G.A. and to touching this victim on one (1) or two (2) occasions. Based on the lack of error, there is no error to cumulate.

/ / /

ARGUMENT

I. THE DISTRICT COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY PROVIDING PROPER JURY INSTRUCTIONS

District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). However, this Court reviews de novo "whether a particular instruction . . . comprises a correct statement of the law." Cortinas, 124 Nev. at 1019, 195 P.3d at 319 (2008).

A. The District Court Did Not Err in Providing Jury Instruction No. 13.

Appellant objected to Jury Instruction No. 13 and claims that Defense Proposed Instruction I would have removed the "inherent prejudice" within the Instruction No. 13. AOB 11. Despite this meritless argument, Appellant admits that the instruction provided to the jury was previously approved of by this Court in Gaxiola v. State, 121 Nev. 638, 119 P.3d 1225 (2005).

Jury Instruction No. 13 read as follows: "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 AA 679.

Appellant's proposed instruction stated,

> 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 of the evidence.

III AA 647.

Overall, Appellant is asking this Court to overturn its existing precedent, but has failed to provide any compelling reasons for this Court to do so. This Court has stated that "'[w]e are loath to depart from the doctrine of stare decisis' and will overrule precedent only if there are compelling reasons to do so." City of Reno v. Howard, 130 Nev. 110, 113-114, 318 P.3d 1063, 1065 (2014) (quoting Armenta-Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013)).

Here, the district court properly overruled Appellant's objection. IX AA 1966. Appellant claims that Jury Instruction No. 13, "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." AOB 11. Each argument will be addressed in turn.

First, it is well established that the uncorroborated testimony of a victim, without more, is sufficient to uphold a conviction. Gaxiola, 121 Nev. at 648, 119 P.3d at 1232; Deeds v. State, 97 Nev. 216, 626 P.2d 271 (1981); Henderson v. State, 95 Nev. 324, 594 P.2d 712 (1979) (holding, no-corroboration instruction proper where the jury found defendant guilty of burglary and sexual assault); May v. State, 89 Nev. 277, 510 P.2d 1368 (1973); Bennet v. Leypoldt, 77 Nev. 429, 366 P.2d 343

(1961). A "no corroboration" instruction informs the jury that corroboration is not required, and it does not tell the jury to give the victim's testimony greater weight. Id. Accordingly, the instruction given in this case was proper and an accurate statement of the law.

Next, Appellant's argument regarding a "Lord Hale" instruction and Turner v. State, 111 Nev. 403, 892 P.2d 579 (1995), has previously been dismissed by this Court. In Gaxiola, this Court held that the instruction given in that case was,

> significantly different from a "Lord Hale" instruction. "Lord Hale" instructions amount to a commentary on the evidence, by telling a jury that a category of witness testimony should be given greater scrutiny. A "no corroboration" instruction does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law.

121 Nev. 638, 648, 119 P.3d 1225, 1232. Accordingly, this argument is of no merit, and there is no prejudice in providing a "no corroboration" instruction. Appellant's additional comment about there being "no physical evidence" and that "many of the allegations were several years old" does not automatically establish prejudice and is not grounds to overturn existing precedent. Moreover, Appellant's citation to different jurisdictions is both non-binding and unpersuasive, especially since those cases were decided prior to Gaxiola.

Moreover, while the trial court in Gammage also instructed the jury to carefully review all evidence, the district court did the same in this case. See People v. Gammage, 2 Cal. 4th at 696-700, 828 P.2d at 684-86 (Cal. 1992). Just as in

Gammage, the district court instructed Appellant's jury that the credibility of a witness should be determined based on the jurors perception of the witness and if the juror believed any witness has lied about a material fact that witness' testimony may be disregarded in instruction seven. III AA 673 In examining the collective or individual jury instructions, the district court did not instruct the jury to give undue weight to any particular witness' testimony. Instead, the court instructed the jury to draw their own conclusions of the evidence. The jury, here, was also instructed to "apply the rules of laws contained in these instructions to the facts of the case." III AA 669. Therefore, the district court squarely followed the precedent set in Gammage and Gaxiola. Regardless, this Court has determined:

> we disagree with Whitener's interpretation of Gammage that a companion instruction on the weight of testimony is required along with the no-corroboration instruction. People v. Gammage 828 P.2d 682 (Cal. 1992). We decline to overrule our decision in Gaxiola v. State, 121 Nev. 638, 649, 119 P.3d 1225, 1233 (2005), where we found no error in the "no corroboration" instruction given.

Whitener v. State, NSC No. 73294, 439 P.3d 958 (Nev. 2019)(*unpublished*).[9]

Appellant also argues that the Gaxiola Court's reliance on the Smith decision is misplaced because it did not adopt the same wording of the Michigan instruction. AOB 15. As mentioned above, this Court has approved a no-corroboration jury instruction in cases limited to sexual assault. Henderson, 95 Nev. 324, 594 P.2d 712

[9] See NRAP 36(c)(2).

(no corroboration instruction given where jury found defendant guilty of burglary and sexual assault). This Court is within its discretion to determine what jury instructions are proper and does not have to word for word copy other jury instructions in order for them to be valid. Thus, the no-corroboration is relevant and does not prevent the courts from following the precedent of cases relied upon in Gaxiola.

Appellant further claims that Jury Instruction No. 13 improperly references an appellate standard of review. AOB 16. This is the same argument raised and rejected in Gaxiola. Gaxiola at 647–49, 119 P.3d at 1232-33. Additionally, the instructions given do not support Appellant's claim that the jury was invited to violate its obligation to consider all of the evidence. Instead, the jury was instructed "all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict." III AA 672.

To rely on case precedent outside of this jurisdiction does not mean that this Court must adopt the mirror image versions of another jurisdiction's instructions. The Nevada Courts and the Legislature have worked together to create different jury instructions that collectively are in line with the majority of jurisdictions that approve of no-corroboration jury instructions. Gaxiola should not be modified to be identical to CALJIC 2.27, because this Court has already rejected the notion that the Nevada version of the jury instructions improperly infers an appellate standard of

review. Appellant's recommendation assumes that juries are unable to make their own credibility and factual determinations. Other courts have found that the corroboration requirement is inconsistent with the appropriate standard of review for challenges to the sufficiency of the evidence because the standard is premised on the notion that appellate courts are not a 'super juror' with the power to override factual determinations supported by sufficient evidence. State v.Porter, 439 S.W.3d 208, 212 (Mo. 2014). Accordingly, this Court should find that the jury needs to be educated that a witness's testimony is sufficient evidence to sustain a conviction and not remove the jury's power to determine credibility of witnesses by overturning Gaxiola. For the reason stated *supra*, the district court did not err in providing Jury Instruction No. 13.

B. The District Court Did Not Err in Overruling Appellant's Objection to Jury Instruction No. 5.

Despite Appellant's arguments in the Opening Brief, Appellant conceded at trial that Jury Instruction No. 5 is the "Nevada Instruction pursuant to the NRS." IX AA 1961. Appellant conveniently neglects to mention this statute nor made any argument that the statute is unconstitutional. Any argument would fail as the applicable instruction is codified in the Nevada Revised Statutes:

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth

> of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

NRS 175.211. In the instant case, the district court gave the following instruction as to reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all of the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

III AA 671.

This instruction has been given numerous times in this jurisdiction and has been upheld on appeal. See Elvik v. State, 114 Nev. 883, 897–98, 965 P.2d 281, 290 (1998); Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995) (This Court has "repeatedly held that jury instructions on reasonable doubt given pursuant to NRS 175.211 are constitutional."); Lord v. State, 107 Nev. 28, 39, 806 P.2d 548, 554–55 (1991) ("We have held that a reasonable doubt instruction based on our statutory definition does not violate due process"). Therefore, Appellant's arguments relating to the statute and the instruction fails, and the district court did not err.

C. The District Court Did Not Err in Overruling Appellant's Objection to Jury Instruction No. 6.

Appellant objected to Jury Instruction No. 6 and requested that his proposed Instruction A on circumstantial evidence be provided. AOB 18. According to

Appellant, "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." Id. Contrary to Appellant's belief, the State's instruction was proper and encompassed information from Appellant's Proposed Instruction. See III AA 631, 672.

As Appellant alludes to, there is a Nevada case that held that there was no error to give an instruction, similar to Appellant's proposed instruction, when the jury is properly instructed on the standards for reasonable doubt. Bails v. State, 92 Nev. 95, 97–98, 545 P.2d 1155, 1156 (1976). While the State does not concede that there was error, if this Court was to find any error, the district court was not required to give Appellant's proposed instruction because the jury in this case was properly instructed on reasonable doubt. See, e.g., Bails, 92 Nev. 95, 96-98, 545 P.2d 1155, 1155-56. Additionally, both victims testified with personal knowledge of the commission of the crimes. For these reasons, the district court properly exercised its discretion.

D. The District Court did not Err in Overruling Appellant's Objection to Jury Instruction Nos. 11 and 12.

Appellant objected to both Jury Instruction Nos. 11 and 12 as irrelevant. AOB 18. According to Appellant, as to Instruction No. 11, "there was no evidence of physical force being used[.]" AOB 18. Further, Appellant claims that Instruction No. 12 was "confusing and irrelevant." AOB 18-19. Overall, Appellant claims that both

instructions contained "inflammatory language" that prejudiced the defense and contained concepts irrelevant to the crimes charged. AOB 19.

As the State explained at trial regarding Jury Instruction No. 11,

> the State is required to show that the -- the sexual penetration was done without the victim's consent or under circumstances where the perpetrator would know that the victim wasn't able to give their consent. Clearly under that scenario the State has to -- has to show in regards to whether it was physical force, whether that physical force was necessary. This properly instructs the jury as to the state of law and therefore, it's necessary and appropriate.

IX AA 1963. As to Jury Instruction No. 12, the State again explained that it was an accurate statement of law and properly instructed the jury. IX AA 1964.

Appellant's arguments for both instructions fail. First, Jury Instruction No. 11 is clear that "[p]hysical force is not necessary in the commission of sexual assault" and explains what the actual inquiry the jury is to undertake. III AA 677. Accordingly, Appellant's claim that there was no evidence of physical force is meritless, as the law is clear that physical force is not necessary. This instruction is an accurate statement of law and provided a clear explanation to the jury as to what the law is. See McNair v. State, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992).

As to Jury Instruction No. 12, this instruction was not irrelevant nor confusing. As stated, this instruction was an accurate statement of the law, and informs the jury that just because the victim does not manifest a certain level of opposition to the sexual assault, there cannot be an automatic finding that no sexual assault occurred.

See McNair, 108 Nev. at 57, 825 P.2d at 574. In this case, G.A.'s testimony established that she did not manifest an opposition, because she thought Appellant's conduct was normal and she trusted Appellant. VI AA 1441-42. Appellant would tell this young victim that everything was all right, and G.A. felt as though she had no choice but to believe him. VI AA 1452. Accordingly, providing these instructions was relevant to this case and cleared up any confusion the jury may have had towards G.A.'s response to Appellant sexually assaulting her. For these reasons, the district court did not err.

E. The District Court Did Not Err in Providing Jury Instruction Nos. 17-19.

Appellant claims that Jury Instruction Nos. 17, 18, and 19 were "irrelevant, cumulative, and confusing." AOB 19. Specifically, Appellant complains that the defense of consent had not been presented, nor did he present a defense that "acts of touching had been inadvertent or non-sexual, making these instructions irrelevant and confusing." Id. Despite Appellant's contentions, the State has a duty to prove each element of the crimes charged beyond a reasonable doubt. See III AA 671. Accordingly, jury instructions dictating what the law, and relevant elements are, are appropriate.

Jury Instruction No. 17 stated, "The law does not require that the lust, passions or sexual desires of either of such persons actually be aroused, appealed to, or gratified." As the State argued at trial, Jury Instruction No. 17, "correctly instructs

on the law on an element of the crime of lewdness with a child under the age of 14. Clearly, it's a proper statement of the law, and it's relevant." IX AA 1967. Despite Appellant's argument, this instruction was an accurate statement of the law. See NRS 201.230.

As to Jury Instruction No. 18, the State explained,

> …the instruction is instructing in regards to whether or not the lewd and lascivious act is necessary that the bare skin be touched. In this case, I believe there was some testimony in regards to some touching that was over clothes and some touching that was under clothes.
>
> So I think that in defining a lewd and lascivious act certainly it's relevant and appropriate. It is a statement of law.

IX AA 1967-68. First, the instruction was an accurate statement of law. Catanio v. State, 120 Nev. 1030, 102 P.3d 588 (2004). Moreover, there was testimony that Appellant would remove the victim's clothing before touching her. VI AA 1441. Therefore, this instruction was proper.

Finally, the State explanation for Jury Instruction No. 19 was:

> it's discussing whether consent is an issue in regards to a -- a child who is sexually touched, a child under the age of 14 who is sexually touched indicating the consent is not necessary. Clearly, that's a statement of the law. Clearly, in this case we have touching and the State has the burden of showing that the touching comported with a violation of the law. And consent is an issue to that relevant, and this instruction's appropriate.

IX AA 1968. Additionally, Jury Instruction No. 19 was also an accurate statement of law. See NRS 201.230. For these reasons, the district court did not err in providing

Jury Instruction Nos. 17, 18, and 19 as said instructions were relevant, not cumulative, nor confusing.

F. Jury Instruction No. 21 was a Proper Statement of Law.

Appellant claims that his proposed Instruction E (Which was Jury Instruction No. 23) was a more accurate reflection of the language in LaPierre v. State. AOB 20. Accordingly, Appellant claims that the district court erred in submitting Jury Instruction No. 21. AOB 20.

Jury Instruction No. 21 stated,

> Where a child has been the victim of sexual assault with a minor under the age of 14 and/or lewdness with a minor under the age of 14, and does not remember the exact date of the act, the State is not required to prove a specific date, but may prove a time frame within which the act took place.

III AA 687. It is not clear what Appellant's actual complaint in his brief is, as his proposed instruction was provided to the jury. III AA 689. What is clear is Appellant is misconstruing the purpose of Jury Instruction No. 21. As the district court explained,

> Well, I don't think she testified to any specific exact date. She testified --… -- to timeframes based on how old she was and where they were living… that is the state of the law. They don't have to prove a specific date, but they have to prove at a minimum a timeframe, correct?

IX AA 1970. Jury Instruction No. 23 pertained to the fact that a victim must testify with particularity, and that there must be a reliable indicia that the number of acts charged actually did occur. III AA 689. The purpose of Jury Instruction No. 21 was

relevant to explain any concern with a victim's ability to cite to specific dates, and that the State is not required to prove a specific date. III AA 687. Jury Instruction No. 21 was an accurate statement of the law. Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). Moreover, it is reasonable to believe that there would be jurors concerned with the fact that the victim could not recall specific dates. As the State argued at trial,

> I think in this case, we have the same situation and it certainly might be an issue that comes to the jury's mind in regards to when did these actual events happen? The law is the State does not have to prove that, I think this makes that very clear.

IX AA 1971. Therefore, Appellant failed to raise any meritorious issue regarding Jury Instruction No. 21 as said instruction is an accurate statement of the law and Appellant's separate instruction was provided to the jury.

G. The District Court Did Not Err in Providing Jury Instruction No. 22 over Defense Proposed Instruction D.

At trial, Appellant argued that his Proposed Instruction D should have been given instead of Jury Instruction No. 22. AOB 20; IX AA 1968. Appellant claimed that his instruction was a more accurate and appropriate statement of the law per Crowley. Id. Overall, Appellant claims that the district court erred by providing instructions "that implicitly favored the State." Crawford v. State, 121 Nev. 746, 754, 121 P.3d 582, 589 (2005).

Jury Instruction No. 22 stated:

> Where multiple sexual acts occur as part of a single criminal encounter a defendant may be found guilty for each separate or different act of sexual assault/lewdness.
>
> Where a defendant commits a specific type of act constituting sexual assault/lewdness he/she may be found guilty of more than one count of that specific type of act of sexual assault/lewdness if:
>
> 1. There is an interruption between the acts which are of the same specific type,
> 2. Where the acts of the same specific type are interrupted by a different specific type of sexual assault/lewdness, or
> 3. For each separate object manipulated or inserted into the genital or anal opening of another.
>
> Only one sexual assault/lewdness occurs when a defendant's actions were of one specific type of sexual assault/lewdness and those acts were continuous and did not stop between the acts of that specific type.

III AA 688. This is a correct statement of law. See Gaxiola, 121 Nev. at 34, 83 P.3d at 285 (reversing conviction where there was no evidence as to timing of lewd acts and sexual assault); Crowley, 120 Nev. at 34, 83 P.3d at 285 (reversing conviction for lewdness where lewdness was incidental to sexual assault); Eberling v. State, 120 Nev. 401, 404, 120 Nev. 401, 91 P.3d 599, 601 (2004) (same).

Defense Proposed Instruction D stated:

> Where multiple sexual acts occur as part of a single criminal encounter, a defendant may be found guilty for each separate or distinct act of sexual assault and/or lewdness. However, when the sexual acts are part of the same episode, the Defendant may be found guilty of only one count of sexual assault or lewdness. When there is no interruption between the acts, or any interruption amounts to merely a hypertechnical division of a single act, the sexual acts are part of the same episode and the Defendant may only be convicted of only one count of sexual assault or lewdness.

III AA 637.

As the State argued at trial,

> …the State's instruction of the instruction that's been presented by the Court clearly goes through and details the elements that is necessary for the jury to consider in a very specific format. The State would submit it's a proper statement of the law, it's relevant to this proceeding, and it should be given as is indicated.

IX AA 1968-69. The State's instruction was properly submitted as it provided a clear understanding of what the necessary elements were and covered Appellant's instruction. Unlike Appellant's Proposed instruction, which used language such as "hypertechnical division," the State's instruction used everyday language that a layman could understand. This is crucial as the jury must be able to understand the instructions. Appellant's instruction would have been confusing based upon language used while the State's instruction provided a breakdown to support when a defendant could be found guilty of multiple acts. See Townsend, 103 Nev. at 121, 734 P.2d at 710 (permitting multiple convictions because of a break in the criminal activity); Wright v. State, 106 Nev. 647, 650, 799 P.2d548, 549-50 (1990) (the facts of a case may support convictions on separate charges "even though the acts were the result of a single encounter and all occurred within a relatively short time.").

Finally, contrary to Appellant's assertion, the focus of the Court in LaPierre was that there is a "reliable indica" as to the number of acts, which was covered in

Jury Instruction No. 23. III AA 689; See LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). For these reasons, the district court did not err.

H. The District Court Did Not Err in Rejecting Appellant's Remaining Proposed Instructions.

i. Unconscious Bias Instructions.

On October 9, 2019, the State filed a Bench Brief Regarding Unconscious Bias. III AA 616-18. As explained in the State's Bench Brief, Appellant relied upon instructions and research conducted from a different jurisdiction. Decisions of federal district court and panels of the federal circuit court of appeals are not binding on this Court. See Blanton v. North Las Vegas Mun. Court, 103 Nev. 623, 633 (1987). Furthermore, the Western District of Washington created a committee to investigate the subject, vetted the research, and created whatever proposed instructions the committee found to be important after discussion with the bench and the bar. While the State acknowledged the importance to safeguard against bias, the State was clear that "[t]o start instructing the jury based on 'emerging social and neuroscience research' without first reviewing said research and discussing it as a committee, however, is something the State would object to." III AA 617.

At trial, the district court also mentioned that,

> [its] only concern is, is the footnote here that indicates the research says maybe we shouldn't bring it to their attention. It says, research regarding the jury instructions is still young and some of literatures raise questions whether highlighting the notion of unconscious bias would do more harm than good.

VI AA 1373; See XI AA 2485. This was a valid concern, and the district court was correct that the materials submitted by Appellant did state that there is some questions as to whether their proposed instructions would provide more harm than good. XI AA 2485.

Next, Appellant's citation to Batson v. Kentucky has no application to this instant issue as Appellant notes the case applies to jury selection. AOB 22. Even the citation to a case, from a different jurisdiction, discusses the diversity of a jury, not the instructions for a selected panel. Id.

Finally, Appellant claims that the purpose of the remaining proposed instructions was to remind the jury "that their verdict must be based on the facts and evidence of the case, and not on any unconscious bias they may harbor." AOB 21. Appellant's concern was reasonably covered by other jury instructions. See III AA 672, 673 (credibility of a witness), 691. For these reasons, the district court did not err.

ii. Play back Instruction

On appeal, Appellant claims that the district court erred in rejecting his request for a playback instruction. AOB 23. Appellant admitted that it did not submit a proposed "playback instruction" but asked the Court if it would provide one. IX AA 1972. The district court explained that it does not provide this instruction as "juries

are familiar with the fact that they can get playbacks and read backs if they want them." Id.

Appellant failed to cite to any case that would require the district court to provide this instruction. Moreover, Appellant's reliance on Miles v. State, 97 Nev. 82, 84, 624 P.2d 494, 495 (1981) cannot cure this defect. In Miles, this Court held that the trial court did not err in refusing to playback testimony, and that a trial court "has wide discretion in the manner and extent of his response to a jury's request during deliberation for reading back testimony."; citing Glaze v. State, 565 P.2d 710 (Okl.Cr.1977); Garden v. State, 73 Nev. 312, 318 P.2d 652 (1957). Accordingly, the fact that the trial court is not required to provide a playback of a witness's testimony supports the district court's decision in this case. Regardless, the district court, here, was within its discretion to deny Appellant's request and Appellant failed to provide any support for a claim that the district court was required to present a playback instruction. For these reasons, the district court did not err.

iii. Defense Proposed Instruction B.

Appellant claims the district court erred by not providing Defense Proposed Instruction B, and claims that it was "far more complete" than Jury Instruction No. 7. AOB 23.

Jury Instruction No. 7 stated:

> The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his/her

> fears, motives, interests or feelings, his opportunity to have observed the matter to which he/she testified, the reasonableness of his statements and the strength or weakness of his/her recollections.
>
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

III AA 673. Appellant admits that his proposed instruction relates to his arguments regarding unconscious bias. AOB 23. As stated *supra,* the district court had a valid concern in not presenting instructions on unconscious bias. Regardless, the instruction provided by the district court covered the numerous elements mentioned in Appellant's instruction. Accordingly, the district court did not err.

iv. Inverse Flight Instruction.

Appellant submitted an "inverse flight instruction" to remind the jury that "they could consider [Appellant's] lack of flight in their deliberations." AOB 24. Said instruction has no application to this case as this situation involved a delayed disclosure, and when the police officers were informed of the conduct, Appellant was present and spoken too. VIII AA 1784-86. The fact that Appellant remained at the scene does not automatically prove to be exculpatory, compared to a situation if Appellant fled the scene. Moreover, said argument does not negate any essential elements of the crimes he was convicted of, nor did Appellant argue that it was needed to disprove any particular fact or evidence that the State was required to show.

Furthermore, while a person fleeing the scene can support an inference of guilt, the absence of flight is "more inherently ambiguous". People v. Williams, 64 Cal.Rptr.2d 203, 205-06 (1997) (internal quotations marks omitted). The fact that a person did not flee is open to numerous interpretations and, arguably, does not satisfy an automatic consciousness of guilt. Com. v. Hanford, 937 A.2d 1094 , 1097 (2007); see also State v. Sorensen, 104 Ariz. 503, 455 P.2d 981, 987 (1969). For these reasons, the district court did not err in declining to present a reverse flight instruction.

v. Defense Proposed Instructions L and M.

Appellant complains that the district court erred in not providing his proposed instructions L and M, which were theories of his case. AOB 24. Defense Proposed Instruction L stated:

> 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 AA 653. Defense Proposed Instruction M stated:

> If you find that [D.A.] made up the allegations against Armando Vasquez-Reyes in order to support her little sister [G.A.], you must find Mr. Vasquez-Reyes not guilty of the charge which relate to her.

III AA 655.

This Court has held that defendants are not "entitled to instructions that are misleading, inaccurate, or duplicitous." Crawford, 121 Nev. 744, 754, 121 P.3d 582,

589. First, Appellant's proposed instructions were purely argument, which is not the purpose of jury instructions. Appellant use of the phrases "made up the allegations" supports the State's argument that Appellant attempted to present an additional argument, outside of closing arguments, in jury instructions. In fact, Appellant made this argument during closing arguments. See e.g., IX AA 2117. Furthermore, contrary to Appellant's claim, the proposed instructions did not define any relevant and necessary legal terminology. The proposed instructions here were completely misleading based on the phrases used. This fact, alone, supports a finding that the district court did not err.

Cases Appellant relies upon apply to vastly different situations regarding legal defenses. For example, the issue in Allen v. State, was about self-defense. Allen v. State, 97 Nev. 394, 632 P.2d 1153 (1981); See e.g. Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 894 (1987) (mere presence instruction); Crawford, 121 Nev. 744, 750, 121 P.3d 582, 586 ("heat-of-passion" instruction). Here, Appellant was attempting to mislead the jury by submitting an improper argument, when the true purpose of jury instructions is to provide the jury with an explanation of the laws.

Furthermore, the jury was instructed that if the State failed to prove beyond a reasonable doubt that Appellant had sexually penetrated G.A. and D.A., then Appellant must be found not guilty. III AA 680-81. A similar instruction was

provided for the lewd or lascivious acts against G.A. III AA 686. For these reasons, the district court did not err.

vi. The District Court did not Err in Declining to Give A Verdict Form With "Not Guilty" Listed as the First Option.

Appellant requested that his verdict form, with "not guilty" listed as the first option, be provided. AOB 25. Jury verdict forms cannot be misleading. Leonard v. State, 114 Nev. 639, 661, 958 P.2d 1220, 1236 (1998). The verdict form in this case was clearly not misleading as it presented both options of "guilty" and "not guilty".

Next, a Texas Court of Appeals had previously rejected an identical argument. See Joshua v. State, 507 S.W.3d 861, 864 (Tex. App. 2016) ("[P]lacement of 'guilty' before 'not guilty' in an otherwise proper verdict form does not indicate a trial court is biased or influence a jury to vote a particular way"). Additionally, Appellant failed to offer any proof that the order would adversely affect the Appellant. Thus, the trial court did not abuse its discretion in refusing to provide Appellant's proposed verdict form as the one submitted to the jury was not misleading.

I. Harmless Error.

To the extent this Court finds that the district court committed error in giving any of these instructions, or in denying Appellant's proposed instructions, any error was harmless. The error will be harmless if the reviewing court is "convinced beyond a reasonable doubt that the jury's verdict was not attributable to [that] error." Crawford, 121 Nev. at 756, 121 P.3d at 590.

Here, G.A. testified that on repeated occasions, Appellant would penetrate her anus with his penis. VI AA 1451-54, 1456-57, 1461, 1463-65. G.A. also testified about the time when Appellant penetrated her vagina with his penis. VI AA1457-58. The sexual abuse was frequent as Appellant had access to G.A. when her mother was not home. See VI AA 1447, 1452, 1465-66, 1471; VII AA 1602-03, 1606-07. The victim also testified about a time when Appellant had her masturbate his penis and when Appellant touched her breast, buttocks, and vaginal area. VI AA 1429, 1437-44. As to D.A., she testified about the time when she was twelve (12), and Appellant sexually assaulted her; Appellant climbed on top of her, removed her shorts, and penetrated her vagina with his penis. VIII AA 1709, 1711-14. Finally, there was some corroboration as Appellant admitted to sexually assaulting G.A. II AA 259-67. As the provided instructions were accurate statements of law, there can be no finding that the jury's verdict was attributable to the alleged errors.

II. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT AND THE DISTRICT COURT PROPERLY DENIED APPELLANT'S REQUESTS FOR MISTRIAL

In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476. The standard of review for prosecutorial misconduct rests upon a defendant showing "that the remarks made by

the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). This Court views the statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865, 336 P.3d 939, 950–51 (2014). Notably, "statements by a prosecutor, in argument… made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018–19, 945 P.2d 438, 444–45 (1997), receded from on other grounds, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d 476–77 (quoting

Wainright, 477 U.S. at 181, 106 S.Ct. at 2471). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

A. State's Closing Argument.

First, Appellant claims that there was improper burden-shifting when the State made arguments such as there was "no evidence" and "no testimony" on penetration a week prior. AOB 27-28. The State notes that, commenting on the lack of evidence supporting a defense theory does not amount to burden shifting. "[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented." Allred v. State, 120 Nev. 410, 418, 92 P.3d 1246, 1252 (2004); citing, Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001). Regardless, the district court advised that the State should refrain from saying the phrase "no evidence". IX AA 2103. The district court was clear that the State could say "just say the evidence". Id. Therefore, the Court sustained the objection. AOB 27.

Appellant further takes issue with the State arguing that, "[s]he never told the police that penetration occurred a week prior[,]" and that the district court overruled his objection. AOB 27. According to Appellant, this was a misstatement of the

testimony. AOB 27-28. Appellant's issue is meritless as the State properly complied with the district court's request to refrain from using the phrase "no evidence", and this was not a misstatement of the testimony. Curiously, Appellant states that the evidence on this matter was conflicting, so, logically, the State was allowed to argue the way it perceived the evidence was presented. See AOB 28. Accordingly, the State did not mischaracterize this issue as sufficient testimony was introduced to support the State's position.

Finally, Appellant complains about the State misstating Dr. Harder's testimony by arguing Appellant's IQ of 61, was "[w]ell below the 70 average." AOB 29. The State's exact statement was: "We heard Dr. Harder's exam. 61, I believe was the number. Well below the 70 average." IX AA 2108. Defense counsel objected, on the grounds that it misstated the testimony, and the district court overruled the objection. IX AA 2108. While Dr. Harder did testify that the average score on the tests, he administered was 100, there can be no finding that the comment was improper as the statement was not patently prejudicial. IX AA 1988. Moreover, the overall substance of the State's argument reflects that there was testimony that Appellant tested below average on his IQ test. Therefore, there can be no finding of prosecutorial misconduct.

To the extent that any of the State's arguments in closing were improper, any error was harmless. As to the statements of "no evidence", the district court sustained

the objections and instructed the State not to say that phrase. Accordingly, the State complied with this directive. As to the statement about Dr. Harder, the error in the number did not rise to a level of affecting Appellant's constitutional rights, or "infected the trial with unfairness as to make the resulting conviction a denial of due process." Valdez, at 1189, 196 P.3d 476–77 (quoting Darden v. Wainright, 477 U.S. at 181, 106 S.Ct. 2464, 2471 (1986). Any error could not have contributed to the verdict as both victims testified about Appellant's sexual abuse, and Appellant's own expert admitted that the IQ test was incomplete. See e.g., II AA 259-61, 265; VI AA 1447, 1451-54, 1456-58, 1461, 1463-661471; VII AA 1602-03, 1606-07; IX AA 1988. Finally, Appellant argued his own interpretation of the evidence regarding what G.A. told patrol officers. See, e.g., IX AA 2119-20, 2128.

B. State's Rebuttal Closing Arguments.

Appellant complains that the State "implied that such evidence existed but had not been admitted into evidence" when the State made the following argument:

> Now, the defendant appeared over this period of time, State would submit, that he generally got along with the 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.
>
> Rosalba had been living with the defendant for about ten years at that time.

AOB 29; IX 2146. At trial, Appellant objected and moved for a mistrial. IX AA 2146. The district court overruled the objection and denied the motion for a mistrial. IX AA 2147.

Appellant's characterization of the argument was completely incorrect. What the State was actually arguing was the exact opposite of Appellant's concern. Furthermore, said comment goes to the issue that Appellant's theory was G.A. made up the accusations in order to have Appellant leave their home. IX AA 2117. The State was not implying that there was evidence out there in the world that the home was volatile. Accordingly, the argument was not improper and does not constitute prosecutorial misconduct. To the extent that Appellant is alleging the district court erred in its denial of his motion for a mistrial, any claim is meritless. A "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). The Court agreed that the purpose of the State's argument was the exact opposite of Appellant's concern, and properly exercised its discretion in not granting the Motion for a Mistrial. IIX AA 2146-47.

Appellant further claims that the State committed prosecutorial misconduct when the State allegedly "introduced personal opinion during rebuttal argument[.]" AOB 29. Appellant references the following portion of the record:

> 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 AA 2159. Appellant objected, on the grounds that no witness testified as to "grooming conduct" and that the State was "inappropriately referring to facts not in evidence and offering personal testimony and opinion." AOB 29-30. While the district court sustained the objection, the court also denied Appellant's Motion for a Mistrial. AOB 30. Appellant adds that the State engaged in "implicit vouching" for the credibility of the G.A., and cites to Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473 (1997). AOB 30.

The State argued at trial that the term "grooming" was a common term, which is why the State used that term in its argument. IX AA 2159-60. The State used the term to describe G.A.'s testimony regarding Appellant's course of conduct where he would have G.A. in a bedroom, alone, with the door closed and locked. VI AA 1442-44, 1449, 1451-52, 63-64. Appellant would then remove her clothing, touch her body, and penetrate her anus. VI AA 1450-54, 1456-58, 1461, 1463-65.

Moreover, the State was not engaging in implicit vouching. "Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle, 113 Nev. 540, 553, 937 P.2d 473, 481; quoting United

States v. Roberts, 618 F.2d 530, 533 (1980)). "Analysis of the harm caused by vouching depends in part on the closeness of the case." Id.; quoting United States v. Frederick, 78 F.3d 1370, 1378 (9th Cir.1996). However, when the outcome of a case "depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness." Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). The State can comment on witness testimony during closing arguments and ask the jury to make reasonable inferences from the evidence. Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000); State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) (The State "has the right to state fully [its] views as to what the evidence shows."). "[T]he prosecutor may argue inferences from the evidence and offer conclusions on contested issues." Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (quotations omitted).

The State neither placed the prestige of the government behind the witness nor referenced facts not in evidence. Instead, he State made a reasonable inference regarding Appellant's course of conduct before he would sexually assault G.A. Even assuming *arguendo* that these statements did constitute impermissible vouching, Appellant cannot demonstrate that he was prejudiced by them. First, the district court sustained the objection. Next, there was testimony introduced at trial that Appellant would remove G.A's clothing, touch her body, and penetrate her anus inside a bedroom with the door closed and locked. VI AA 1442-44, 1449-54, 1456-58, 1461,

1463-65. For these reasons, if this Court were to find that the comment was improper, there was no error.

C. Testimony of Officer Murray.

Appellant raises additional complaints of prosecutorial misconduct regarding the testimony of Officer Murray. Appellant claims that the State elicited improper vouching testimony.

During the testimony of Officer Murray, the following questions occurred:

> Q Do you know how many people that you've interacted with during the course of your training -- not your training -- during the course of your employment with the Las Vegas Metropolitan Police Department?
>
> A Do I know how many people I've interacted with?
>
> Q Yes.
>
> A Thousands.
>
> Q Have you seen people sad?
>
> A Yeah.
>
> Q Have you seen people upset?
>
> A Yes.
>
> Q Have you seen people happy?
>
> A Yes.
>
> Q Based on your training and your experience, when you made contact with [G.A.], what was her demeanor like to you?

VIII AA 1576. Appellant objected on the grounds that the witness was speculating, but the district court correctly noted that the officer could describe a person based on their own perspective of another's demeanor. Id. The district court overruled the objection, and the Officer answered with: "She -- like I said, she -- she seemed nervous. She wasn't hysterical, and she was direct. She seemed very genuine with what she told me." VIII AA 1577. Appellant again objected on the grounds of speculation, and the court overruled the objection.

Officer Murray again stated that, "like I said, she seemed nervous, not hysterical. She was able to talk to me clearly, and she seemed genuine in what she told me." VIII AA 1577. Appellant then objected on the grounds of vouching, which the court sustained and struck the last observation from the record. VIII AA 1577-78.

As Appellant admits, the district court both sustained the objection and struck it from the record. On this ground, alone, there can be no finding that the testimony was patently prejudicial. As noted *supra,* "[v]ouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle, 113 Nev. 540, 553, 937 P.2d 473, 481; quoting United States v. Roberts, 618 F.2d 530, 533 (1980)).

Unlike the trial court in DeChant, the district court here did not allow this testimony to proceed, and struck any comment from the record. DeChant v. State, 116 Nev. 918, 926, 10 P.3d 108, 113 (2000). Furthermore, this Court should disregard Appellant's citation to Lobato v. State, as nowhere in that opinion is the quoted language. See AOB 31. In fact, Appellant citation leads to the section on impeachment and extrinsic evidence. See Lobato v. State, 120 Nev. 512, 518-19, 96 P.3d 765, 770 (2004). Regardless, Officer Murray did not testify that G.A. was a credible witness, and any error was harmless as the district court sustained the objection and struck the comment from the record.

D. The State Did Not Redefine its Burden of Proof.

Appellant further claims that the State, improperly belittled its standard of proof, and points to this section of the rebuttal closing argument:

> Now, first of all, defense counsel touched on reasonable doubt a little bit. 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.

AOB 32; IX AA 2140-41. At trial, Appellant's objection was that the State was explaining the reasonable doubt instruction, and the district court sustained the objection. IX AA 2141.

The State then explained, "I just 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." IX AA 2141. Appellant raised the same objection,

which the district court responded, "I don't have any problem with specifically citing to the instruction and reading the words in the instruction, but anything else you're not permitted to do." IX AA 2141.

Essentially, the State was explaining that proving its case beyond a reasonable doubt was not impossible or unattainable. Defense counsel called into question whether the State could meet this burden. IX AA 2139. The State was not attempting to redefine the standard of reasonable doubt, rephrase the definition, or minimize the burden of proof. The State was clearly responding that it could meet its burden.

Even assuming *arguendo,* that the State committed misconduct, there is no harmless error as the jury had Jury Instruction No.5 which was provided in accordance with the NRS 175.211. See III AA 671; Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001) ("[w]e have nevertheless consistently deemed incorrect explanations of reasonable doubt to be harmless error as long as the jury instruction correctly defined reasonable doubt.").

E. The State Did Not Disparage Defense Counsel.

Appellant complains that the State disparaged his defense attorneys by stating:

> Something else we heard about was protecting her little sister with regards to [D.A.]. That [D.A.] made this up to protect her little sister right before her sister's statements were going to be cross-examined for the first time. What did [D.A.] tell us as to why she came forward when she did? And why she didn't come forward back in April or before that.
>
> She had moved past that. She did not want her husband to find out. 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.

IX AA 2105-06. Appellant then objected on the grounds that the State was disparaging the defense and committed burden shifting. IX AA 2106-07. On appeal, Appellant only argues that the State was disparaging the defense, essentially conceding that there was no burden shifting. AOB 32-33.

Regardless, there was no burden shifting as the State was merely responding to Appellant's comments, in opening statements, that D.A. made her disclosure to protect G.A. Moreover, the State did not disparage the defense nor was it criticizing the work of all defense attorneys. In fact, the State was arguing that nothing had changed in regard to defense attorneys scrutinizing D.A.'s statements. The State was arguing that even now, by good defense attorneys, her statements were again scrutinized. Such comments merely pointed to weaknesses in the defense theory and did not disparage Appellant or his counsel. Evans, 117 Nev. at 631, 28 P.3d at 513.

To the extent the State inadvertently crossed the line, a point the State does not concede, any such error was harmless. To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process and must consider such statements in context, as a criminal conviction is not to be lightly overturned. Thomas v. State, 120 Nev. 37, 47 (2004). When evidence of guilt is overwhelming, even a constitutional error can be insignificant. Haywood v. State, 107 Nev. 285,

288 (1991); State v. Carroll, 109 Nev. 975, 977 (1993). The statements Appellant complains about were offered in direct response to his defense theories. Still, the district court asked that the State refrain from referring to the defense attorneys as good or bad. As such, the State's comments, even if held to be in error, did not prejudice Appellant and were harmless when compared to the overwhelming evidence presented at trial and the fact that Appellant confessed to at least one act of sexual assault against G.A. II AA 259-61, 265; VI AA 1447, 1451-54, 1456-58, 1461, 1463-661471; VII AA 1602-03, 1606-07.

To the extent that Appellant is arguing that the district court erred in denying their Motion for a Mistrial, Appellant's claims are meritless for the reasons stated *supra*.

F. The District Court Did Not Err in Denying Appellant's Motion for Mistrial.

At the very end of this section, Appellant finally stated what the relevant standard for a Motion for Mistrial is and argued that there was reversible error. AOB 34. Defense counsel noted at trial that it moved for a mistrial at the bench, and moved again for a mistrial in order to expand the record. IX AA 2113. As Appellant noted in their expanded argument, there was no contemporaneous objection to the State arguing that Appellant was claiming that G.A. had the motivation to lie because she blamed Appellant for her siblings moving out. AOB 34; IX AA 2114.

The exact statement was:

> Now, I want to talk a little bit about defense theories. These are things that I picked up, I believe, during opening statements and throughout the course of trial of cross-examination and their witnesses. The first one I want to describe is what I refer to as the motive. During opening statements, defense counsel told us that [G.A.] wanted the defendant out of the house because her siblings were moving because of him.
>
> So [D.A.] and their brother were moving because of the defendant, and she wanted them out of the house so they would stay. What evidence did we hear of that? We know when the police arrive, Rosalba told us that [G.A.] speaks to them within minutes. Officer Murray told us that no final determination had been made by the time [G.A.] speaks with them.

IX AA 2099-2100. As defense counsel acknowledged, counsel stated that D.A. leaving was one of G.A.'s motivations to lie, but never stated that their brother also leaving was part of the motivation. IX AA 2116. The district court then denied the motion for mistrial. IX AA 2116.

The State is allowed to comment on arguments made in opening statements by defense, and the lack of evidence to support those claims. Commenting on the lack of evidence supporting a defense theory does not amount to burden shifting. "[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented." Allred, 120 Nev. 410, 418, 92 P.3d 1246, 1252; citing, Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001).

The State argued that there was no motive, as her siblings moved out anyways, and G.A. lives alone with her mother. VII AA 1603-04. Moreover, there

was testimony that the brother and D.A. were married, so it made sense that they were moving out. VII AA 1618. Appellant did hint that there were issues of arguments between Appellant, and both of G.A.'s siblings. IX AA 2117. There was no mischaracterization as, ultimately, Appellant was arguing that G.A had a motive to lie in order to make sure Appellant was taken away from her family. In fact, Appellant's Proposed Instruction L hinted that this was the defense theory. III AA 654. For these reasons, the district court did not err in denying Appellant's Motion for a Mistrial.

Overall, Appellant's final argument is the cumulative effect of the alleged misconduct should result in reversal. AOB 34. For the reasons stated *supra,* Appellant is not entitled to a reversal.

III. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT MOTIONS TO SUPPRESS

Appellant claims that under the totality of the circumstances, all evidence related to his "illegal detention and subsequent statements" should have been suppressed. AOB 35.

The Fifth Amendment of the United States Constitution affords an individual the right to be informed, prior to custodial interrogation, that:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed to him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966).

Miranda's procedural safeguards are only prophylactic in nature, designed to advise suspects of their rights, and "not themselves rights protected by the Constitution." Michigan v. Tucker, 417 U.S. 433, 444, 94 S. Ct. 2357, 2364 (1974). The United States Supreme Court has held that Miranda does not require some "talismanic incantation." California v. Prysock, 453 U.S. 355, 360, 101 S. Ct. 2806, 2809 (1981) (per curiam). Rather, the warning need only "reasonably convey to a suspect his rights as required by Miranda." Florida v. Powell, 559 U.S. 50, 60, 130 S. Ct. 1195, 1204 (2010) (internal quotations omitted). Thus, the Supreme Court has instructed reviewing courts that they need not examine the warning rigidly "as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203, 109 S. Ct. 2875, 2880 (1989).

When a defendant is fully advised of his Miranda rights and makes a free, knowing and voluntary statement to the police, such statements are fully admissible at trial. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966); Stringer v. State, 108 Nev. 413, 417, 836 P.2d 609, 611-612 (1992). Coercive police conduct is a "necessary predicate" to a finding that a defendant's statement is involuntary such that its admission violates the defendant's Due Process rights. Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 522 (1986) When analyzing a waiver of Miranda rights, the test is whether the waiver was "knowingly and intelligently made."

Tomarchio v. State, 99 Nev. 572, 576, 665 P.2d 804 (1983); Edwards v. Arizona, 451 U.S. 477, 483, 101 S.Ct. 1880 (1981). This Court has stated:

> Moreover, the Miranda waiver validity must be determined in each case through an examination of the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

Anderson v. State, 109 Nev. 1129, 1133, 865 P.2d 318 (1993) ("after reviewing the totality of the circumstances, we conclude that there was sufficient evidence to indicate that Anderson knowingly and intelligently waived his rights").

Whether a defendant voluntarily waives his Miranda rights is normally judged under the totality of the circumstances existing at the time that the rights were read to the defendant. Floyd v. State, 118 Nev. 156, 172, 42 P.3d 249, 259-60 (2002). It is sufficient if the officer obtains an affirmative response to the question of whether the suspect understands the rights that were just read to him. See generally Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828 (1987); Tomarchio v. State, 99 Nev. 572, 665 P.2d 804 (1983); Taque v. Louisiana, 444 U.S. 469, 100 S.Ct. 652 (1980); North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979).

Waiver of the right to remain silent has two (2) distinct portions: 1) it must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception;" and 2) it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135,

1140 (1986). Waiver of Miranda rights may be implied through "the defendant's […] course of conduct indicating waiver" is sufficient to admit a suspect's statement into evidence. Butler, 441 U.S. at 376 & 373, 99 S.Ct. at 1755. In Butler, the United States Supreme Court concluded that "[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." Id. at 372–376, 99 S.Ct. 1755.

The prosecutor has the burden to prove that the waiver of a suspect's 5th Amendment Miranda rights was voluntary, knowingly and intelligently made. This burden is on the prosecution by preponderance of the evidence. Falcon v. State, 110 Nev. 530, 874 P.2d 772 (1994). This is generally accomplished by demonstrating to the court that the officer advised the defendant of his Miranda rights and at the conclusion of the advisement asked the suspect if he understood his rights. An affirmative response by the suspect normally satisfies the knowingly and intelligent portion of the waiver.

The voluntariness prong is normally judged under a totality of the circumstances existing at the time that the rights were read to the defendant. A waiver of rights need not be expressed, i.e., the suspect need not say "I waive my Miranda rights" nor need the officer ask the suspect "do you waive your Miranda rights". It is sufficient if the officer obtains an affirmative response to the question

whether the suspect understands the rights that were just read to him. See generally Tomarchio v. State, 99 Nev. 572, 665 P.2d 804 (1983); North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979) (defendant refused to sign the waiver but agreed to talk to the officers. This was an adequate waiver according to the United States Supreme Court). See also Taque v. Louisiana, 444 U.S. 469, 100 S.Ct. 652 (1980). See also, Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828 (1987), wherein defendant agrees to make oral, but declines written statement.

A. The District Court Did Not Err in Denying Appellant's Motion to Suppress.

Here, the district court denied Appellant's Motion to Suppress and stated that, while the jury could hear the statements, the court would instruct the jury that "it's up to them to determine whether it was freely, voluntarily, intelligently and knowingly entered into." XI AA 2482. Contrary to Appellant's assertion, his statements were voluntary, and his will was not overborne; moreover, Appellant knowingly and intelligently waived his Miranda rights.

First, the State notes that in this section of Appellant's Opening Brief, he discusses testimony that was introduced at trial. The inquiry should solely relate to testimony presented at the suppression hearing where the district court made its ruling regarding the first Motion to Suppress. Moreover, Appellant's citations to the second Jackson v. Denno hearing should also be disregarded, as that hearing was related to his second, and separate, Motion to Suppress. Appellant cannot argue in

the contrary, as that section explicitly claims that the district court erred in "denying the suppression of all evidence related to [Appellant's] illegal detention and subsequent statements to the police". AOB 35. Any argument regarding the second Jackson v. Denno hearing is reserved for subsection B, and any argument regarding the testimony about Appellant's IQ and voluntariness is reserved for Section VIII.

Accordingly, the following testimony took place on April 26, 2018. Maria Corral testified that when she arrived at Appellant's home, she made contact with Appellant and when Detective Pretti arrived, shortly after, she assisted with the Spanish to English, and *vice versa*, translations. XI AA 2399-2400, 2422. When Detective Pretti arrived, he identified himself to Appellant, and told him that some allegations had been made; he also informed Appellant that he would like to move everyone over to headquarters and requested Appellant's consent. XI AA 2423-24. Appellant stated that he was fine with this request. XI AA 2424. Although Ms. Corral did not remember what the exact conversation was, she believed that Appellant had been informed that there were allegations made against him, and they needed to go to LVMPD headquarters to have a further discussion. XI AA 2400. Ms. Corral also testified that Appellant agreed to go to headquarters. Id. According to Detective Pretti, Appellant was clam and cooperative. XI AA 2424.

Detective Pretti further explained to Appellant that since he would be transported in the patrol vehicle, Appellant needed to be handcuffed pursuant to

LVMPD policy. XI AA 2424. Appellant responded that he was okay with this condition. Id. Once Appellant arrived at headquarters, and was seated in the interview room, his handcuffs was removed. XI AA 2425. Ms. Corral was also present to assist with translating. XI AA 2402.

Ms. Corral testified that there was one conversation about rent money. XI AA 2402. Moreover, there was a conversation where Appellant stated that he was feeling lightheaded. Id. Detective Pretti was made aware that Appellant had told Ms. Corral he felt lightheaded, and that Appellant requested his medication, which was at his house. XI AA 2426. According to Detective Pretti, Ms. Corral explained that Appellant said due to his diabetes he was feeling lightheaded; in response, Detective Pretti explained that if Appellant needed medical attention, they would have someone come in to take a look at him. Id. According to Ms. Corral, Detective Pretti stated that if he needed medical attention, then Appellant needed to let them know so that they could call an ambulance. XI AA 2403.While having the conversation, Appellant was calm and, based on Detective Pretti's observation, Appellant appeared to understand nor had the inability to convey his thoughts. XI AA 2427.

Appellant's formal interview began with Detective Pretti reading Appellant his Miranda rights from his Miranda rights card. XI AA 2430. Appellant stated that he understood rights and agreed to speak with the detectives. XI AA 2431. Appellant was then provided the card for him sign in acknowledgement of his rights. XI AA

2432.[10] Detective Pretti described Appellant as calm and cooperative. XI AA 2433. Ms. Corral also observed that Appellant was clam during the interview, and at no point did he request medical assistance. XI AA 2403.

Ultimately, Appellant admitted that he initially lied when he said nothing had occurred between him and G.A. and admitted that he touched the victim. XI AA 2435. Detective Pretti noted that Appellant did tear up during the interview and described an act of penetration. XI AA 2436. At no point did Detective Pretti observe anything that would cause him to believe that Appellant had medical issues, nor did Appellant verbalize any medical issues. XI AA 2437.

Appellant also testified at this hearing. According to Appellant he had diabetes, high blood pressure, and high cholesterol. XI AA 2456. He further claimed that while in the interview room, he felt dizzy and that his heart was beating rapidly; Appellant also claimed that he felt as though his head was going to explode. XI AA 2456. Appellant claimed that he felt pressured and harassed by the detectives. XI AA 2458.

Appellant asserted that when he asked for his pills, he was referring to the ones for diabetes and his high blood pressure. XI AA 2457. According to Appellant,

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[10] Ms. Corral further testified that Miranda warnings had been given, and the acknowledgement of the Miranda rights card, that was provided to Appellant. XI AA 2406. Ms. Corral was shown the card, informed the district court that it was in Spanish, and informed the district court that the State's Exhibit 3 was an accurate depiction of the card. XI AA 2407.

he takes one in the morning, and one at noon, "two pills for sugar and one for the blood pressure every day." Id. Appellant could not remember the names of those medications but agreed that he would have been ready to take his medications at noon. XI AA 2461. Appellant noted that it was important for him to take his medicine, and that he normally took it at noon. XI AA 2463. Appellant also claimed that the Detective never told him that if he were having any medical issues, he would get someone to take care of him, and that Detective Pretti never said anything about medical care. XI AA 2464-65.

During the formal interview, Appellant claimed that G.A. masturbating was the first thing that came to his mind, but he only told the Detectives something so that he could get medical attention. XI AA 2466. Regardless, Appellant admitted that the Detective never said anything about masturbation first. Id. Furthermore, when confronted with his statements, Appellant claimed that he never said that it was rape, but with no force; when confronted with whether that statement would be on tape, Appellant said he did not remember and that it was not on tape. XI AA 2468.

Here, the record clearly revealed that Appellant's statements were voluntary, and his will was not overborne. First, the interview was only twenty (20) minutes long, which is a fairly short interview. II AA 249, 272; XI AA 2438. Moreover, Appellant was not handcuffed during the interview and both Detective Pretti and Ms. Corral testified that Appellant was calm. XI AA 2413, 2427, 2433.

Next, Appellant was given his Miranda rights, and signed the Acknowledgement of Rights card which detailed those rights. II AA 247-250; XI AA 2430-32. Additionally, Appellant stated that he did understand these rights, but he still wished to speak with the detective. II AA 250. It is sufficient if the officer obtains an affirmative response to the question of whether the suspect understands the rights that were just read to him. See generally Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828 (1987); Tomarchio v. State, 99 Nev. 572, 665 P.2d 804 (1983); Taque v. Louisiana, 444 U.S. 469, 100 S.Ct. 652 (1980); North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979).

Additionally, there is no repetitive questioning, as the transcript shows there was a clear course taken in the interview. Initially, while Appellant claimed that he did not remember, he soon admitted that he sexually abused G.A. II AA 259-67. Appellant was the one who brought up the information and used words such as "rape" and "masturbation". II AA 265. Ultimately, when Appellant decided that he did not want to talk anymore, the Detective did not push him and simply ended the interview. II AA 271. The record clearly showed that Appellant was fully advised of his Miranda rights, and there was no evidence of coercive police conduct.

The State would submit that the waiver was sufficient. This is generally accomplished by demonstrating to the court that the officer advised the defendant of his Miranda rights and at the conclusion of the advisement asked the suspect if he

understood his rights. An affirmative response by the suspect normally satisfies the knowingly and intelligent portion of the waiver. In Mendoza v. State, 122 Nev. 267, 130 P.2d 176 (2006), this Court addressed the issue of an explicit waiver and held:

> "A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement." U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir.1998) (citing United States v. Pinion, 800 F.2d 976, 980 (9th Cir.1986)) A written or oral statement of waiver of the right to remain silent is not invariably necessary. See *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Rather, a waiver may be inferred from the actions and words of the person interrogated. Id.
>
> A detective read Mendoza his rights in Spanish, and Mendoza never expressed difficulty understanding the nature of his rights or the content of the subsequent questioning. Further, Mendoza never expressed a desire not to speak. A review of the totality of the circumstances reveals that Mendoza voluntarily, knowingly, and intelligently waived his Miranda rights. Given the wealth of evidence pointing to Mendoza's guilt, even if a Miranda violation occurred, any error in admitting Mendoza's un-Mirandized statement is harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 295-96, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Id., 122 Nev. 267, 276, 130 P.2d 176, 181-182. This case is completely applicable to the case at hand.

Appellant now places a lot of emphasis on his own testimony, which is problematic for him. Based on the timing as to when Appellant needed to take his medications, he would have taken it prior to the police arriving at his home. XI AA 2461. Moreover, the transcript contradicted Appellant's claim that he did not use the word "rape". II AA 265. For these reasons, the district court did not err in denying

Appellant's first Motion to Suppress as there was a valid waiver of his Miranda rights.

Appellant cites to testimony from the trial, but this Court need not forget that this testimony occurred *after* the district court's ruling. Accordingly, Appellant's argument on pages 39 through 42 should be disregarded and reserved for the proper section. The State does note that there was testimony that Appellant understood what was occurring, and he did not indicate that he was having any medical issues. XI AA 2403, 2427, 2437. To the extent this Court considers testimony from trial, Appellant's arguments still fail. First, Rosalba testified that she was not aware of Appellant having any health issues until 2014 when he was diagnosed with diabetes, and Appellant would take one (1) pill a day, in the morning for his condition. VII AA 1607-08. She also testified that she was not aware of Appellant having any issues with high blood pressure. VII AA 1608. Appellant also admitted that he would have been ready to take his medications at noon. XI AA 2461. Additionally, Mr. Duke did not observe that Appellant was hallucinating, delusional, nonsensical, confused, unresponsive, or had any altered mental state. IX AA 1946. Moreover, Appellant did not have any slurred speech nor was he disoriented. IX AA 1947. Mr. Duke testified that it is no unusual for a person, who has just been arrested, to have high blood pressure. IX AA 1949. Finally, while Dr. Harder testified that Appellant's IQ score was 61, he also admitted that this was only an estimate and a

person with intellectual disabilities could function normally. IX AA 1988, 2004. For the reasons stated *supra*, the district court did not err in denying Appellant's Motion to Suppress as his statements were voluntarily made and there was a valid Miranda waiver.

B. Appellant's Second Motion to Suppress.

Appellant further claims that the district court erred in excluding his confession on the basis that there was an illegal detention. AOB 42. As Appellant noted in the Opening Brief, his argument to the district court was that he was in custody, and he was unlawfully arrested pursuant to NRS 171.123. AOB 42. The Jackson v. Denno hearing for this Motion was held on the first day of trial, and the district court denied the second suppression motion. IV AA 941-1032; V AA 1001-02.

The "purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S. Ct. 3074, 3081 (1976)). The United States Supreme Court has explained that the determination of whether a person has been "seized" within the meaning of the Fourth Amendment is based on the totality of the circumstances surrounding the incident. See Id.

The Fourth Amendment does not require a police officer "who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Adams v. Williams, 407 U.S. 143, 144, 92 S. Ct. 1921, 1922 (1972). The State may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is minimal and is justified by legitimate law enforcement purposes. Michigan State Police Department v. Sitz, 496 U.S. 444, 450, 110 S.Ct. 2481, 2485 (1990).

Under NRS 171.123(1) and Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), police officers may temporarily detain a suspect when officers have reasonable articulable suspicion that the suspect "has committed, is committing or is about to commit a crime." Somee v. State, 124 Nev. 434, 442, 187 P.3d 152, 158 (2008). The level of suspicion necessary for a Terry stop must be more than an unparticularized suspicion or 'hunch.' Terry, 392 U.S. at 27, 88 S.Ct. 1868. Instead, an officer must have an objective justification for detaining a person. Id. An officer may, given the proper circumstances, briefly detain a person to conduct a brief investigation even though the officer lacks probable cause to make an arrest. Id. at 22, 88 S.Ct. 1868. Under NRS 171.123(4), "[a] person must not be detained longer than is reasonably necessary to affect 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 affected, unless the person is arrested.

Here, the fact that Appellant was a suspect did not render him automatically detained. Moreover, testimony at the hearing established that Appellant was agreeable to going to police headquarters, and okay with being transported in the patrol car. IV AA 975-76. Detective Pretti explained that it was LVMPD policy that a person riding in the patrol vehicle must be handcuffed. Id. At the time Appellant arrived at the headquarters and was placed in the interview room, and Appellant was not placed under arrest until the conclusions of the interview. IV AA 982.

Now, the applicable statute shows that if the individual is held for sixty minutes or more, then they are deemed to be under arrest from that point. See State v. McKellips, 118 Nev. 465, 471, 49 P.3d 655, 660 (2002). Even if Appellant was correct, then he already received the applicable remedy: the detention would be considered to be an arrest. However, there was always sufficient probable cause to arrest Appellant, prior to his transportation to LVMPD headquarters. G.A.'s disclosure to the responding officers provided sufficient probable cause to arrest Appellant for the crimes of sexual assault if the officers had chosen to do so. See, Gaxiola, 121 Nev. 638, 119 P.3d 1225. Here, the Detective decided to investigate the allegation of sexual abuse further and asked all the parties to go to the police

headquarters. Since the original call involved a dispute between victim's mother and Appellant, it would have been unsafe to have Appellant and the victim's mother ride in the same car. Moreover, Appellant was informed of the sexual abuse allegations made by G.A. before Detective Pretti asked him to come to the station. Therefore, Appellant could not ride to the station with G.A. as that would have also been unsafe. Finally, the statement that Appellant, again, sought to preclude occurred after he was given his Miranda warnings, signed an acknowledgment that he understood, and then waived said rights. IV AA 958-60, 981. For these reasons, the district court did not err.

C. Harmless Error

To the extent that this Court finds that the district court erred by not suppressing Appellant's statements, although the State firmly believes there was no error, any error is harmless. Ultimately, the jury had the ability to determine if the statements were voluntary. Moreover, there was sufficient testimony introduced at trial that Appellant sexually abused both victims. G.A. was subject to repeated sexual assaults where Appellant would penetrate her anus with his penis. VI AA 1451-54, 1456-57, 1461, 1463-65. G.A. also testified about the time when Appellant penetrated her vagina with his penis. VI AA1457-58. As to the lewd acts, G.A. testified about one incident where Appellant had her masturbate his penis and another incident when Appellant touched her breast, buttocks, and vaginal area. VI

AA 1429, 1437-44. The sexual abuse was frequent. See VI AA 1447, 1452, 1465-66, 1471; VII AA 1602-03, 1606-07. As to D.A., this victim testified about the time when she was twelve, and Appellant sexually assaulted her; Appellant climbed on top of her, removed her shorts, and penetrated her vagina with his penis. VIII AA 1709, 1711-14.

IV. THE DISTRICT COURT DID NOT ERR IN ITS EVIDENTIARY DECISIONS

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 188 P.3d 1126 (2008); see, e.g., Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong. Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 507-08 (1985).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Although generally admissible, relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice, if it confuses the issues, or if it misleads the jury. NRS 48.025; NRS 48.035. Further, "courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998).

A. Uncharged Bad Acts

According to NRS 48.045(3),

> 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. As used in this subsection, "sexual offense" has the meaning ascribed to it in NRS 179D.097.

The State filed a Motion regarding this issue on October 7, 2019. III AA 602-15. As the State informed the court, while conducting pretrial with the victim, it became apparent that the victim was going to make references to certain acts and detail the circumstances of how the alleged sexual acts occurred. X AA 2202. Essentially, G.A. was to testify about the steps taken in preparation for the sexual abuse, which included acts such as fellatio, cunnilingus, and digital penetration. Id.

The State made the following proffer before the court:

> Well, my proffer would be that, that the testimony that we would expect to receive from the victim would be in regards to other sexual acts surrounding the actual acts that are charged to include the acts of cunnilingus, fellatio and digital penetration of the anus and the vaginal cavity as well as the last incident of sexual penetration that occurred at the end of 2015 and the touching of the victim's buttocks about a week before the police arrive to -- and ultimately make contact with the defendant in regards to the offense.
> … she would testify that, you know, before the events there were other things that happened. There was touching that happened.

X AA 2208-09. Prior to trial beginning, the victim testified about these additional acts. VI AA 1286-1352.

This Court in Franks v. State 135 Nev. 1, 5–6, 432 P.3d 752, 756 (2019) provided the following framework:

> First, similar to the Petrocelli framework, we conclude that the State must request the district court's permission to introduce the evidence of the prior sexual offense for propensity purposes outside the presence of the jury. See Bigpond, 128 Nev. at 117, 270 P.3d at 1250. The State must then proffer its explanation of how the prior sexual offense is relevant to the charged offense, i.e., tends to make it more probable that the defendant engaged in the charged conduct. See NRS 48.015.
>
> Second, we note that the relevancy of a prior sexual offense also "depends upon the fulfillment of a condition of fact, [wherein] the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition." NRS 47.070(1). In light of the nature of prior sexual act evidence, federal courts require "district court[s] [to] make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the other act occurred." See, e.g., United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (internal quotation marks omitted); see also United States v. Oldrock, 867 F.3d 934, 939 (8th Cir. 2017); United States v. Dillon, 532 F.3d 379, 387 (5th Cir. 2008). Therefore, prior to the admission of prior sexual offense evidence for propensity purposes under NRS 48.045(3), the district court must make a preliminary finding that the prior sexual offense is relevant for propensity purposes, and that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred.
>
> Finally, while all "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice," State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (internal quotation marks omitted), other courts have cautioned to "pay careful attention to both the significant probative value and the strong prejudicial qualities of that evidence" due to "the inherent strength of [prior sexual act] evidence," LeMay, 260 F.3d at 1027 (internal quotation marks omitted).

This Court further stated that the factors announced in LeMay should be utilized:

> (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, 135 Nev. at 6, 432 P.3d at 756 (2019); citing United States v. LeMay, 260 F.3d 1018, 1028 (9th Cir. 2001).

The purpose of the State's Motion was to provide a framework for Appellant's continuing course of conduct, as it was always known that the sexual abuse was reoccurring conduct. The State also sought to introduce the last act of anal penetration, where G.A. fought Appellant by pushing him off, and the conduct stopped for a period of time leading up to the incident in the kitchen. X AA 2203.

Pursuant to Franks, the State was able to show why this evidence should be permitted at the trial. First, Appellant admitted that some of the acts were similar to the crimes that Appellant was convicted of. AOB 52. The State would agree that the acts are similar to the charged acts and provides a framework for the conduct that Appellant engaged in. Moreover, the course of conduct is relevant, as the information detailed the steps that Appellant took prior to sexually assaulting the victim. As to the closeness of the acts to the charged acts, the State was able to show that the acts were contemporaneous. See e.g., VI AA 1456-57. As to the frequency, the State again showed that this was a continuing course of conduct that Appellant engaged in. Additionally, since there was a continuing course of conduct, there was

no intervening circumstances. Finally, the necessity of the evidence beyond the trial testimonies was demonstrated as the uncharged acts would provide a framework for the jury to show the steps Appellant would take before sexually assaulting the victim.

As to Appellant's assertions regarding the timing of this information, the State explained at trial that, "I know they did come to our office. But as the Court might -- might understand, when we have a victim of sexual abuse… it's very delicate to talk about it." X AA 2213-14. The State further added:

> And we don't do it unless we absolutely have to. Now, I will tell you, and the Court will see when G.A. testifies, she is a -- she's a very -- a quiet girl who is obviously affected by this and moves into tears rather quickly as she starts to talk about it.
>
> She doesn't want to talk about it. My course when I prepare a victim to come in and testify is I tell them, I have to know everything. You have to give me each step that you remember. I know that when the Preliminary Hearing was put on another deputy DA, Jenny Clemons, put on the -- the case, and I'm not sure exactly how she pretrialed the victim in the case.
>
> But as I asked her to detail each step it took quite some time but she did -- she did detail out what happened. And that's when I found out that there was other things that were happening and that's why I had to bring this motion.

X AA 2214. With this explanation for the timing of the motion, the district court did not err in allowing this evidence to be presented before the jury.

To the extent that Appellant is alleging the district court erred in denying his Motion for a Mistrial, his claim also fails as there was no clear showing of an abuse of discretion. See Parker, 109 Nev. at 388-89, 849 P.2d at 1066 ("A 'denial of a motion for a mistrial is within the trial court's sound discretion. The court's

determination will not be disturbed on appeal in the absence of a clear showing of abuse.'") As stated *supra*, the district court properly allowed for this evidence to be admitted. Moreover, what a witness does or does not testify to cannot be a basis for a Motion for Mistrial. Still, on redirect examination, testimony was elicited about the time when Appellant placed his mouth on G.A.'s vaginal area. VII AA 1549-50. Therefore, the district court also did not err in denying Appellant's Motion for a Mistrial.

B. The District Court Did Not Err in Granting the State's Motion in Limine to Preclude Evidence that G.A. Tested Positive for the Sexually Transmitted Disease Chlamydia.

Contrary to Appellant's argument, evidence regarding the victim's sexually transmitted disease was neither relevant nor probative. See AOB 53. As stated, *supra*, NRS 48.025(1) provides "all relevant evidence is admissible." NRS 48.015 states "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Such determinations of relevancy are within the discretion of the trial court. Brown v. State, 107 Nev. 164, 168, 807 P.2d 1379, 1382 (1991).

Here, the evidence did nothing to prove or disprove the crimes that Appellant was convicted of. Moreover, NRS 50.090 prohibits the accused from impeaching a rape victim's credibility with evidence of her prior sexual conduct, unless the victim

has testified regarding her sexual history or the prosecution has presented evidence regarding the victim's prior sexual conduct. In addition, NRS 48.069 provides:

> In any prosecution for sexual assault or for attempt to commit or conspiracy to commit a sexual assault, if the accused desires to present evidence of any previous sexual conduct of the victim of the crime to prove the victim's consent:
>
> 1. The accused must first submit to the court a written offer of proof, accompanied by a sworn statement of the specific facts that he expects to prove and pointing out the relevance of the facts to the issue of the victim's consent.
>
> 2. If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the victim regarding the offer of proof.
>
> 3. At the conclusion of the hearing, if the court determines that the offered evidence:
>
> (a) Is relevant to the issue of consent; and
>
> (b) Is not required to be excluded under NRS 48.035, the court shall make an order stating what evidence may be introduced by the accused and the nature of the questions which he is permitted to ask. The accused may then present evidence or question the victim pursuant to the order.

In Summit v. State, 101 Nev. 159, 697 P.2d 1374 (1985), this Court explained that the general policy behind rape victim shield laws is to (1) reverse the common law rule that use of evidence of a female complainant's general reputation for morality and chastity is admissible to infer consent and to attack credibility, (2) protect rape victims from degrading and embarrassing disclosure of intimate details about their private lives, and (3) encourage rape victims to come forward and report crimes and testify in court protected from unnecessary indignities and needless probing into their respective sexual histories. See also, Drake v. State, 108 Nev.

523, 836 P.2d 52 (1992); Brown v. State, 107 Nev. 164, 807 P.2d 1370 (1991); Lane v. Second Judicial Dist. Court, 104 Nev. 427, 760 P.2d 1245 (1988).

Any attempt to present this evidence would have resulted in improperly introduced evidence of the victim's prior sexual history, which was irrelevant to the case. Furthermore, this line of questioning would have simply been an attempt to assault the victim's credibility before the jury, which is in complete contradiction and in violation of Nevada's rape shield laws. Finally, the danger of undue prejudice would be high, and would have misled the jury as to the real issues in this case where Appellant started to sexually assault a victim as young as five (5) or six (6) years old.

Appellant's position is based upon his misguided beliefs regarding what G.A. told the patrol officer. As clarified at trial, G.A. testified that she told police officers that she was being raped and described what she meant by "rape". VII AA 1483. She denied telling the officers that the last incident of sexual assault occurred a week prior. VII AA 1502. She further testified that the officers never asked her when the sexual abuse started or ended. VII AA 1506. Officer Murray testified that he was trying to establish a timeframe; when he was discussing the "last time", he meant the last time any sexual contact occurred. VII AA 1591-93. Detective Pretti further testified that G.A. had explained that the last incident of contact occurred when

Appellant touched her buttocks, over her clothes, but the last sexual assault occurred in November 2015. VIII AA 1798-99, 1839.

Additionally, the district court reminded defense counsel that they could have also tested Appellant, and that an opportunity was given for counsel to have Appellant tested. V AA 1017. During the argument on the Motion to Reconsider, Appellant made it clear that the purpose of introducing this evidence was to discuss the victim's prior sexual history and to impeach the victim on this testimony. V AA 1016-20. Regardless, the district court did not err in prohibiting this evidence from being introduced at trial as the evidence was not irrelevant and was highly prejudicial.

C. The District Court Did Not Err in Admitting Hearsay Statements Under the Prior Consistent Statements Exception.

"Hearsay" is a statement offered in evidence to prove the truth of the matter asserted unless:

> 1. The statement is one made by a witness while testifying at the trial or hearing;
> 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> (a) Inconsistent with the declarant's testimony;
>
> (b) Consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;
>
> (c) One of identification of a person made soon after perceiving the person; or
>
> (d) A transcript of testimony given under oath at a trial or hearing or before a grand jury; or
>
> 3. The statement is offered against a party and is:

> (a) The party's own statement, in either the party's individual or a representative capacity;
> (b) A statement of which the party has manifested adoption or belief in its truth;
> (c) A statement by a person authorized by the party to make a statement concerning the subject;
> (d) A statement by the party's agent or servant concerning a matter within the scope of the party's agency or employment, made before the termination of the relationship; or
> (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

NRS 51.035.

As to prior consistent statements, this Court has held,

> Prior consistent statements of a witness are generally considered to be inadmissible hearsay. See NRS 51.035. However, they are admissible to rehabilitate a witness charged with recent fabrication or having been subjected to improper influence. See NRS 51.035(2)(b). A prior consistent statement is not hearsay if: (1) the declarant testifies at trial; (2) the declarant is subject to cross-examination concerning the statement; (3) the statement is consistent with the declarant's testimony at trial; and (4) the statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. See Patterson v. State, 111 Nev. 1525, 1531–32, 907 P.2d 984, 988–89 (1995). Additionally, the prior consistent statement, to be admissible, must have been made at a time when the declarant had no motive to fabricate. See Id.; see also Cheatham v. State, 104 Nev. 500, 502, 761 P.2d 419, 421 (1988).

Runion v. State, 116 Nev. 1041, 1052, 13 P.3d 52, 59–60 (2000)

The State sought to elicit the brief testimony regarding what G.A. said at police headquarters, after defense counsel used reports to impeach G.A.'s statements. VIII AA 1789-90. The State noted that the report did not have specific statements, but defense counsel still asked questions regarding what she specifically

said, which said use of the prior statements was not correct. V AA 1790. The State further explained that the purpose of the testimony was to show that G.A.'s statements to police officers, prior to her statements to the Detective, was consistent. Id. Additionally. G.A. had been made available and was subject to cross-examination regarding these statements. Further, the testimony cleared up Appellant's argument regarding the motive to fabricate, since Appellant alleged that any motive occurred when she realized the police officers were not going to arrest Appellant. V AA 1793; IX AA 2117-18. Therefore, the district court did not err in allowing the State to elicit this testimony.

As to Appellant's argument that the State engage in impermissible vouching, defense counsel only stated that there was vouching, and failed to cite to any support for the claim. VIII AA 1797. Even on appeal, Appellant failed to explain how the State engaged in vouching and failed to cite to any support for his claim. Regardless, the testimony was not impermissible vouching. "Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle, 113 Nev. 540, 553, 937 P.2d 473, 481; quoting United States v. Roberts, 618 F.2d 530, 533 (1980)). Here, the State did not place the prestige of the government behind the witness nor did the State indicate that information not presented supports a witness's testimony. As the State explained *supra*, G.A. was consistent that

Appellant had been sexually abusing her for the majority of her life, starting when she was younger. Additionally, when G.A. gave her voluntary statement to Detective Pretti, she indicated that that an incident occurred one week prior where Appellant touched her buttocks over her clothes; and, the last time Appellant sexually assaulted her was in November 2015 when he put his penis into her anus. VIII AA 1798-99, 1839.

Assuming, *arguendo,* that there was any error, the error was harmless based on the fact that Appellant was able to elicit similar hearsay testimony, as allowed by the trial court. VIII AA 1838, 1841. Furthermore, as stated *supra*, there was overwhelming evidence of Appellant's guilt, and these statements could not have infected the jury's verdict. For these reasons, the district court did not err, and if this Court was to find error, the error was harmless.

D. The District Court Did Not Err in Declining to Hold a Hearing on the Issue of Officer Body Work Cameras.

Appellant further complains that the district court erred in denying a request for a hearing on "potentially exculpatory evidence[.]" AOB 56. "Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); quoting Mazzan v. Warden,116 Nev. 48, 66, 993 P.2d 25, 36 (2000). To prove a Brady violation, the accused must make three showings: 1) "the evidence at issue is favorable to the accused;" 2) "the evidence was withheld

by the state, either intentionally or inadvertently;" and 3) "prejudice ensued, i.e., the evidence was material." Id.; Mazzan,116 Nev. at 67, 993 P.2d at 37.

First Appellant discusses the lack of body cameras on the officers. AOB 56-58. The initial issue raised by Appellant was that the State failed to preserve any evidence from body worn cameras. Appellant's sole argument, on appeal, is that the district court should have held a hearing on LVMPD's polices for body cameras, and defense counsel noted that "the alleged victim's claims at the scene were inconsistent with her subsequent statements…" AOB 57. Appellant's position is again based upon a misguided belief that the statements G.A. made to Officers Murray and Detective Pretti were inconsistent. In Officer Murray's report, he wrote, "[t]he last time being approximately one week ago from today." III AA 503. As clarified at trial, Officer Murry meant the last incident of sexual contact. VII AA 1591, 1593. At LVMPD Headquarters, G.A. told Detective Pretti that, approximately, one (1) week prior, Appellant touched her buttocks, but the last sexual assault occurred in November 2015. VIII AA 1798-99, 1839. Accordingly, Appellant would have been unable to demonstrate prejudice sufficient to meet his prior argument that he was unduly prejudiced. Appellant is unable to show that there was a reasonably possibility that the material would have affected the outcome. Regardless, without the body camera footage, Appellant was able to still cross-examine the victim and officers about G.A.'s statements.

Furthermore, a hearing was not necessary as the State explained in its opposition why there were no body cameras:

> With regard to issue raised by Defendant regarding actual bodycam footage from the domestic disturbance call on April 16, 2016, the State contacted Detective Jane Pinot from the LVMPD Systems Administration Unit, who provided the following information with regard to the body camera information for each officer that responded.
>
> P#12133: no camera; not mandatory
> P#5542: no camera; not mandatory
> P#7863: no camera; not mandatory
> P# 9639: no camera; not mandatory
> P#13458: 1st camera issued on 6/6/2016; not mandatory
> P#6468: 1st camera issued 9/29/2014 (pilot program); account deactivated 7/16/2015 (pilot ended); new camera issued 7/12/2016; not mandatory
>
> As of April 16, 2016, the date Police Officers responded to call for a domestic dispute, body cameras were not mandatory and were not being worn four of the police officers who responded. The information for another officer who assisted during the call (P#13458) indicates that he did not receive a body camera until June 6, 2016, two months after being called to the residence in the instant case; and, the camera was not mandatory. Finally, the officer with P#6468 was issued a camera on September 29, 2014, for a pilot program. That account was deactivated on July 16, 2015, when the pilot ended. That officer received a new camera on July 12, 2016, three (3) months after responding to assist in the call reference this case. Apparently, there were no body cameras being worn by any of the responding officers in this case, on April 16, 2016, as they were not mandatory.

III AA 498-99. As an officer of the court, the State again reiterated this information. V AA 1003. The district court further noted that there was no evidence that body camera footage had been destroyed. V AA 1003. Here, Appellant failed to demonstrate a necessity to hold this hearing, so the district court did not err. Defense

counsel's reliance on chatter from attorneys, compared to information from Detective Jane Pinot from the LVMPD Systems Administration Unit is of no merit. Regardless, the district court did permit Appellant to ask questions to the officers as to whether they had a body cam. V AA 1005.

Next, Appellant takes issue with G.A.'s counseling records. As the State explained:

> Well, in all sexual assault cases pursuant to statute, the victim is given the opportunity to have counseling, and that's what happened in this case. There is counseling that occurred after the sexual assault was reported to the police. Now, the State's position has always been that's clearly not in the State's possession; it's not discoverable from the State. And if in fact, the Defense were to subpoena those records, I think that there is a good defense that could be put up that in fact they're privileged records.

IV AA 829. Interestingly, Appellant admits that there is case law that firmly states that counseling records are privileged, so an *in camera* review would completely violate this holding. In fact, in Bradley v. Eighth Judicial Dist. Court in & for County of Clark, 133 Nev. 754, 755, 405 P.3d 668, 670 (2017) the issue was that the district court in that case ordered Dr. Bradley to disclose counseling records for an *in camera* review. As Appellant admits, this case foreclosed his request. Bradley, 133 Nev. at 762, 405 P.3d 668, 675 (2017); AOB 58-59. Despite this concession, Appellant ended his argument by briefly requesting that this Court narrow its holding in Bradley without citing to any law supporting this decision. Accordingly, this Court should decline to review this issue. See Maresca v. State, 103 Nev. 669, 673, 748

P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Regardless, this Court need not limit its holding, and the district court did not err.

E. The District Court Did Not Err in Admitting the Redacted Video.

Appellant neglected to inform this Court of the full history surrounding State's Exhibit 3. As defense counsel admitted at trial, the video was turned over to them, and defense counsel was asked to review it. VIII AA 1826. Contrary to Appellant's beliefs regarding the redactions, any redactions were not clear as the video transition was smooth, and there were no clear gaps in time between the conversations. VIII AA 1826. If anything, the State asserted that it just appeared that there was a technical error.

Now on direct appeal, Appellant failed to cite to which portions of the video that he took issue with and failed to cite to case law that would support his position that the district court "clearly erred". Even though Appellant attempted to cite to Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), Appellant admitted that this situation did not involve a Bruton issue. AOB 59-60. Nevertheless, Appellant failed to support his position that the district court erred. The State would reassert its argument that the video did not show obvious redactions and that Appellant had time to review the video before it was played to the jury. Appellant's position relies on the redactions being "obvious" but has failed to support this position.

Accordingly, this Court should decline to review this claim. Maresca, 103 Nev. at 673, 748 P.2d at 6 ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Regardless, without the video, there was testimony about the interview, and statements Appellant made. VIII AA 1828-1830.

To the extent Appellant is arguing that the district court erred in denying their Motion for a Mistrial, said claim is meritless for the reasons stated *supra.* For these reasons, the district court did not err.

V. THE DISTRICT COURT DID NOT RESTRICT APPELLANT'S DEFENSE, DID NOT IMPROPERLY LIMIT CROSS-EXAMINATION, AND DID NOT ERR IN ALLOWING FOR REMOTE TESTIMONY

The district court has discretion to limit the scope of cross-examination, provided "sufficient cross-examination has been permitted to satisfy the sixth amendment. Crawford v. State, 121 Nev. 744, 758, 121 P.3d 582, 591 (2005). The district court's discretion to curtail cross-examination is more limited if the purpose of cross-examination is to expose bias. Id. In those instances, "counsel must be permitted to elicit any facts which might color a witness's testimony. Id.

In Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986), the U.S. Supreme Court indicated that while the trial court must not curtail a defendant's ability to cross-examine a witness, the right to cross-examine a witness is not without limits. The Court stated:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Id. at 679, 106 S.Ct. at 1438.

Not only did the Supreme Court state that the trial court has discretion to limit cross-examination, but the Confrontation Clause does not guarantee that an unsatisfactory witness or cross-examination is a violation. The district court "retains wide discretion to limit cross-examination based on considerations such as harassment, prejudice, confusion of the issues, and relevancy." Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16, 31 (2004).

Additionally, this Court has held that "the scope and extent of cross-examination is largely within the sound discretion of the trial court and in the absence of abuse of discretion a reversal will not be granted." Azbill v. State, 88 Nev. 240, 246, 495 P.2d 1064, 1068 (1972) (citing Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748 (1968)). This Court has recognized that the district court has less discretion to curtail cross-examination where potential bias is at issue. Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004). However, the district court retains wide discretion to restrict cross-examination regarding bias to bar those inquires which are repetitive, irrelevant, vague, speculative, or designed merely to

harass annoy or humiliate. Id., Accord, Bushnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979).

A. The District Court Did Not Err in Limiting Appellant's Cross-examination of Detective Pretti.

Appellant takes issue with the fact that the district court sustained several of the State's objections on the grounds that there was hearsay. The first objection occurred during this portion of the cross-examination:

> Q So if you wrote something in the report, it's what occurred that day at the Berkley Avenue address?
>
> A Yes.
>
> Q And the officers who came and told you about what they had heard, told you --
>
> MR. ROWLES: Objection. Hearsay.
>
> THE COURT: Let me hear the question.
>
> BY MS. HOJJAT:
> Q The officers told you that Ms. Alvarez --
>
> THE COURT: Okay. You're not -- are you going to put the hearsay in the question?
>
> MS. HOJJAT: Yes, the hearsay is in the question, Your Honor.

VIII AA 1833. At that point, the parties approached the bench and contrary to what Appellant stated in his opening brief, defense counsel admitted that the statements were being offered for the truth of the matter asserted but offered an alternative exception. See AOB 61; VIII AA 1836. Despite the hearsay, the trial court allowed

defense counsel to proceed with the testimony and explicitly said: "Okay. Listen, go right ahead…Both sides can go into it." VIII AA 1838.

The next objection occurred during this portion of the testimony:

> Q She told you that she thought the sex started when she was five or six years old?
>
> MR. ROWLES: Objection. Hearsay.
>
> THE COURT: Yeah, sustained.

VIII AA 1839. Defense counsel explained that they were not offering the statements for the truth of the matter asserted, but to challenge the scope of the investigation. VIII AA 1839-40. Regardless, this proffer showed that the statements defense counsel wanted to elicit was hearsay.

Appellant cites to another objection that was made on page 1841 of the record, but ignores the response from the Court:

> MS. HOJJAT: Your Honor, this is not offered for the truth of the matter asserted.
>
> THE COURT: What's its relevance, then?
>
> MS. HOJJAT: Its goes to what this detective did next based on the information he had. We're challenging the scope of his investigation. The information he had and how he acted next is effect on the listener.
>
> THE COURT: *So I'm going to give you a little leeway, but it doesn't mean that all the hearsay comes in.*

XIII AA 1841 (emphasis added). The Officer proceeded to answer counsel's question. Appellant wants this Court to believe that he was completely prohibited

from cross-examining the officer, but the district court was clear that the officer just could not testify to hearsay. In this particular example, it is misleading for Appellant to cite to this objection. Despite the court's warning, Appellant proceeded to ask questions that would elicit hearsay testimony, which prompted the Court to sustain the State's objections.

Appellant's citation to the record on pages 1842-43 is also misleading. As to that particular objection, the district court also found that the testimony was not relevant. VIII AA 1842.

The district court was clear that Appellant could elicit the information it sought without using specific statements:

> THE COURT: Okay. Well, you can ask him how he reacted to certain statements.
>
> MS. HOJJAT: But I need to establish --
>
> THE COURT: But you have to do it --
>
> MS. HOJJAT: -- the information --
>
> THE COURT: -- without going into hearsay.
>
> MS. HOJJAT: I'm -- it's not hearsay. We are not trying to offer it for the truth of the matter.
>
> MR. ROWLES: Your Honor, State's position would be is that with the prior online friend, they were able to discuss the investigation without getting into specific statements --
>
> THE COURT: I agree.

MR. ROWLES: -- that [G.A.] made.

XIII AA 1845.

Moreover, the district court noted that defense counsel, could not, "get everything in and just say well, the State talked about it. Every time I've sustained the objection, you have rephrased your question appropriately." VIII AA 1848. The district court's comment highlights the fact that there was alternative means for Appellant to elicit this testimony without admitting hearsay statements. As to this particular example, Appellant was clearly attempting to elicit hearsay statements that G.A. made to Detective Pretti, which was offered for the truth of the matter asserted, that G.A. made said specific expletives. VIII AA 1848-49. Immediately right after that objection, defense counsel rephrased her question, and was able to elicit testimony about what G.A. said. VIII AA 1849. In fact, defense counsel proceeded to ask a successful line of questioning regarding words used during the interrogation. VIII AA 1850-51.

The final objection Appellant points to occurred at this portion of the trial:

> Q [G.A.] at one point you asked her what bothered her the most about the accusations.
>
> A I said what bothered you most about all of this, I believe.
>
> Q That's right.
>
> A The whole situation.
>
> Q You're right. You're right. About all of this?

A Yes.

Q You did ask her that question?

A Yes.

Q And she said that she --

MR. ROWLES: Objection. Hearsay.

THE COURT: Sustained.

MS. HOJJAT: Your Honor, it goes to what he did next.

THE COURT: Ask him what he did next after hearing what she said.

VIII AA 1867-68.

As shown, Appellant could have asked his questions while avoiding hearsay statements. VIII AA 1868. What the State was allowed to do, and not do, in its direct examination is not an exception to hearsay. The record shows that the district court properly sustained the State's hearsay objections, but this did not limit Appellant's cross-examination. Repeatedly the trial court reiterated its position that, "You certainly can ask him about the scope of his investigation, but you have to do it inside the rules of evidence." VIII AA 1869. Appellant simply could not use hearsay statements and contravene the rules of evidence. Moreover, it was up to Appellant offer a sufficient exception to the hearsay rule, besides repeating the claim that the statements were not offered for the truth of the matter asserted, when the statements clearly were offered for its truth.

At the conclusion of the testimony, Appellant moved for a mistrial on the grounds that his cross-examination had been limited, and that both his confrontation clause rights, and effective assistance of counsel rights was infringed upon. VIII AA 1896-97. Appellant then, incorrectly, stated that they were trying to get the statements in under a prior inconsistent statements exception, for the effect of the listener, and effect on Detective Pretti's investigation. VIII AA 1897; AOB 62. The district court noted that the court repeatedly asked if Appellant had any exceptions, and not once did counsel raise these exceptions. VIII AA 1897. The one-time counsel argued that an applicable exception was prior inconsistent statements, the court allowed for the testimony. VIII AA 1834, 1838. However, counsel did not raise this exception again. Overall, Appellant still had the ability to elicit certain testimony that was important to defense counsel. Appropriately, the district court denied the motion for a mistrial. As to the argument regarding effect on the listener, Appellant did not offer this exception until after the testimony had been completed. Accordingly, this Court should disregard this argument now. The statements Appellant attempted to elicit were offered for the truth of the matter asserted.

Appellant argued that he was trying to highlight any issues with the thoroughness of Detective's Pretti's investigation. AOB 62. This included a discussion with an online friend. Id. Appellant's example to support his argument is

meritless based on the testimony elicited. The State elicited on direct examination that:

> Q You were also informed or were you informed at the time when she disclosed to you that she had conversations 6 regarding what a friend had gone through online?
>
> A Yes.
>
> Q Did she ever tell you that she disclosed sexual abuse to that friend?
>
> A She did not.

VIII AA 1804. Accordingly, the fact that G.A. did not disclose her own sexual abuse provides ample support for why Detective Pretti did not follow-up with this unnamed online friend. Regardless, Appellant had the ability to point out its concerns with the investigation on cross-examination. VIII AA 1843. The fact that Appellant could not elicit hearsay did not hinder his defense.

To the extent that Appellant is arguing the district court erred in the denial of his Motion for a Mistrial, the district court did not err in its denial for the reasons stated *supra.* See AOB 62. Moreover, the district court did not err in sustaining the State's objections. If there was any error, it was harmless as Appellant still had the ability to elicit testimony from Detective Pretti during the cross-examination. As noted, *supra,* Appellant had the ability to elicit which expletives/words that G.A. used during the Detective's testimony. See e.g., VIII AA 1850-51.

/ / /

B. The District Court did not Err in Permitting the Remote Testimony

Appellant claims that the district court erred in permitting the remote testimony of Dr. Cetl. AOB 63-65. As Appellant admits, defense counsel initially agreed to remote presentation of this witness. AOB 63-64. In fact, the Friday afternoon before trial, defense counsel confirmed that it had no objection:

> So I believe -- I think it was Friday that I told Mr. Sweetin and Mr. Rowles that I didn't have an issue with Dr. Cetl testifying remotely. But on further discussion and thought, I think we want her here live. So I just wanted to make that record, that we are requesting live testimony. But I understand we did have a conversation last week, so --

V AA 1013. It was not until the first day of trial did Appellant raise an objection. Id. The State further noted that having Dr. Cetl testify remotely was discussed in advance of trial. VII AA 1529.

With this spontaneous change of position, the State explained that it was not sure that Dr. Cetl could appear in person as she lived in Texas and had a full schedule. V AA 1014-15. The district court requested that the State contact Dr. Cetl, and it would make a determination on the issue when more information was presented. V AA 1015. Appellant neglects the fact that the State represented to the court that Dr. Cetl tried to make herself available but was unable to do so. V AA 1529. Appellant also neglects to inform this court that the State further explained,

> MR. ROWLES: Her assistant as well as her receptionist both got in car accidents today. So from my understanding --
> …

> -- they are not in the office, which has caused a little bit of a storm for her.

VII AA 1526.

The Sixth Amendment's Confrontation Clause provides criminal defendants the right to confront the "witnesses against [them]" and to cross-examine such 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). "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).

This Court has stated that, "the right to a witness's physical presence at trial is not absolute." Lipsitz, 135 Nev. at 136, 442 P.3d at 143. Furthermore,

> [a]s the United States Supreme Court explained in Craig, "the Confrontation Clause reflects a preference for face-to-face confrontation at trial," but that preference "must occasionally give way to considerations of public policy and the necessities of the case." Id. at 849, 110 S.Ct. at 3165 (internal quotation marks and citation omitted). The Supreme Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the

> testimony is otherwise assured." Id. at 850, 110 S.Ct. at 3166. At issue in Craig was a state statute that allowed child witnesses to testify via a one-way closed-circuit television in child abuse cases. The Supreme Court concluded that the use of the one-way closed-circuit television procedure did not violate the defendant's right to confrontation because (1) it was necessary to further the State's interest in protecting the child victim from emotional trauma that the child would suffer by having to testify in the defendant's presence, and (2) the procedure adequately preserved the other elements of confrontation, thereby providing indicia of reliability. Id. at 851-57, 110 S.Ct. at 3166–70.

Lipsitz, 135 Nev. at 136, 442 P.3d at 143. Appellant acknowledges that the Lipsitz Court found that there was no violation of the Confrontation Clause. Id. at 138, 442 P.3d at 144; See AOB 64.

Here, Dr. Cetl's testimony was necessary as she reviewed records and performed examinations on G.A. VIII AA 1908, 1912. Moreover, she was necessary to explain why there would be any lack of physical examinations in a situation where there are delayed disclosures. IX AA 1920-22. Next, Dr. Cetl testified under oath, was subject to cross-examination, and the jury could observe her demeanor as she testified. VIII AA 1901; IX AA 1924. Therefore, the district court did not err in denying Appellant's last-minute request that Dr. Cetl appear in person instead of testifying remotely. For these reasons, the district court did not err.

VI. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE EXPERT TESTIMONY

Appellant claims that the district court erred in denying his objection to Ms. Corral testifying as an expert on the grounds that Ms. Corral was not qualified. AOB 66. At the first suppression hearing, Appellant made the following objection:

> I think anything that she's testified to that my client said in her function as an interpreter, we're now discovering that she doesn't have the qualifications to be an interpreter, and so she shouldn't be allowed to testify to that.

XI AA 2411-12. With that explanation, the district court overruled the objection.

"The district court has discretion to determine the admissibility of expert testimony, and we review this decision for a clear abuse of discretion." Baltazar-Monterrosa v. State, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006); quoting Sampson v. State, 121 Nev. 820, ——, 122 P.3d 1255, 1259 (2005). The question of an interpreter's competence is a factual one for the trial court." Baltazar-Monterrosa v. State, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006); quoting, People v. Aranda, 186 Cal.App.3d 230, 230 Cal.Rptr. 498, 502 (1986). "In making this determination, the trial court is given considerable latitude, and absent a manifest abuse of discretion, its ruling will not be disturbed on appeal." Baltazar-Monterrosa v. State, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006); citing People v. Roberts, 162 Cal.App.3d 350, 208 Cal.Rptr. 461, 464 (1984); cf. Mulder v. State, 116 Nev. 1, 12–13, 992 P.2d 845, 852 (2000) (noting that whether expert testimony will be admitted, and whether a witness is qualified to be an expert, are within the district court's discretion, and the reviewing court will not disturb that decision absent a clear abuse of discretion).

According to NRS 50. 275,

> If scientific, technical or other special knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

Here, Ms. Corral was qualified to testify as an expert regarding the Spanish/English translations that were conducted in this case. As Ms. Corral testified, she has taken courses at UNLV, attended court workshops, and is certified by LVMPD to be an interpreter. XI AA 2397. Additionally, she had previously testified as an expert in regard to translations from English to Spanish, and *vice versa*. Id.

Moreover, Appellant failed to cite to any law that Ms. Corral had to be a qualified court interpreter in addition to being a qualified interpreter for LVMPD. Accordingly, this Court should decline to review this issue. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n. 38, 130 P.3d 1280, n. 38 (2006) (court need not consider claims unsupported by relevant authority); State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Maresca, 103 Nev. at 673, 748 P.2d at 6. Regardless, the district court did not err in allowing Ms. Corral to testify as she was a qualified expert. Additionally, she was able to provide a lay opinion as to her observations of Appellant during the interviews. See NRS 50.265.

VII. THE DISTRICT COURT DID NOT ERR IN ALLOWING DR. ROLEY TO TESTIFY AS A REBUTTAL WITNESS

Appellant raises two (2) distinct issues in this section. First, Appellant claims that there was a lack of notice as to both Dr. Kapel and Dr. Roley. AOB 68. Although the State would argue that there was sufficient notice as to both experts, the focus of the inquiry is on Dr. Roley, as the district court only allowed for her to testify. IX AA 2026-27.

As to the issue of notice, this Court has held that,

> once a party in a criminal case receives notice of expert witnesses, the receiving party must provide reciprocal notice if that party intends to present expert rebuttal witnesses. If a party fails to provide notice of an expert rebuttal witness, the court in its sound discretion may prohibit the expert witness from testifying; grant a continuance; order the party to provide a brief statement regarding the subject matter on which the expert rebuttal witness is to testify and the substance of his testimony, a copy of curriculum vitae of the expert rebuttal witness, and a copy of all reports made by or at the direction of the expert rebuttal witness; or enter such other order as it deems appropriate under the circumstances.

Grey v. State, 124 Nev. 110, 119–20, 178 P.3d 154, 161 (2008) (internal citations omitted). See NRS 174.234. To comply with NRS 174.234(2), a notice has to include:

> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony; (b) A copy of the curriculum vitae of the expert witness; and (c) A copy of all reports made by or at the direction of the expert witness.

Perez v. State, 129 Nev. 850, 862–63, 313 P.3d 862, 870 (2013).

Dr. Harder was first noticed in Appellant's Notice of Expert Witnesses filed on February 25, 2019. II AA 386. The following brief statement was given: "Harder will testify at trial regarding Vasquez-Reyes' cognitive functioning." Id. Later, Appellant filed an updated notice on March 22, 2019. II AA 417. According to this notice, Dr. Harder would testify "regarding his findings after completing a neurological evaluation of Vasquez-Reyes. The evaluation included an I.Q. test and a memory test. Dr. Harder will testify regarding the results of those tests and the meaning of the tests." Id. An amended notice was filed on March 25, 2019 and the following statement was provided:

> Dr. Harder will testify regarding his findings after completing a neurological evaluation of Vasquez-Reyes. The evaluation included an I.Q. test and a memory test. Dr. Harder will testify regarding the results of those tests and the meaning of the tests as they relate to Vasquez-Reyes' ability to understand and communicate with law enforcement officers in this case.

II AA 421.

On April 22, 2019, the State filed its Third Supplemental Notice of Witnesses and/or Expert witnesses with Dr. Roley listed as an expert witness. II AA 423-26. Dr. Roley's CV was attached to the Fourth Supplemental Notice. II AA 469-74. The State's notice explained that Dr. Roley:

> 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.

II AA 425. Appellant's notice explained that Dr. Harder would testify to an I.Q. test and a memory test, so clearly the State provided notice that their expert would testify in rebuttal to this information. Additionally, the State noted in its Supplemental Points and Authorities in Support of its Motion to Strike that Dr. Roley had reviewed Dr. Harder's diagnosis of Appellant. II AA 406.

Appellant's citation to Grey is misleading, as the citation is incomplete. As stated above, this Court, in Grey, was clear that if a party fails to provide notice, which the State firmly stands that adequate notice was provided, the trial court may also,

> grant a continuance; order the party to provide a brief statement regarding the subject matter on which the expert rebuttal witness is to testify and the substance of his testimony, a copy of curriculum vitae of the expert rebuttal witness, and a copy of all reports made by or at the direction of the expert rebuttal witness; or enter such other order as it deems appropriate under the circumstances.

124 Nev. 110, 120, 178 P.3d 154, 161.

The State made several proffers as to what Dr. Roley would testify too:

> We also have Dr. Roley, who was an attending clinician at Stein. She's going to testify in regards to her observations of the defendant over an extended period of time of about two months, and the fact that she didn't find any deficits with the defendant at that time.
>
> Now, this was a competency evaluation that was ordered by the Court. We are merely going to again address this by asking her questions that there was a clinical evaluation performed on him for an

> extended period of time. She will testify that he was observed on a continuous basis over that two-month period.

IX AA 2009-10. The State further added:

> We also have Dr. Roley, who is what is currently a clinician at Stein Diagnostic Center. The defendant went to that facility and was there for approximately two months in the course of determination of competency. Over that period of time, she made observations of him, and will testify to those observations and whether or not those observations support a finding of memory or intellectual deficit.
>
> Additionally, she will testify that she's had the opportunity to review as part of her evaluation of defendant at that time the report of Dr. Harder, and she will testify and opine in regards to both his testimony here today and the conclusions reached in that report and whether she agrees with him or disagrees with him.

IX AA 2012.

Additionally, defense counsel admitted that a brief statement about the subject matter was provided. IX AA 2016. Regardless, the State was able to adequately explain why Dr. Roley should be allowed to testify in rebuttal, and the district court limited what that testimony may be. IX AA 2019-2026. For these reasons, there was sufficient notice as to what Dr. Roley would testify to in rebuttal; if this Court was to find that the Notice was deficient, the State cured any defects at trial.

The second issue Appellant raises is based on the State's questioning about effort measure testing to Dr. Roley; Appellant claims the questioning fell outside the scope of Dr. Harder's testimony. AOB 69. During the cross-examination of Dr. Harder, the State asked the following questions:

> Q Okay. Sir, are you familiar with effort testing?

A Not by -- not by that term.

Q Okay. Are you familiar with the concept that individuals may not put forth full effort when conducting these examinations?

A That has certainly happened in my career a few times.

Q Did you ever perform that type of testing to make sure that he was putting forth full -- or full effort in this exam?

A I believe he was putting for the his best effort in this exam because his goal to appear intelligent. I don't think he had any objective to appear that he wasn't. This wasn't that kind of evaluation.

Q You note in your reports, though, that you did not mention that type of effort testing that I just referred to?

A I did not note it because I didn't think that this individual was malingering or trying to put forth a negative effort.

IX AA 2003. Dr. Harder also testified about how the tests were administered:

Q All right. This examination, both the IQ test and the memory test, those are English tests; is that correct?

A They are. They are administered in English. So there was a translator that did read the questions to him.

Q So you interpreted a -- an English test through Spanish with Mr. Vasquez-Reyes; is that correct?

A That is also correct.

IX AA 2003-04. Effort testing was raised during the cross-examination of Dr. Harder because it was relevant to the inquiry about the amount of effort one would put towards an IQ and memory test. On rebuttal, the State was then permitted to ask Dr. Roley about this testing, and the concerns with having the test be translated from

Spanish to English. Therefore, there is no actual issue in allowing Dr. Roley to testify about effort testing.

To the extent that Appellant is alleging that the district court erred in denying his motion for a mistrial, said claim is meritless. Appellant was aware of the substance of the testimony for the reasons stated above. Furthermore, Appellant had the ability to impeach Dr. Roley's testimony regarding effort measure testing as shown *supra.*

Finally, to the extent that this Court finds that there was error, any error was harmless. First, Appellant's own expert was problematic as he admitted that the testing was incomplete. IX AA 1988. Regardless, Appellant called Dr. Harder as a witness to testify regarding his claim that his confession was not knowingly and voluntarily made. As shown *supra,* in Section III, Appellant's confession was knowingly and voluntarily made. For these reasons, the district court did not err, and if there was any error, it was harmless.

VIII. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS FOR LEWDNESS WITH A CHILD UNDER THE AGE OF 14, AND SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

Appellant made a blanket assertion that the State failed to prove, beyond a reasonable doubt, any of the crimes that Appellant committed, despite the fact that there was sufficient testimony. See AOB 72. Clearly, Appellant blinds himself to the fact that the uncorroborated testimony of a victim, without more, is sufficient to

uphold a conviction. Gaxiola, 121 Nev. at 648, 119 P.3d at 1232; AOB 72. Moreover, Appellant confessed to touching G.A. on one (1) or two (2) occasions, and penetrating her anus with his penis. II AA 259-67.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing 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." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380. (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d

220, 221 (1979) (Court held it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (In all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court), cert. denied, 429 U.S. 895, 97 S.Ct. 257 (1976). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S.Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S.Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, this Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976).

The relevant inquiry in a sufficiency of the evidence claim is not whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, the limited inquiry is

"whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (quotation and citation omitted). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (emphasis removed).

A. The State Presented Sufficient Evidence to Show that Appellant was Guilty of Counts 1 and 2 Beyond a Reasonable Doubt.

According to NRS 201.230,

> 1. A person is guilty of lewdness with a child if he or she:
> (a) Is 18 years of age or older and willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child;

Moreover, when a child has been the victim of sexual assault with a minor under the age of 14 and/or lewdness with a minor under the age of 14, and does not remember the exact date of the act, the State is not required prove a specific date, but may prove a time frame within which the act took place. Cunningham v. State, 100 Nev. 396 683 P.2d 500.

As to Count 1, G.A. testified that Appellant brought her into his room, at the apartment, and instructed her to touch his exposed penis; G.A. was in her mother's

bedroom, with the door closed and locked. VI AA 1442-44. Appellant proceeded to show G.A. and instruct her on how to touch his penis. VI AA 1445. G.A. described for the jury how she gripped his penis, by curving her hand and moving it back and forth. Id. G.A. was approximately five (5) or six (6), as she testified that was her age when she first arrived to Las Vegas. VI AA 1429. As the jury was instructed, it does not matter if a person's sexual desires are actually gratified. III AA 683. Here, the lewd act was evidenced by Appellant exposing his penis and telling G.A. to touch it. VI AA 1442-45. Additionally, Appellant's intent was evidenced by the circumstances in which the crime occurred. Appellant had G.A. in a room with a door closed and locked, and he proceeded to ejaculate on her chest and having her masturbate his penis. VI AA 1442-46. From the moment he exposed his penis, his intent was clear. Therefore, there was sufficient evidence to support a conviction for Count 1.

As to Count 2, G.A. testified that Appellant would invite her into the room, at the apartments, and proceed to touch her buttocks, vaginal area, and her breasts, after removing her clothing. VI AA 1437-38. Appellant would tell G.A. to come into his bedroom, alone, and would lock and close the door. VI AA 1436-38. G.A. was able to describe the ways that Appellant would touch her. As to her breasts, she made a motion with her hand to show that there was squeezing back and forth. VI AA 1438-39. When Appellant would touch her buttocks, he would grip and squeeze it. VI AA

1439-40. When Appellant touched her vagina, G.A. described it by making a fist with one hand and her other hand, which was opened at the palm, would move under the fist and upward. VI AA 1440-41. Again, Appellant's intent was demonstrated in the locations that he would touch her, that he would undress G.A., and proceed to fondle her. Therefore, there was sufficient evidence to support a conviction for Count 2.

B. The State Presented Sufficient Evidence to Show that Appellant was Guilty of Counts 3-10 Beyond a Reasonable Doubt.

Appellant was charged with, and convicted of, eight (8) counts of Sexual Assault with a Minor Under Fourteen Years of Age. I AA 121-24. A person is guilty of this crime if they subject another person to sexual penetration, against the victim's will, or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his/her conduct, and the victim is under the age of fourteen (14). See NRS 200.366; III AA 676. "Sexual penetration" means any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning. See NRS 200.364; III AA 676.

The State presented sufficient evidence to support each conviction. Overall, every act that Appellant committed against G.A. occurred when she was under the age of fourteen, as she did not turn fourteen until 2016. VI AA 1429. As to Count 3,

the relevant time period was when G.A. was living at the apartment with the pool. VI AA 1451-52; IX AA 2086. Behind a locked and closed door, Appellant penetrated her anus while she was laying on the bed, on her back. VI AA 1451-52. As to Count 4, G.A. testified about the time at the green house when Appellant penetrated her anus. VI AA 1450-51, 1453; IX AA 2086. For this particular crime, G.A. described how Appellant had her positioned on her knees, on the floor. VI AA 1453-54. Under Count 5, G.A. testified that while at the second green house, in her mother's room, Appellant penetrated her anus. VI AA 1456-57; IX AA 2086. There was also the separate incident in the laundry room when Appellant approached her, from behind, lifted up her leg on to the machine, and inserted his penis in her anus, which was the basis for Count 6. VI AA 1461; IX AA 2087. The factual basis for Count 7 occurred when G.A. lived in the two-story house. IX AA 2087. G.A. was in her bedroom, with the door locked, when Appellant unlocked her door. VI AA 1463. As G.A. and Rosalba testified, the lock could easily be opened from the outside. VI AA 1462-63; VII AA 1622. Appellant then closed the door, re-locked it, removed G.A.'s clothing, and penetrated her anus. VI AA 1463. As to Count 8, G.A. testified about the time in the second green house when she was alone with Appellant in her mother's room and Appellant placed his penis in her vagina. VI AA1457-58. G.A. remembered feeling Appellant's penis penetrate her. VI AA 1458. Count 9 was for another incident at the two-story home when G.A. was alone in Appellant's and her

mother's bedroom. VI AA 1464-65. Appellant, again, placed his penis in her anus. VI AA 1465.

Overall, G.A. was subject to repeated sexual abuse, and her testimony was sufficient to establish that these specific acts occurred. See VI AA 1447, 1452, 1465-66, 1471. Appellant would tell her that everything was okay, and G.A trusted him as he was a father figure. VI AA 1441-42. G.A. had no idea what was going on, as she explained it was not until she was older that she learned that Appellant's actions were improper. VI AA 1469-72. Moreover, she was not able to give consent. Further, it was possible for Appellant to be alone with G.A. and D.A., in the bedroom that he shared with their mother, as Appellant and Rosalba worked at different times. VII AA 1602-03, 1606-07. Additionally, Appellant confessed that there was sexual contact between he and G.A. II AA 259, 261, 263, 265-67.

Moreover, there was sufficient evidence to support Appellant's conviction for Count 10. As stated in the Information, Count 10 was about Appellant's crime against D.A. D.A testified that when she was twelve (12), and residing in the Stanford Street house, Appellant called her into his room. VIII AA 1709, 1711. When D.A. went into the room, Appellant threw her on bed and started touching her with his hand. VIII AA 1713. Appellant then climbed on top of her, removed her shorts, and penetrated her vagina with his penis. VIII AA 1713-15. Throughout this, Appellant kept saying that he wanted her, while D.A. kept telling Appellant to stop

and that she did not want this to happen. VIII AA 1713, 1716. Appellant takes issue with D.A.'s testimony regarding her age, but D.A. was honest that she did not remember exactly how old she was, and that her previous statement of thirteen was incorrect. VIII AA 1738. Still, this is not enough to undermine the fact that D.A. was able to testify about what occurred. Moreover, it makes sense that D.A. was unaware of what was occurring with G.A. as G.A. testified that Appellant's sexual abuse occurred behind a closed and locked door. See e.g., VI AA 1437-38.

Appellant further asserts that there was a lack of physical evidence to support the charges, which completely ignores standing case law as the uncorroborated testimony of a victim, without more, is sufficient to uphold a conviction. Gaxiola, 121 Nev. at 648, 119 P.3d at 1232; Deeds v. State, 97 Nev. 216, 626 P.2d 271 (1981); See AOB 75. Dr. Cetl testified that 90 to 95% of examinations are normal. IX AA 1920-21. This is due to the nature of the healing process; the fact that an examination is normal does not rule out inappropriate sexual contact. IX AA 1921. Moreover, Dr. Cetl testified that vaginal and anal tissue is made to stretch; because the skin is stretchy, it can heal quickly resulting in injuries that are not visible to the naked eye. IX AA 1921-22. The State would further note that Rosalba testified that she worked a different schedule than Appellant, which would provide Appellant with the opportunity and access to the victims. VII AA 1602-03, 1606-07.

Overall, Appellant's main issue is the delayed disclosure of the crimes. However, as this Court noted in Cunningham,

> in cases such as the present one which involve the sexual abuse of children by members of their own family, the children are often understandably reluctant to tell anyone of such occurrences, and often do not tell anyone until quite some time later.

100 Nev. 396, 400, 683 P.2d 500, 502. Particularly in this case, G.A. was convinced that the abuse was done, that she would never be subject to these inappropriate acts. VI AA 1476. However, a couple of weeks before the incident on April 16, 2016, she was alone in the kitchen when Appellant walked past her and grabbed her buttocks. VII AA 1477-78. This conduct, with the knowledge that she soon will be living alone with Appellant and her mother, caused her to fear that she would be subject to the same abuse that she had endured since she was only five (5) or six (6) years old. VII AA 1479-81, 1618. Even Detective Pretti testified that in his experience, it is not unusual for people to come forward years later after the abuse. VIII AA 1887. Initially, D.A. did not tell anyone, as she was afraid that no one would believe her, and she also wanted to leave the incident in her past. VIII AA 1717-18. D.A. decided to come forward, at the District Attorney's Office because she knew it was the right thing to do, that Appellant would be punished for his conduct, and so that the office would know that this abuse did not occur solely to G.A. VIII AA 1724.

Appellant further complains that G.A. was unable to remember "many details of the alleged abuse" but the simple fact is the crimes were committed starting when

G.A. was five (5) or six (6) years old. VI AA 1429,1432, 1435-37. As to Appellant's claims regarding testimony about Appellant laying down with G.A. during a sleepover, and unknown names of individuals, Appellant was not charged with these crimes. Moreover, G.A. never told her friend, whose sister was sexually abused, what happened to her. VII AA 1552. As to the sleepover, G.A. initially thought she dreamt what happened. VII AA 1538. When her friend told her that she saw Appellant, G.A. still did not tell this person about Appellant inappropriately touching her. VII AA 1539. G.A.

Appellant, again, references his issue as to when G.A. disclosed the last sexual assault occurred. Officer Murray prepared an initial report that stated, "[t]he last time being approximately one week ago from today." III AA 503. Officer Murray then testified at trial that he was:

> trying to determine whether this is an ongoing thing that she's telling me or if this is something that happened several years ago or if it's something that happened that day. I need to know the timeframe…So all I'm trying to do is establish a timeframe.

VII AA 1591. When he indicated what he meant by "the last time" Officer Murray explained it was related to any type of sexual contact. VII AA 1593. Based upon G.A.'s statements, he contacted Detective Pretti who responded to the residence with Ms. Corral. VII AA 1483, 1575, 1589. Based upon the amount of family members present at the scene, and the fact that there was no active crime scene, Detective

Pretti determined that the investigation should continue with interview conducted at LVMPD Headquarters, which was a more sterile environment. VIII AA 1782-83.

While interviewing G.A. at LVMPD Headquarters, she told Detective that approximately one (1) week prior, Appellant touched her buttocks over her clothes, but the last sexually assault have occurred several months prior. III AA 508. Detective Pretti also testified that Appellant touched her buttocks approximately one week prior. VIII AA 1798-99. G.A. was consistent that Appellant had been sexually abusing her for the majority of her life, starting when she was young. Additionally, when G.A. gave her voluntary statement to Detective Pretti, she indicated that the last time Appellant sexually assaulted her was several months prior when he put his penis into her anus, in November 2015. VIII AA 1798-99, 1839. Regardless, the jury determines what weight and credibility to give conflicting testimony. Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

Finally, both victims were able to testify with particularity of the crime as they were able to describe what occurred, when the sexual abuse occurred, including the location in which household. For these reasons, the State was able to prove that Appellant committed several acts of sexual assault with a minor under the age of fourteen (14), and several acts of open and gross lewdness.

/ / /

/ / /

C. Appellant's Confession was Voluntary.

During the voluntary interview, Appellant admitted that on at least one occasion, he penetrated G.A.'s anus with his penis. II AA 263,265-66. According to Appellant, this occurred when G.A. was approximately eight (8) years old, and he went in to her bedroom and found her masturbating. II AA 265-67. Moreover, Appellant admitted that he touched the victim's breasts and legs, on one (1) or two (2) occasions. II AA 259-61. Appellant's exact statement was, "it's a rape, but not forced". II AA 265.

Appellant continues to mention his IQ score, but as Appellant's expert admitted, Appellant's IQ score was only an estimate, as the entire IQ test was not completed. IX AA 1988. Moreover, the State's rebuttal expert, Dr. Roley, testified that one issue with Appellant's IQ score was that Dr. Harder used a Spanish interpreter to translate the English version into Spanish, and this is not the way the test should be utilized. IX AA 2042. For example, one of tests was a verbal knowledge which would be difficult to conduct with an interpreter. IX AA 2043.

Furthermore, Mr. Duke noted that while Appellant's blood pressure was elevated at the time he arrived at CCDC, it is not unusual for a person, who has just been arrested, to have high blood pressure. IX AA 1944, 1949. Additionally, Mr. Duke did not observe that Appellant was hallucinating, delusional, nonsensical, confused, unresponsive, or had any altered mental state. IX AA 1946. Mr. Duke also

testified that Appellant did not have any slurred speech nor was he disoriented. IX AA 1947. Both Detective Pretti and Ms. Corral testified that Appellant appeared to understand what was going on during the questioning, and Appellant signed a document showing he understood his rights. II AA 250; XI AA 2406, 2430-33. Accordingly, Appellant's claims that his confession was not voluntary are of no merit.

D. Appellant's Arguments Regarding the Police Investigation are Irrelevant to the Instant Inquiry.

Appellant claims that the police investigation was inadequate, but this comment has no place in relation to the sufficiency of the convictions. See AOB 76. Regardless, Appellant's claims are meritless.

Investigator Leon testified that she was unable to recall if she was aware of the fact that G.A. had an anal exam completed when she was nine (9) or ten (10) years old. VIII AA 1699. However, Investigator Leon testified that her main duties are to coordinate witnesses and victims for the court process. VIII AA 1700. She also testified that actions outside of bringing a witness to the court proceeding, in terms of investigations, is handled by the investigative agencies. VIII AA 1701. Moreover, the outside agency is responsible for continuing the investigation. Id.

As to Detective Pretti, the following testimony occurred:

> Q Did anybody ever indicate to you that there might be a doctor out there who had examined [G.A.]'s anus when she was nine or ten years old?

A I don't believe so.

Q You were specifically aware that the allegations in this case were that the anal rape started when she was five or six years old?

A Yes.

Q If you were aware that there was a medical professional out there who had examined her anus when she was nine or ten years old, would you have followed up on that?

A If I needed to, yes.

Q If you needed to?

A Yes.

Q So that's not even a guaranteed yes?

A Correct.

VIII AA 1876. Regardless, Dr. Cetl testified that due to the fact that the anal tissue can stretch, and the nature of the healing process, it makes sense that injuries would not be noticed. IX AA 1921-22. Moreover, in her training and experience, an examination for constipation would not be as thorough as the exams she performs. IX AA 1923. Finally, Appellant failed to explain why the name of G.A.'s friend who talked about his knowledge of a sexual abuse victim would be relevant to G.A.'s incident of sexual abuse. See AOB 77. G.A. testified that she never told this particular person that Appellant sexually assaulted her. Therefore, Appellant's claims regarding the investigation are meritless and relevant to the inquiry. For these

reasons, there was sufficient evidence presented for the jury to have been convinced of Appellant's guilt beyond a reasonable doubt.

IX. THERE IS NO CUMULATIVE ERROR

According to Appellant, "[v]iewed as a whole, the combination of errors in this case warrants reversal of these convictions." AOB 78. This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17 (2000). Appellant must present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533 (1975) (citing Michigan v. Tucker, 417 U.S. 433 (1974)).

First, Appellant has not asserted any meritorious claims of error. Thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*".) (emphasis added).

Second, the issue of guilt was not close. G.A. was able to testify about each separate and distinct incident of sexual abuse that she endured from the hands of Appellant. G.A was under the age of fourteen (14) when these crimes occurred. VI AA 1429. At the apartment, that G.A. lived in when she first arrived to Las Vegas, Appellant brought her into his room, that he shared with her mother, closed and

locked the door, and had her masturbate his penis. VI AA 1429, 1442-44. Appellant would also touch her breasts, buttocks, and vaginal area, and G.A. was able to describe for the jury how he touched her. VI AA 1437-41. Again, the door to the bedroom was closed and locked. VI AA 1436-38.

On repeated occasions, Appellant would penetrate G.A.'s anus with his penis. This occurred at the apartment with the pool, the first green house, the second green house, the sexual assault in the laundry room, her bedroom in the two-story house and the room where Appellant and her mother slept. VI AA 1451-54, 1456-57, 1461, 1463-65. G.A. also testified about the time when Appellant penetrated her vagina with his penis. VI AA1457-58. The sexual abuse was frequent as Appellant had access to G.A. when her mother was not home. See VI AA 1447, 1452, 1465-66, 1471; VII AA 1602-03, 1606-07. As to D.A., she testified about the time when she was twelve (12) when Appellant called her into his room. VIII AA 1709, 1711. Appellant threw her on bed and started touching her with his hand. VIII AA 1713. Appellant then climbed on top of her, removed her shorts, and penetrated her vagina with his penis. VIII AA 1713-15. Additionally, Appellant confessed that he touched G.A., sexually penetrated her, and defined the conduct as "it's a rape, but not forced". II AA 259-61, 265. Finally, Appellant failed to allege that this was a grave crime. For these reasons, there was no cumulative error.

/ / /

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 30th day of November, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief is proportionately spaced, has a typeface of 14 points and contains 33,330 words and 2,941 lines of text pursuant to accompanying Motion for Leave to File Respondent's Answering Brief in Excess of Type-Volume Limitations.
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 30th day of November, 2020.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 30, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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AC/Seleste Wyse/ed