IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction

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APPELLANT'S REPLY BRIEF

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

An erroneous jury instruction is harmless when "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Nay v. State*, 123 Nev. 326, 330-33, 167 P.3d 430, 433-35 (2007) (internal citations omitted); *see also* NRS 178.598. The district court abused its discretion by giving the "no corroboration" instruction set forth in *Gaxiola v. State*, 121 Nev. 638, 119 P.3d 1225 (2005), over the objection of the defense. (IX 1964; III 679). Although a victim's uncorroborated testimony may be sufficient to uphold a conviction, the *Gaxiola* instruction unconstitutionally implies that jurors need not consider *any* other evidence

when evaluating a victim's testimony. Further, the provision of this instruction in the instant case was particularly prejudicial and unjustified where no physical evidence corroborated the charges.

In essence, this instruction "effectively placed the judge's thumb on the scale to lend an extra element of weight to the victim's testimony." *Gutierrez v. State*, 177 So.3d 226, 229-30 (Fla. 2015). For this and other reasons, numerous states have rejected similar "no corroboration" instructions. *See, e.g., State v. Stukes*, 787 S.E.2d 480, 483 (S.C. 2016) (no corroboration instruction violated state constitution by commenting on the facts of the case); *Ludy v. State*, 784 N.E.2d 459, 462 (Ind. 2003) (no corroboration instruction overemphasized testimony of victim and was confusing and misleading); *Veteto v. State*, 8 S.W.3d 805, 816 (Tex. Ct. App. 2000), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008) (no corroboration instruction amounted to an improper comment on the weight of the evidence); *Burke v. State*, 624 P.2d 1240, 1257 (Alaska 1980) (no corroboration instruction "unduly emphasizes the lack of a need for corroboration without similarly indicating that other witnesses' testimony need not be corroborated"); *State v. Schmidt,* 757 N.W.2d 291, 297 (Neb. 2008) (no corroboration instruction was "redundant and unnecessary"); *Garza v. State*, 231 P.3d 884, 891 (Wy. 2010) (no

corroboration instruction "has the potential to mislead the jury" and should not be given).

The State argues that other instructions properly advised jurors regarding the evaluation of witness testimony, and that jurors must view all instructions equally. (Answering Brief, 27-28). However, the instructions referenced by the State regarding the general duty of jurors to review all evidence and witness credibility fall far short of the admonition provided by CALJIC 2.27, the instruction mandated by the California court in *People v. Gammage*, 2 Cal. 4th 693 (Cal. 1992), whenever the "no corroboration" instruction is also provided. (III 673, 691). Instruction Thirteen advised jurors that corroboration of a victim's testimony is never required – implicitly contradicting Instruction Seven's admonition that jurors can disregard the testimony of an incredible witness. (III 673).

The State argues that numerous cases from Nevada approve the "no corroboration" jury instruction. However, except for *Gaxiola v. State*, 121 Nev. 638, 119 P.3d 1225 (2005), the other Nevada cases the State relies upon actually do not specifically address the arguments advanced regarding the "no corroboration" jury instruction or do not address the same procedural posture (with the exception of an unpublished case). (AB, 26-30). In *Bennett v. Leypoldt*, 77 Nev. 429, 430-31, 366 P.2d 343, 344 (1961), the

defendant appealed the denial of a pretrial petition for a writ of habeas corpus alleging insufficient evidence to support the justice court's probable cause determination. On appeal, the defendant argued the victim's preliminary hearing testimony was not corroborated. *Id.* The Nevada Supreme Court disagreed, and noted in passing, "... in this state the testimony of a prosecutrix in a rape case need not be corroborated." *Id.* at 432, 366 P.2d at 345.

Similarly, in *Deeds v. State*, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981), the defendant argued insufficient evidence supported his sexual assault conviction because the alleged victim's testimony was "contradictory." *Id.* In reviewing this appellate claim, the Nevada Supreme Court reiterated, "[i]t is well established law in Nevada that in a rape case, a jury may convict upon the uncorroborated testimony of the victim." *Id.* Likewise, in *Henderson v. State*, 95 Nev. 324, 326, 594 P.2d 712, 713 (1979), the defendant argued on direct appeal that insufficient evidence supported his sexual assault conviction. The Nevada Supreme Court disagreed, noting, "It is the law of this state that in a rape case, a jury may convict upon the uncorroborated testimony of the victim." *Id.* (AB, 26-30). These cases do not explicitly address the inherent flaws within Instruction Thirteen.

Further, other jurisdictions have noted that language relevant to appellate-level analysis does not warrant automatic inclusion in jury instructions. *Foster v. State*, 795 N.E.2d 1078, 1085 (Ind. 2003) (superseded on other grounds by rule as stated in *Dugan v. State*, 876 N.E.2d 1172 (Ind. Ct. App. 2007)) (*citing Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003)). Instruction Thirteen "invited the jury to violate its obligation to consider all the evidence." *Foster*, 795 N.E.2d at 1085 (*citing Ludy*, 784 N.E.2d at 462). To the extent that *Gaxiola* improperly conflates standards of appellate review with the burden of proof beyond a reasonable doubt, *Gaxiola* should be overruled.

Other states reject language similar to Instruction Thirteen's implicit emphasis in favor of the credibility of complaining witnesses. Florida rejected a "no corroboration" instruction similar to the *Gaxiola* instruction because "[the instruction] constitutes a comment on the testimony presented by the alleged victim and presents an impermissible risk that the jury will conclude it need not subject the victim's testimony to the same tests of credibility and weight applicable to other witnesses." *Gutierrez v. State*, 177 So.3d 226, 229-30 (Fla. 2015);

South Carolina found that the "no corroboration" jury instruction violates the state's constitutional provision prohibiting courts from

commenting to the jury on the facts of the case. *State v. Stukes*, 787 S.E.2d 480, 483 (S.C. 2016) (*citing* S.C. Const. art. V, § 21) ("Judges shall not charge juries in respect to matters of fact but shall declare the law"). Like South Carolina's Constitution, Nevada's Constitution also provides that "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Nevada. Const. Art. 6, § 12; *see also* NRS 3.230 ("District judges shall not charge juries upon matters of fact but may state the evidence and declare the law."). Given these similarities, South Carolina's analysis is instructive for Nevada and demonstrates why the *Gaxiola* instruction should be found unconstitutional in Nevada.

This Court must recognize the inherent prejudice in privileging the words of the alleged victim over all other evidence; in *Burke v. State,* 624 P.2d 1240 (Alaska 1980), the court ruled on a similar instruction:

> This instruction is the obverse of a cautionary instruction concerning the victim's testimony and, instead of suggesting that the victim's testimony be treated with caution, it alerts the jury to the fact that nothing more than the victim's testimony is necessary to convict.
>
> In our view, to instruct that the victim's testimony need not be corroborated by other evidence unduly emphasizes the lack of a need for corroboration without similarly indicating that other witnesses' testimony need not be corroborated. Particularly where the defendant has given a statement or taken the stand, it would be prejudicial to indicate that the victim's testimony need not be corroborated without similarly indicating that the defendant's testimony need not be corroborated. Thus we conclude that the instruction should not have been given.

Id., at 1257.

This Court should reevaluate *Gaxiola* because Instruction Thirteen improperly emphasizes and validates the testimony and statements of the complaining witness in a manner that undermines the presumption of innocence and the burden of proof beyond a reasonable doubt. This instruction essentially advises jurors that an alleged victim's testimony, standing alone, is sufficient to sustain a guilty verdict, without corroborating evidence, and arguably even in the presence of conflicting evidence. For these reasons, and for all the reasons set forth in the Opening Brief, the district court's error in giving the *Gaxiola* instruction was not harmless beyond a reasonable doubt, warranting reversal.

The Court also erred in rejecting the defense proposed instructions regarding implicit bias. (XII 2485-2489). The U.S. Supreme Court has recognized that jury instructions can play a significant role in reducing juror bias:

> Trial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind. Some instructions are framed by trial judges based on their own learning and experience. Model jury instructions likely take into account these continuing developments and are common across jurisdictions. See, *e.g.,* 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 10:01, p. 22 (6th ed. 2008) ("Perform these

> duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way").

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 871, 197 L. Ed. 2d 107 (2017). The U.S. Supreme Court has acknowledged, in the context of *Batson* analyses, the presence of unconscious biases and stereotypes on the part of prospective jurors and prosecutors:

> And most importantly, at step three, *Batson* asks judges to engage in the awkward, sometimes hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge. See 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring) (noting that the unconscious internalization of racial stereotypes may lead litigants more easily to conclude "that a prospective black juror is 'sullen,' or 'distant,' " even though that characterization would not have sprung to mind had the prospective juror been white); see also Page, Batson's Blind–Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U.L.Rev. 155, 161 (2005) (" '[s]ubtle forms of bias are automatic, unconscious, and unintentional' " and " 'escape notice, even the notice of those enacting the bias' " (quoting Fiske, What's in a Category?: Responsibility, Intent, and the Avoidability of Bias Against Outgroups, in The Social Psychology of Good and Evil 127, 127–128 (A. Miller ed.2004))). In such circumstances, it may be impossible for trial courts to discern if a " 'seat-of-the-pants' " peremptory challenge reflects a " 'seat-of-the-pants' " racial stereotype. *Batson,* 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring) (quoting *id.,* at 98, 106 S.Ct. 1712 (REHNQUIST, J., dissenting)).

Miller-El v. Dretke, 545 U.S. 231, 267–68, 125 S. Ct. 2317, 2341, 162 L. Ed. 2d 196 (2005). The Washington Supreme Court noted the difficulty in identifying and eliminating unconscious bias:

> Unconscious stereotyping upends the *Batson* framework. *Batson* is equipped to root out only "*purposeful* " discrimination, which many trial courts probably understand to mean conscious discrimination. *See Batson,* 476 U.S. at 98, 106 S.Ct. 1712. But discrimination in this day and age is frequently unconscious and less often consciously purposeful. That does not make it any less pernicious. Problematically, people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it.

State v. Saintcalle, 178 Wash. 2d 34 at 48–49, 309 P.3d 326 at 336 (2013) (abrogated on other grounds by *City of Seattle v. Erickson*, 188 Wash. 2d 721, 733, 398 P.3d 1124, 1130 (2017) (a single peremptory strike, absent other circumstances showing legitimate grounds, was enough to trigger a prima facie finding under the first step of the *Batson* analysis)).

Although this recognition has usually arisen in the context of *Batson* challenges, the presence of widespread unconscious biases and stereotyping has equal application to all types of decision-making, including jury deliberations:

> Stereotypes can greatly influence the way we perceive, store, use, and remember information. Discrimination, understood as biased decision-making, then flows from the resulting distorted or unobjective information. The attorney exercising the peremptory challenge will be unaware of this biased information processing and so will be unaware of her gender- or race-based discrimination.... To put it simply, good people often discriminate, and they often discriminate without being aware of it.

State v. Saintcalle, 178 Wash. 2d 34 at 48, 309 P.3d 326 at 336. The proposed defense instructions would have warned jurors regarding their own

potential underlying biases and fostered awareness of and sensitivity to these issues during the deliberation process.

Further, the court erred in rejecting the defense request to have "not guilty" appear first on the verdict form. (III 657; IX 1982). Studies show that jurors, like voters considering candidates on a ballot, are subconsciously predisposed to select the first option they are presented with. Courts routinely acknowledge the "primacy effect" of placement on ballots in election outcomes. Although no rule requires this type of verdict form, the placement of "not guilty" as the first option would have helped to overcome inherent juror bias and protect Armando's presumption of innocence. The State would have suffered no prejudice in this simple adjustment of the verdict form.

Finally, the trial court should have provided the proposed defense instructions regarding witness credibility, playback of testimony, flight, and the defense theory of the case. (III 633, 651, 654, 673; IX 1972, 1974, 1978, 1980; XII 2488). Although other instructions may have articulated some similar concepts, courts may not reject proposed defense instructions on these grounds:

> Even though this principle of law could be inferred from the general instructions, this court has held that the district court may not refuse a proposed instruction on the ground that the legal principle it provides may be inferred from other instructions. Jurors should neither be

> expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case.

Crawford v. State, 121 Nev. 744, 754 (2005); *Honeycutt v. State*, 118 Nev. 660, 56 P.3d 362, 368 (2002), *rev'd in part on other grounds*, *Carter v. State*, 121 Nev. 759, 121 P.3d 592 (2005). When an erroneous instruction infects the entire trial, the resulting conviction violates due process. *Estelle v. McGuire,* 502 U.S. 62, 72 (1991). The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Jury instructions relieving states of this burden violate a defendant's due process rights. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Here, the provision of prejudicial instructions and the rejection of proposed defense instructions warrants reversal.

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

Because criminal cases "involve constitutional issues," they require "heavy scrutinization of improper comments" by attorneys. *Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 983 (2008). "The point of not allowing a prosecutor to comment on the credibility of a witness is that expressions of

personal opinion by the prosecutor are a form of unsworn, unchecked testimony, not commentary on the evidence of the case." *State v. Pabst*, 268 Kan. 501, 511 (2000). Here, this Court must conclude that the prosecutor committed reversible misconduct that infected this trial with unfairness by shifting the burden of proof, misstating the evidence, and injecting improper opinions regarding witness credibility. (IX 2102-04; 2147; 2159). The statements that G.A.'s testimony "makes a heck of a lot of sense" and the characterization of her allegations as "grooming conduct" on Armando's part constitute clear instances of witness vouching, offering improper personal opinions, and mischaracterizing the actual evidence in the case.

The State denies "placing the prestige of the government" behind the complaining witness. (AB, 54). However, this argument ignores the role of the prosecutor in the courtroom:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Emerson v. State, 98 Nev. 158, 164 (Nev. 1982), *citing Garner v. State*, 78 Nev. 366, 370, 374 P.2d 525, 528 (1962), *quoting Berger v. United States*, 295 U.S. 78, 88 (1935). "Vouching is especially problematic in cases where the credibility of the witnesses is crucial, and in several cases applying the more lenient harmless error standard of review, we have held that such prosecutorial vouching requires reversal." *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991). Where the record reveals a dereliction of the prosecutor's obligations, this Court must reverse the convictions.

Based on the multiple instances of manifest misconduct discussed *supra* and in the Opening Brief, this Court should find that this is a case where the State's gamesmanship seriously affected the integrity or public reputation of the judicial proceedings. *Gaxiola v. State*, 119 P.3d 1225 (2005). The State owed appellant the duty to act as an "unprejudiced, impartial, and nonpartisan" public official "bent only on seeing justice done and the law vindicated in accordance with the rules of law." *State v. Rodriguez*, 31 Nev. 342, 346, 102 P. 863 (1909). Error is harmless if without reservation, the verdict would have been the same in the absence of error. *Witherow v. State*, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988). Because the State's misconduct tainted this trial and the jury's verdicts, this Court must reverse.

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

A trial court's voluntariness determination presents mixed questions of law and fact subject to de novo review. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). Whether a confession is the product of "rational intellect and a free will" hinges not only on the means by which the confession was extracted, but the subjective effect the methods employed have on a particular defendant. The United States Supreme Court noted:

> ...[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.

Miller v. Fenton, 474 U.S. 104 (1985) (emphasis in original). *See also Passama v. State*, 103 Nev. 212, 735 P.2d 321, 323 (1987) (" ... certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive . . . that they must be condemned under the Due Process Clause of the Fourteenth Amendment") (citations omitted).

The trial court erred in finding that Armando's waiver of his Fifth Amendment rights and his subsequent statement were freely and voluntarily

given. Armando was taken in handcuffs to the police station by an armed detective. A valid waiver "cannot be presumed . . . simply from the fact that a confession was ultimately obtained." *Miranda v. Arizona,* 384 U.S. 436, 22 475 (1966). "Voluntary means that the waiver was the product of free and deliberate choice rather than intimidation, coercion or deception." *Colorado v. Spring*, 479 U.S. 564, 573 (1987). Here, Armando was taken into custody and questioned in a police interrogation room while feeling lightheaded and in need of his blood pressure and diabetes medication. (XII 2402; 2423-26; 2456). Under these circumstances, this Court should find that the waiver was not freely and voluntarily given but was the result of inherently coercive circumstances. Further, even if this Court finds the waiver valid, this Court should find that the confession itself was involuntary based on inherently coercive police tactics. A criminal defendant is deprived of due process of law if his conviction is based, in whole or in part, upon an involuntary confession, even if there is ample evidence aside from the confession to support the conviction. *Jackson v. Denno*, 378 U.S. 368, 376 (1964); U.S. Const. Amends. V, XIV. To find a confession voluntary, courts must determine whether the confession was "the product of an essentially free and unconstrained choice by its maker." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). A voluntary confession is "the product of a rational intellect and

a free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). A voluntary confession requires that the appellant's will was not "overborne." *Reck v. Pate*, 367 U.S. 433, 440 (1961). Because the evidence revealed that Armando's statements were not made voluntarily or rationally, this Court should find error in their admission.

Further, the Court erred in finding that Armando engaged in a consensual encounter with Det. Pretti. Under *Florida v. Bostick*, 501 U.S. 429 (1991), the relevant inquiry is whether a reasonable person would have felt at liberty to ignore police demands and go about his business. Armando did not feel at liberty to refuse compliance with Pretti. (V 992). Under *United States v. Mendenhall*'s factors regarding whether an encounter is consensual, the totality of the circumstances fails to support the trial court's conclusion that Armando voluntarily participated in this interaction. *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). Under the totality of the circumstances, this was not a consensual encounter, and this Court should deem this detention unconstitutional and illegal. *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S. Ct. 1801, 114 L.Ed.2d 297 (1991); *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412 (1990); *Orhorhaghe v. I.N.S.,* 38 F.3d 488, 494 (9th Cir. 1994), *citing Bostick*, 501 U.S. at 436, 111 S.Ct. at 2387.

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

Appellate courts review the decision to admit or exclude evidence of prior bad acts under an abuse of discretion standard. *Fields v. State*, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009). Here, the court erred in admitting irrelevant and prejudicial evidence regarding multiple uncharged acts. (VI 1353-56). The court's ruling resulted in the admission of highly prejudicial evidence regarding numerous uncharged acts which were not necessary to the State's case, and about which G.A. was often unable to provide specific details. (VI 1356; VII 1525). The trial court erred in finding that the admission of this evidence met the standards enunciated in *Franks v. State*, 135 Nev. 1, 6, 432 P.3d 752, 756 (2019).

The Court also erred in excluding relevant evidence. Contrary to the State's claim that the defense sought to introduce evidence that violated Nevada's rape shield statute, the defense explicitly sought to introduce evidence of G.A.'s contraction of a sexually transmitted condition as an alternate source of the SANE findings and as a means of challenging the thoroughness of the State's investigation. (V 1017; V 1021-22). Further, the State failed to show that the admission of G.A.'s prior statements to Pretti at

Metro headquarters met the requirements of the prior consistent statement hearsay exception under NRS 51.035(2)(b). "Under *Quinto,* once a showing of fabrication is made, the State has the burden to show that the victim's prior consistent statements occurred prior to the alleged fabrication." *Patterson v. State*, 111 Nev. 1525, 1532, 907 P.2d 984, 988 (1995), citing *United States v. Quinto,* 582 F.2d 224 (2d Cir. 1978). Here, G.A.'s statements to Pretti were subsequent to her statements to Officer Murray, and any motive to fabricate would have been identical during both statements. *Runion v. State*, 116 Nev. 1041, 1053, 13 P.3d 52, 60 (2000).

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. "Evidence against the defendant must be substantial enough to convict him in an otherwise fair trial, and it must be said without reservation that the verdict would have been the same in the absence of error." *Schoels v. State*, 115 Nev. 33, 35, 975 P.2d 1275 (1999). *Fahy v. Connecticut* held "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. 85, 86-87 (1963). Because the cumulative effect of the admission of highly inflammatory and irrelevant evidence undermined appellant's Fifth, Sixth,

and Fourteenth Amendment rights, this Court must reverse and remand this case.

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

Contrary to the State's argument that the defense " ... wants this Court to believe that he was completely prohibited from cross-examining the officer .... ," the defense explicitly acknowledged that the trial court had, in fact, allowed the defense to inquire into some of G.A.'s statements to Det. Pretti during his direct examination. (AB, 97-98; OB, 61). When the State repeatedly objected based on hearsay, defense counsel responded that the questions were designed to explore the scope and thoroughness of Pretti's investigation. (VIII 1837-41). The defense noted that the court had allowed the State to explore many of G.A.'s statements to Pretti during direct examination, and contended that the court had improperly limited the defense's ability to examine Pretti about some of the avenues he chose to explore or omit from his investigation. (VIII 1869).

Ultimately, the defense sought a mistrial on the grounds that the cross-examination of Pretti had been so limited and constrained that it violated

Armando's constitutional rights. (VIII 1899-1900). The court should have granted a mistrial under Article I, Section 3 of the Nevada Constitution and under the Fifth and Sixth Amendments. The failure to do so on these facts warrants reversal of these convictions. *Rudin v. State*, 120 Nev. 121, 86 P.3d 572, 587 (2004); *Hylton v. Eighth Judicial District Court*, 103 Nev. 418, 421, 743 P.2d 622 (1987); *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

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

The district court has discretion to determine the admissibility of expert testimony. Appellate courts review these decisions for abuse of discretion. *Baltazar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006). Here, the trial court manifestly abused that discretion in admitting the testimony of a witness who is not a court-certified interpreter, who lacked any professional degrees, and who had taken only two college courses in the area of purported expertise. (XII 2409).

VII. The court erred in admitting improper rebuttal testimony.

NRS 174.234(2)(a) requires both parties to provide the other side with written notice of "the substance" of expert testimony. By rejecting the

defense objection to irrelevant and unqualified testimony beyond the scope of the notice provided by the State, the court permitted the admission of testimony that ambushed the defense and violated Armando's due process and fair trial rights. "It is a fundamental principle of statutory construction that where at all possible, statutes should be construed so as to give effect to the legislative intent.... It is equally fundamental that statutes should be construed in order to validate each provision of the statute." *Sheriff, Clark County v. Morris*, 99 Nev. 109, 118 (1983) (internal citations omitted). In Nevada, "words in a statute should be given their plain meaning unless this violates the spirit of the act." *McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) (internal citations omitted). By permitting the State to ambush the defense with undisclosed testimony regarding challenges to Harder's testing methods, the trial court failed to give the words in NRS 174.234 their plain meaning. The trial court failed to validate the Legislature's requirement that the State produce the "substance" of expert testimony to the defense prior to trial, and in doing so impaired trial preparation and presentation and violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

The purpose of requiring the State to disclose evidence is to promote "the fair and efficient administration of criminal justice by providing the

defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence." *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312 (11th Cir. 1985) (internal citations omitted).

> The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony.

Taylor v. Illinois, 484 U.S. 400, 410-411 (1988). The State's failure to comply with NRS 174.234 and the Court's rejection of the defense objections warrant a finding of prejudicial error.

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

Because the evidence failed to support these convictions beyond a reasonable doubt, this Court should reverse these convictions. " . . . [T]he relevant question 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. . . . The

criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Because the State failed to prove that Armando committed these crimes beyond a reasonable doubt, reversal is warranted.

IX. Cumulative error warrants reversal of this conviction.

Although multiple discrete errors may not warrant reversal when reviewed individually, the cumulative effect of these errors on the trial as a whole warrants relief. *Daniel v. State,* 119 Nev. 498, 78 P.3d 890 (2003). A cumulative-error analysis "aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and . . . analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *U.S. v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc). Courts analyze cumulative error by conducting the same inquiry as for individual error: whether the defendant's substantial rights were affected. *U.S. v. Kartman*, 417 F.2d 893, 894, 898 (9th Cir. 1969). The combination of errors in this case warrants reversal even if this Court finds any individual errors harmless.

CONCLUSION

Appellant is satisfied that the Opening Brief adequately addresses all remaining issues and incorporates by reference all arguments made therein. Based on the foregoing argument and on the Opening Brief, this Court should reverse and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

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DATED this 28th day of January, 2021.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of January, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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