IN THE SUPREME COURT OF THE STATE OF NEVADA

DEQUINCY BRASS, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 81142

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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DEQUINCY BRASS,	)	NO. 81142
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Appellant,	)	
	)	
vs.	)	
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THE STATE OF NEVADA,	)	
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Respondent.	)	
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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant, Dequincy Brass ("Brass"), appeals from his judgment of conviction pursuant to NRAP 4(b) and NRS 177.015. Brass's judgment of conviction was filed on April 30, 2020. (Appellant's Appendix Vol. I at pp. 216-219).[1] This Court has jurisdiction over Brass's appeal, which was timely filed on May 4, 2020. (I:220-223). See NRS 177.015(1)(a).

ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because Brass went to trial and was convicted of 17 Category A felonies: four counts of lewdness with a child, nine counts of sexual assault with a

[1] Hereinafter, citations to the Appellant's Appendix will start with volume number, followed by page number. For example, (Appellant's Appendix Vol. I at pp. 216-219) will be shortened to (I:216-219).

minor, three counts of first degree kidnapping of a minor, and one count of battery with intent to commit sexual assault, victim under 16. (I:216-219); See NRAP 17(b)(2).

ISSUES PRESENTED FOR REVIEW

I. The court violated Brass's Sixth Amendment rights by denying his requests to substitute counsel.

II. The State presented insufficient evidence of guilt for lewdness and dissuading.

III. Improper jury instructions contributed to Brass's convictions for lewdness and dissuading.

IV. The court failed to give Tavares instructions before admitting unduly prejudicial bad act evidence that was not proven by clear and convincing evidence.

V. The jury was improperly exposed to the prosecutor's notes and victim impact testimony.

VI. The jury heard inadmissible hearsay testimony about "Google maps" data.

VII. Violation of Brass's rights to due process and an impartial jury.

VIII. Violation of Brass's right to public trial.

IX. Violation of Brass's Confrontation Clause rights in connection with Sandra Cetl's testimony and SNCAC exam documentation.

X. Prosecutorial Misconduct.

XI. Ineffective Assistance of Counsel.

XII. Cumulative Error.

STATEMENT OF THE CASE

On September 13, 2017, the State filed a criminal complaint charging Brass with five counts of sexual assault with a minor (V.M.). (I:1-2). On November 7, 2017, the State filed an amended criminal complaint charging Brass with four additional counts of sexual assault with a minor (a total of 9 counts), five counts of lewdness with a child, one count of child abuse, neglect or endangerment, three counts of first degree kidnapping of a minor, two counts of preventing or dissuading witness or victim from reporting crime or commencing prosecution, and one count of battery with intent to commit sexual assault, involving V.M. and two other minors: R.M. and A.W. (I:3-8).

Although the Clark County Public Defender's office was initially appointed on October 5, 2017 (I:11), Brass's family subsequently retained Mitchell L. Posin (Posin) to represent him. Posin entered a notice of Substitution of Attorney on January 18, 2018. (I:11,13). At the time, Posin was still on "probation" with the State Bar of Nevada, after pleading guilty to violations of RPC 1.1 (competence), RPC 1.2 (scope of representation), RPC 1.3 (diligence), RPC 1.4 (communication), and RPC 1.15 (safekeeping property), and receiving a 2-year suspension with 18 months "stayed." See In re Discipline of Posin, No. 69417, 132 Nev. 986 (March 25, 2016)

(unpublished). Though Posin was permitted to plead guilty in exchange for more lenient discipline, three Justices of this Court believed that the "2–year suspension with 18 months stayed [was] insufficient to protect the public and the integrity of the profession considering Posin's admitted misconduct, the number of clients harmed, the extent of the harm, and the relatively recent prior discipline for similar misconduct." In re Discipline of Posin, No. 69417, 132 Nev. 986 (March 25, 2016) (unpublished) (dissent).

At Brass's preliminary hearing on February 6, 2018, the State added an additional count of sexual assault and he was bound over to district court. (I:10). The State filed a 22-count information in district court on February 12, 2018. (I:14-19). At his initial arraignment on February 14, 2018, Brass pled not guilty and waived his right to trial within 60 days. (II:349).

On February 26, 2018, Posin filed an *Ex Parte* Motion for Authorization of Employment of Investigator and Payment of Fees. (I:21-24). In the motion, Posin explained that Brass was indigent, *that his family was paying his legal fees*, and that it would be "more efficient for a trained investigator to perform the investigation, rather than counsel." (I:22).

On March 12, 2018, Posin filed a Motion to Withdraw as Brass's attorney. (I:25-30). In the motion, Posin stated that Brass's family had not paid for legal services beyond the retainer, which covered the preliminary

hearing only. (I:26). Posin claimed "[t]he representation has been rendered unreasonably difficult by client" because of "continued false promises of impending payment." (I:27).

Posin did not appear in court when the motion was scheduled to be heard on March 27, 2018. (I:234). Brass appeared in court *alone*, *unrepresented*, and *wholly unaware* of Posin's motion. (II:351B). The court continued the hearing until March 29, 2018. (I:234). Although Brass was not present at the rescheduled hearing, Posin told the court he "didn't even talk to" his client but was withdrawing the motion after speaking with Brass's family. (II:351E-F).

At a status check on April 3, 2018, Posin requested a continuance and trial was reset for July 23, 2018. (I:351J-K).

Two months later, Posin submitted an *ex parte* order authorizing payment to Investigator Robert Lawson, which was entered on June 8, 2018. (I:33-34).

At calendar call on July 19, 2018, Posin requested a second continuance and trial was reset for November 13, 2018. (I:353).

On October 18, 2018, the State filed a Motion to Allow Dr. Sandra Cetl to Appear by Simultaneous Audio-Visual Transmission Equipment because "Dr. Cetl has recently relocated to another state." (I:94-103). At the

hearing on the State's motion on October 30, 2018, Posin said, "No, I have not filed any opposition, nor do I have any, Your Honor." (II:356). The court granted the State's motion. (II:356).

At calendar call on November 8, 2018, Posin admitted he was unprepared for trial because he was "unable" to review the State's discovery because of a "financial reason" relating to Brass's family:

> MR. POSIN: Your Honor, this is - - this is my request for a continuance, as the State was mentioning when we're previously called. Um, the State I believe can announce ready. However, it's my request - - I don't feel that I can - - I can provide, um, adequate assistance of counsel understand (sic) the circumstances. **And those circumstances being, that all tho (sic) the State made some discovery ready and available some time back. I was unable for financial reason of my client's family to obtain it until recently**. These are very serious charges; I do need to go over some extensive discovery with him. And we do not feel we can be ready for this trial stack.

(II:359) (emphasis added). Though Posin apparently ceased preparing for trial while awaiting payment from Brass's family,[2] the court granted his *third* request for a continuance. (II:360). The next day, the State filed a Receipt of Copy for Discovery, proving that the State had made the

[2] Posin subsequently told the court what it was like "being retained by his family, it's a - - it has been a family effort. Where I have gotten, ah, my fee paid probably by six or seven different family members, as they can, a little bit here and a little bit there." (II:369).

discovery available *in July*, but Posin had not picked up the documents until *eleven days before trial*, on November 2, 2018. (I:104-05,118).

At calendar call on May 7, 2019, when Posin asked for a fourth continuance, the State pointed out that Posin *still had not noticed any witnesses* and this was the *fourth* trial setting. (II:375-76). The court asked the parties to come back in two days. (II:376).

At the continued calendar call on May 9, 2019, Posin said he needed a continuance because an employee of Investigator Lawson had "quit" and was not returning his calls. (II:378). The court initially denied the motion. (II:380).

On May 13, 2019, Posin renewed his motion for a continuance. (II:384-85). At that point, Brass advised the court he was receiving ineffective assistance of counsel from Posin, who had failed to communicate with him *at all* about the substance of his case:

> THE DEFENDANT: I just wanted to also add, Judge, that I haven't had a chance to speak with my lawyer regarding the details of the case, nor have we had a visit since December of last year. So I don't think he's prepared to represent me in this case as it stands right now. We haven't discussed the case at all in detail. Again, I haven't had a visit with him since December of last year. So I don't think he's -- I don't think his counsel will be efficient at this time.

(II:387). In response, Posin blamed *both* his failure to prepare Brass's case *and* his failure to communicate with Brass on the former investigator who would not call him back. (II:390-91).

The court pointed out that it was Posin's fault for not following up with the investigator sooner. (II:392-93). Investigator Lawson agreed that the problem could have been avoided had Posin simply contacted him in a timely manner to say that his employee was unresponsive. (II:407). However, Lawson acknowledged that his employee had done *absolutely nothing* to investigate Brass's case before leaving the job (no witnesses interviewed, no experts consulted or retained, etc.) and that Brass clearly needed a continuance. (II:404). Placing the blame squarely at Posin's feet for failing to follow up with the investigator, the court granted a fourth continuance because without it, Brass would have been denied effective assistance of counsel. (II:409,413). Trial was reset for February 24, 2020. (II:412).

At a status check on August 13, 2019, Posin said his investigator had been busy and was not "able to do as much as [he] had hoped by this point" and that he thought "perhaps" they could negotiate the case. (II:417). The State indicated that it did not appear that the defense had done anything to

work up the case since getting the continuance. (II:417). The court shared the State's concerns. (II:418).

At a status check on October 1, 2019, Investigator Lawson appeared and said he had not "personally seen the Defendant" but had spoken with Posin on several occasions. (II:421). The court asked Brass whether he had communicated with Posin and Brass said, "not completely, but I think that he is supposed to come and visit me." (II:422).

At a status check on December 2, 2019, the State explained that it *still* had not received any discovery from the defense and it did not appear that the defense had done the things it said were necessary to obtain the last continuance. (II:425). Posin claimed he had been "consulting with [his] investigator and reviewing the documents" and expected to have an expert shortly. (II:426).

At the status check on December 17, 2019, Posin claimed he was still "working on" getting an expert. (II:429). When asked what he'd done to prepare for trial, Posin told the court he "met with my client yesterday, and I've been reviewing the transcripts of the preliminary hearing, and I've met several times with my investigator." (II:429).

At the status check on January 14, 2020, Posin suddenly changed course and said he no longer intended to retain an expert but claimed he was "working diligently" and would be ready for trial. (II:433).

A week before calendar call, Investigator Lawson visited Brass at CCDC and advised him that Posin had failed to subpoena *any* of the witnesses or documents that Lawson deemed necessary for Brass's defense. (III:655). So, on February 18, 2020, Brass drafted a motion to dismiss counsel and appoint alternate counsel that was postmarked February 19, 2020 but was not received by the court until February 21, 2020. (I:154-158).

At calendar call on February 20, 2020, the court held a sealed Young[3] hearing to address Brass's motion to dismiss Posin, which the court had not yet received. (II:451-61). Brass informed the court that he mailed the motion "sometime last week" when he discovered that Posin had done nothing to prepare for trial since May. (II:452). Brass explained that Posin had not met with him to discuss strategy. (II:452). The last time Posin met in person with Brass was over a month before calendar call, for 5 minutes. (II:453). And Posin had not filed motions Brass asked him to file. (II:453).

When the court asked why he did not complain sooner, Brass explained that he thought Posin was working on his case *based on Posin's*

[3] Young v. State, 120 Nev. 963, 102 P.3d 572 (2004) (governing motions for substitution of counsel).

representations in court. (II:455). When the court asked Brass to identify the necessary witnesses that Posin failed to subpoena, Brass said that Lawson had that information, and he wished Lawson were present to speak on his behalf. (II:456). Brass also identified his brother as a potential witness. (II:456).

When the court asked Posin what he had done to prepare for trial, Posin claimed he had met the investigators "several times" and that he had been "going extensively over all of the documents." (II:454). Posin said, "I felt that I had a strategy; he does not seem to feel that was adequately explained to him or that he is comfortable with me." (II:454).

The Court took a brief recess so Posin could speak with Brass "about trial preparation and strategy. And see if you can figure out what the disconnect if any, is." (II:457). After giving them 14 minutes to speak, the court asked Posin, "did you tell him what your trial strategy was and why you thought it was appropriate?" (II:458). Inexplicably, Posin said no, "I did not see that as a useful exercise just now." (II:458). Posin reiterated that he had been "preparing" and was ready for trial but now felt that he and Brass had "irreconcilable differences" and he believed new counsel should be appointed. (II:461). The court orally denied Brass's motion to dismiss Posin. (II:440-46).

When trial began on February 24, 2020, Posin *finally admitted*, "there may be an issue of whether I'm providing adequate representation of counsel based on whether perhaps I dropped the ball" and he invited Investigator Lawson to address the court at a second sealed Young hearing. (III:645-46). Lawson then detailed – *with great specificity* – Posin's utter incompetence and failure to prepare a defense:

> THE INVESTIGATOR: Good morning, Your Honor. My name is Robert Lawson and I'm a licensed investigator, been licensed since 2002 in the State of Nevada. I've probably participated as an investigator and as a parole officer in 200 or more trials.
>
> When I appeared in your courtroom you made it clear to us, myself and Mr. Posin, what you expected as in terms of investigation and being prepared for trial. As an investigator we've met that obligation. On several occasions, we've attempted to meet with Mr. Posin and advise him of where we were in our investigation. We've met with him approximately one time. We've explained to him the need for certain subpoenas.
>
> We've explained for him the need that we need to get certain information from Mrs. Rhoades. And on a couple of occasions I've actually emailed her myself. And her response was I've given everything to Mr. Posin. Things that Mr. Posin said he had or didn't have we subsequently found. We've never done a file review on this case.
>
> **So yesterday at 12 p.m. I met with Mr. Posin along with my other investigator Amber Leon. And during this investigation it became apparent to me that Mr. Posin had literally no knowledge of this case.** I explained this to Mr. Posin. **Mr. Posin was basically asking my investigator and myself how we would try the case.** I explained to Mr. Posin

that during our investigation we have developed exculpatory evidence, but we needed him to issue the subpoenas.

One of the things that we developed is that there was disconnect between the information that one of the victims, victim A, I think her name is [V.M.], had given the police and then subsequent information that was provided during a preliminary hearing that Mr. Posin actually participated in. And we asked him specific questions regarding testimony. **He said he would look into it and get back to us. He hadn't -- he did not.** This goes directly to his -- when I say him, I'm referring to Mr. Brass' defense.

We interviewed several witnesses who could provide exculpatory testimony along with actual evidence, circumstantial evidence that Mr. Posin -- I mean, excuse me, Mr. Brass likelihood didn't commit this crime. . . . We explained that to Mr. Posin, how important it was that we provide that -- we subpoena that information.

We also were provided information that the State was going to allege that an incident occurred at the Palm Hotel. We went down to the hotel. We spoke to the manager. **We gathered information that would prove that that -- the allegations could not possibly have happened.**

. . . .

We also learned that there's a substantial CPS history that we asked Mr. Posin to subpoena that, so you could review it in-camera and determine what was appropriate for the defense of Mr. Brass. We talked to Mr. Posin about whether Mr. Brass was going to testify. He has never talked to Mr. Brass about testifying.

Mr. Brass, when we've met with Mr. Brass on several occasions, he has expressed to me and Amber Leon, his dissatisfaction with Mr. Posin. He feels that he is not getting an adequate defense. He said that when Mr. Posin meets with him it's very short in nature and it's well my investigatory is looking into that.

> **My personal feeling is that this man is looking at the rest of his life in prison. And this isn't about whether the bus runs on time whether we go to trial today or not.**

(III:646-649) (emphasis added).

When the court expressed outrage that it was facing the same issue that caused the delay back in May of 2019, Lawson apologized but explained that the situation was Posin's fault. (III:650). Lawson stated, "**I cannot let this Court believe for one minute that Mr. Brass is getting any kind of a defense, let alone a bad defense.**" (III:650) (emphasis added). Lawson then stated that he "could not be a part of a defense that [he] did not feel was adequately represented" and said he would no longer participate in the defense unless ordered to do so, and the court acquiesced. (III:658-59).

When the court advised Posin that it had "a lot of details from Mr. Lawson that basically you haven't done anything", (III:651), Posin took "issue" and told the court that he had "[p]repared potential opening statements, cross-examinations" but had not "subpoenaed anybody." (III:652). Beyond that, Posin said he reviewed "[a]ll of the State's documents." (III:652-63). But Posin conceded that, *up until yesterday*, he had not met with his investigators for over a month. (III:653). And Posin

conceded *that he had done nothing* to follow up on the leads generated by his investigators. (III:654).

When the court asked Posin "if everything or a substantial portion of what Mr. Lawson and Mr. Brass have told me is true, then do I need to refer you to the State bar?", Posin sought to protect himself from discipline by charactering the issue as a matter of trial strategy. (III:656). Then, Posin *repeatedly* begged the court not to refer him to the State Bar:

- "I certainly hope the Court doesn't see this as a Bar matter, because I've – you know, I am – even doing this I am zealously representing Mr. Brass." (III:657).
- "I don't think that's an issue – again I certainly hope it's not an issue for the Bar, but it's an issue for Mr. Brass." (III:658).
- "I don't really see where that's something that I should be, you know, brought before the Bar anyway for something that I'm just doing my best to present the Court with areas I could have been more effective and haven't been." (III:658).

Crediting Posin's self-serving representations that the conflict related solely to "trial strategy", the court denied Brass's request to substitute counsel and forced him to go to trial with Posin as his attorney, without an investigator, and without any witnesses having been noticed. (III:470-74).[4]

Jury selection began that same day. After four seated jurors gave answers suggesting that they would not be fair and impartial, Posin asked

[4] See also Court's Order Denying Defendant's Motion to Withdraw Counsel at (I:167-69).

them no questions about their partiality and passed them all for cause. See **Section VII**, infra.

On February 26, 2020, Posin failed to object to the State's request for a partial courtroom closure, despite a lack of evidence to support the closure. (II:253). Posin then *stipulated* to admit unredacted forensic interview transcripts and videos of R.M., V.M.[5] and A.W. which referenced unfairly prejudicial prior bad acts, and contained the prosecutor's annotations and punishment recommendations. (IV:901). Although a Tavares[6] instruction was included among the written jury instructions (I:208), no oral Tavares instructions were given when the bad acts were admitted into evidence and discussed by witnesses.

When the court reminded the parties that NRS 51.385 required a hearing outside the presence of the jury to determine the admissibility of certain hearsay statements by children under the age of 10 (*e.g.,* both R.M.

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[5] Though 8-year old V.M.'s forensic interview transcript indicated that she had seen YouTube videos involving "threesomes" (VI:1414) and was aware of sex noises that her "mom" knew how to make (VI:1386), Posin never requested a Summitt hearing to address those potential sources of sexual knowledge. Cf. Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985). And Posin never argued in closing that V.M. *had* alternate sources of sexual knowledge.

[6] Tavares v. State, 117 Nev. 72, 30 P.3d 1128 (2001).

and V.M.), Posin did not request that such a hearing be conducted and the court declined to conduct one. (V:986-89).

On February 27, 2020, Posin stipulated to admit unredacted medical examination paperwork relating to SANE exams for R.M., V.M. and A.W. which contained testimonial hearsay and findings of "probable abuse". (V:1119). And Posin failed to object on hearsay or Confrontation Clause grounds when Dr. Sandra Cetl testified about the SANE examinations conducted and documented by her absent coworker.

When Posin sought to introduce evidence that R.M. falsely claimed V.M. and his mother sexually and physically abused him, the court denied his request because Posin had been aware of these allegations before trial but failed to request a Miller hearing. (VI:1260-65).

Posin did not object to *any* of the State's proposed jury instructions, nor did he propose any instructions of his own. (VI:1368-71).

Posin did not object *once* during the State's closing arguments, not even when the State asked the jury to consider his presence in the courtroom as evidence of fabrication, or when the State repeatedly asked him if witnesses "lied". (VII:1523-59,1570-80).

Not surprisingly, it took the jury just three-and-a-half hours to find Brass guilty of all but two counts. (VII:1581-1587).

At his sentencing on April 23, 2020, Brass maintained his innocence and objected that the court had forced him to go to trial "with counsel knowing that he was unprepared to represent me". (VII:1599-1600). The court acknowledged that it "did have concerns about the representation and work done by Mr. Posin" prior to trial, but claimed its "concerns were adequately addressed at the hearing prior to the trial commencing, and the Court had no issues or concerns with the work that counsel performed at the trial." (VII:1606-07). The court then sentenced Brass to an aggregate term of 115-years-to-life. (VII:1609).

After the court filed the judgment of conviction on April 30, 2020 (I:216-19), Brass timely filed his notice of appeal on May 4, 2020. (I:220-23).

STATEMENT OF FACTS

Kim Madden has two children – a girl V.M. (born in May 2007) and a boy R.M. (born in November 2011). (VI:1289). Kim used to work at Sprint and lived with her children in a three-bedroom home on Arden Valley Drive in Henderson. (VI:1290-91;VII:1479). While working at Sprint, Kim met Appellant Brass, who was a coworker on her team. (VI:1290).

Kim began dating Brass in the summer of 2015, when V.M. was 8 and R.M. was 3. (VII:1408). In November or December 2015, Brass moved in

with Kim and her children. (VII:1469). While Kim and Brass lived together, they both worked from home for Apple. (VII:1474-75). Brass also had a second job in the men's department at Dillard's. (VII:1478). When Brass lived with Kim, he would help out around the house and occasionally pick up the kids and V.M.'s female friend A.W. (born in August 2003) from the Boys and Girls Club after school. (VI:1294-95,1300-01;VII:1474).

In July 2016, Kim's aunt Lisa and her daughter T. moved into the home with them. (VII:1469-70). Brass moved out a month later, in August of 2016, when their relationship soured after the two began dating other people. (VI:1301;VII:1470,1480-81). However, Brass came back a few times to spend the night after that. (VI:1295).

V.M. discloses sexual abuse by Brass

In January or early February 2017, Brass came over to Kim's house to pick up his W-2 which had been mailed to her house. (VII:1482). Brass brought dinner from McDonalds and they watched the movie Barbershop. (VI:1302). According to Kim, the night Brass came over, V.M. "kept looking at [Brass]" and flirtatiously "swinging her legs" around. (VI:1304). Kim "felt weird" and noticed Brass looking at her daughter across the room. (VI:1304).

Kim sent V.M. upstairs and when she put her leg on Brass's lap, she noticed his private area was hard. (VI:1305). Although Kim claims she got upset and told Brass to leave (VI:1306), Brass denied that any of this happened and said he ended up staying at Kim's house for the next "three or four days." (VII:1483-84).

Kim confronted V.M. about her flirtatious behavior and V.M. told her mom that her 11-year-old cousin T. (who lived with them the previous summer) had been touching her. (VI:1308). Eventually, in late February 2017, V.M. told her mom that Brass had been touching her. (VI:1310). Kim called the police on February 27, 2017 and took V.M. to Sunrise Hospital. (VI:1307).

Evidence Collected at SNCAC from V.M. and R.M.

On March 2, 2017, V.M. and R.M. gave forensic interviews at Southern Nevada Children's Assessment Center (SNCAC). (VI:1331-32). V.M. told forensic interviewer Elizabeth Espinoza about an occasion at home where Brass told her to take her clothes off, sit on top of him with her legs wrapped around him, and he wedged his penis into her vagina. (VI:1382-83). They stopped when they heard Kim wake up upstairs. (VI:1383).

V.M. told Espinoza that a couple days later she gave him "head" and "sucked his 'D'". (VI:1383). Then he put his "D" in her "V". (VI:1383-84). That incident ended because V.M. was crying and Kim was about to come home. (VI:1390-91). V.M. told Espinoza that Brass touched her "V" and her "bottom" (putting his finger in the "hole"). (VI;1391-92). V.M. told Espinoza that Brass threatened to hurt her mom and brother if she told. (VI:1408-09).

Finally, V.M. told Espinoza that he "licked my 'V' or bottom." (VI:1409). V.M. stated that when Brass licked her bottom and her "V", he put "porn" on TV with two "teen girls" and a "Black dude" having sex. (VI:1412-13,1416). V.M. told Espinoza they were having a "threesome" and explained that she knew about "threesomes" from watching YouTube videos. (VI:1414).

When asked if anything else happened, V.M said, "[h]e only did those three things" and denied that anything else happened. (VI:1418-19). When asked if Brass did anything to "anyone else", V.M. said, "I think to my brother because that's why we're also here", and she stated that Brass would go upstairs into the room where R.M. was playing on his computer and shut the door, then R.M. would begin crying. (VIII:1702-03).

Four-year-old R.M. told Espinoza that Brass "punched" him in the head and "hit my butt." (VI:1421-22). R.M. claimed Brass touched the part where he pees and drank his pee. (VI:1424). R.M. told Espinoza that Brass "drank it a lot" and "got strong." (IX:1869). During the brief interview, R.M. was "hyper" and unintelligible at times, climbing on chairs, and going under the table. (VI:1338).[7]

The same day that V.M. and R.M. spoke to Espinoza, they received medical examinations at SNCAC, performed and documented by Alexis Pierce, who did not testify at trial. (V:1118). Pierce's co-worker Dr. Sandra Cetl testified that R.M.'s exam was "normal". (VI:1124-25). In response to leading questions at trial, Cetl testified that R.M.'s exam should have indicated a finding of "probable abuse." (V:1126-27). Cetl testified that V.M.'s examination had "nonspecific" findings that included discharge and redness which could have been caused by any number of things, including abuse. (V:1129).

A.W. discloses sexual abuse by Brass

Kim testified that a couple of weeks after V.M. and R.M. visited SNCAC, she went through the Google "search history" on V.M.'s phone and

[7] Witnesses described R.M. as a troubled child, with severe behavioral problems. (V:1060-61). R.M. also falsely accused an employee of Montevista Hospital of taking him into a room and trying to insert his hand into R.M.'s bottom. (VI:1252,1318).

discovered that V.M. and her friend A.W. were searching for "abortion clinics". Kim testified that she "went into the map of each device" using Google Map "and the map showed from -- [V.M.'s] device, from, you know, email A and B, they were over there, and then it showed [A.W.'s] phone, because you can go through the different devices, and it showed they were at [Brass's] house, his brother's house, or at least the map showed it was mapped to there on Google Map." (VI:1312-13).[8]

Kim asked V.M. whether her friend A.W. was involved and V.M. said "Mom, [A.W.] was involved, too." (VI:1312). So, on the evening of March 17, 2017, Kim took her kids over to A.W.'s house and told A.W.'s mom, Shontai Whatley, what she had discovered. (VI:1314). Kim and Shontai immediately called the police, and the 911 call was played for the jury. (V:1017-1031).

During the 911 call, Kim reiterated that she had "found some stuff in [her daughter's] phone" indicating that both her daughter and A.W. were involved with Brass. (V:1020). Kim described location data that linked her daughter and A.W. with Brass, and stated that A.W. had been in the same location as Brass "without my daughter." (V:1020-21).

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[8] Although police took V.M. and A.W.'s phones into evidence they did not find *anything* of evidentiary value on those phones. (V:1101).

Shontai told the dispatcher that A.W. was bipolar and had a tendency to "lie", claiming she was "drugged" and "all this stuff." (V:1029). Shontai said that A.W. had recently run away, so she had taken A.W. to Spring Mountain (a mental health treatment facility) for 10 days. (V:1029).[9]

Eventually, the police responded to Kim's house, where Shontai and A.W. gave statements. (V:1032). Then, Shontai took A.W. back to Spring Mountain. (V:1032).

Evidence Collected at SNCAC from A.W.

A.W. gave a forensic interview to Elizabeth Espinoza at SNCAC on April 3, 2017. (VI:1426). A.W. told Espinoza that the abuse began the day of the Convoy of Hope festival. (VI:1428). She rode her bike over to A.W.'s house to see V.M. (VI:1430). She asked Brass for water, drank it, and felt "weird" after that. (VI:1429).

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[9] Shontai testified that she had taken A.W. to Spring Mountain because she was acting odd and suicidal and "it was obviously because she had been molested, but she would not tell me." (V:1032-33).

Then she "just woke up" and felt "pain" on her side. (VI:1430,1436).[10]

A.W. told Espinoza about another occasion where she went over to V.M.'s house, and instead of driving A.W. home afterwards, Brass took A.W. and V.M. to The Palm Hotel, where Brass made them take their clothes off before vaginally raping them and threatening to kill them. (VI:1431;1453-59).

Then, A.W. told Espinoza about a third occasion where Brass "kept on blowing up my phone", calling and texting while she was in school, and when she finally answered, he told her to meet him by a big "castle place" right after school. (VI:1437-38). Brass picked A.W. up from the "castle" and he took her to a less fancy hotel, also called The Palm or the Palms.

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[10] Several times, A.W. described the "drugging" incident in this exact manner: she drank some water, woke up, and had pain in her side. (VIII: 1776,1815-16,1820). But her story changed after suggestive questioning by Espinoza. When Espinoza asked her, "*tell me ... how your clothes were when you woke up*?", A.W. suddenly remembered, "my buttons, my button pants – well, the button on my pants were unbuttoned." (VIII:1820-21). Espinoza followed up by asking, "And you said the two buttons were unbuttoned. *Tell me what else you noticed different about your clothing*?" to which A.W. responded, "my pants were lower than they were." (VIII:1823-24) (emphasis added). After leading A.W. to conclude that her pants had been unbuttoned and unzipped, Espinoza asked A.W. again, to explain how she knew something had happened while she was asleep. (VIII:1824). At that point, for the first time, A.W. put everything together: "Because when I woke up, my pants were unbuttoned, my zipper was down, they were lower than they already were, and I had excruciating pain on my side." (VIII:1824). This became the story A.W. maintained throughout trial. Posin never cross-examined her about this story. (V:999-1003).

(VI:1440-41). When they got to the room, Brass took her pants off and he forced her to have vaginal intercourse. (VI:1445-46,1449-50). A.W. told Espinoza that during intercourse she was "kicking and fighting" and he "punched" her and put his arm on her chest. (VI:1446,1450). Then he drove her back to the "castle", and she walked home. (VI:1451-52).[11]

Dr. Sandra Cetl conducted a medical examination of A.W. on April 3, 2017. (V:1118). During the exam, Cetl noted a "deep notch" in A.W.'s hymen, which was a "significant finding." (V:1120). In her report, Cetl found that this was "concerning for abuse or trauma." (V:1121).

V.M. Trial Testimony

At trial, V.M. testified about six incidents of sexual assault, which now included allegations of anal intercourse: (1) an incident in her living room without the fireplace where Brass directed her to take her clothes off and sit on his lap and he put his private into her vagina and touched her chest with his hand, then told her not to tell or "something bad was going to happen" (V:1165-73); (2) an incident in her living room *with* the fireplace where Brass directed her to take her clothes off, then put his private inside her butt, touched her private with his hands, put his finger in her private, put his private in her vagina, and then put his private in her mouth, before telling

[11] A.W. also told Espinoza that four-year-old R.W. *told her* that Brass "went inside of my butthole." (VIII:1825).

her not to tell her mom or something bad would happen (V:1174-84); (3) an incident in her living room *with* the fireplace where Brass made her watch pornography, then directed her to take her clothes off and put his private in her butt and then her vagina (V:1200-08); (4) an incident in a hotel with A.W. where Brass made them watch pornography, directed them to take their clothes off, then *anally* raped both A.W. and V.M., put his hands on V.M.s chest, put his hands/fingers in both of their vaginas and then took them home (V:1185-92); (5) a time in a hotel by herself where he directed her to take off her clothes then put his private in her butt and then her vagina (V:1193-99); and (6) V.M. remembered another time downstairs when he put his mouth on her private. (VI:1228-29).

At trial, V.M. no longer merely *suspected* that Brass had done something to her brother (VIII:1702-03), she testified that she *actually saw* Brass touching and raping R.W.'s "butt" in his bedroom. (V:1208-09).

A.W. Trial Testimony

At trial, A.W. testified about three incidents: (1) the incident where she was at V.M.'s house, she asked Brass for water, drank the water, fell asleep, and woke up with her "pants unzipped and unbuttoned" and her "side hurt" (IV:946-49); (2) an incident that she now claimed occurred on the night of the Convoy of Hope festival, where Brass took A.W. and V.M. to a

fancy hotel room near the strip, had them take off their clothes, touched their bodies, and engaged in digital and vaginal intercourse with them before threatening them and driving them home (IV:950-963); and (3) an incident at night, where Brass picked A.W. up from "the castle" and took her to a less fancy hotel, punched her in the face when she refused to take off her clothes, took her clothes off, touched her private and her chest, and forced her to have vaginal intercourse before driving her back to the castle. (V:963-70).

R.M. Trial Testimony

At trial, R.M. testified that Brass "did touch me in my butt, and it didn't feel right. (VI:1283). However, he did not mention any anal intercourse. (VI:1283). On cross-examination, R.M. admitted he had lied three years earlier when he accused a bus driver and counselor of touching his butt. (VI:1287).

Brass testified at trial and denied having any sexual contact whatsoever with V.M., R.M. and A.W. (VII:1470-72).

The jury convicted Brass of the twenty counts related to V.M. and A.W. and acquitted him of both counts involving R.M. (I:171-75).

SUMMARY OF THE ARGUMENT

The court violated Brass's Sixth Amendment right to effective assistance of counsel when it denied Brass's valid requests to dismiss his

retained attorney, Mitchell L. Posin, who had conflicts of interest and was utterly incompetent to represent him at trial. The court's error in forcing Brass to go to trial with Posin as his attorney led to multiple serious constitutional errors that, when considered alone or cumulatively, require reversal.

ARGUMENT

I. The court violated Brass's Sixth Amendment rights by denying his requests to substitute counsel.

Brass was denied his Sixth Amendment right to effective assistance of counsel when the district court refused his repeated requests to appoint substitute counsel despite an irreconcilable conflict with his retained attorney who was unprepared to represent him at trial. See Young v. State, 120 Nev. 963, 968-69, 102 P.3d 573, 576 (2004); U.S. v. Moore, 159 F.3d 1154 (9th Cir.1988); U.S. Const. Amend. VI, Amend XIV; Nev. Const. Art. 1, Sec. 8.

In Young v. State, this Court adopted the Ninth Circuit's 3-part test for evaluating Sixth Amendment claims premised on a trial court's refusal to substitute counsel. When reviewing a denial of a motion to substitute counsel, this Court considers three factors: "(1) the extent of the conflict between the defendant and his or her counsel, (2) the timeliness of the motion and the extent to which it will result in inconvenience or delay, and

(3) the adequacy of the court's inquiry into the defendant's complaints." Young, 120 Nev. at 968, 102 P.3d at 576 (citing Moore, 159 F.3d at 1158-59). A district court abuses its discretion by denying a request to substitute counsel when a combination of these factors demonstrates an irreconcilable conflict. Id. at 972, 102 P.3d at 578.

Here, the district court abused its discretion when it denied Brass's motions to dismiss Posin because it failed to consider the extent of the conflict between Posin and Brass, it improperly deemed Brass's legitimate motions to be an untimely "ploy" to continue the trial, and its inquiry into Brass's complaints were inadequate given extensive evidence that Posin was unprepared for trial and had conflicts of interest with his client.

A. The court failed to consider the extent of the conflict.

"Every defendant has a constitutional right to the assistance of counsel unhindered by conflicting interests." Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992) (citing Holloway v. Arkansas, 435 U.S. 475 (1978)). "Conflict of interest and divided loyalty situations can take many forms", but generally, a conflict is said to exist "when an attorney is placed in a situation conducive to divided loyalties." Id. (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)).

In this case, Posin allowed his personal interests to interfere with his ability to effectively serve as Brass's attorney from day one of the representation. Cf. RPC 1.7(a)(2). Posin agreed to accept payment for Brass's legal defense from "six or seven different family members" (II:369), and allowed that payment arrangement to interfere with the "client-lawyer relationship."[12] In addition, Posin allowed his personal desire to avoid discipline from the State Bar to interfere with his duties to Brass. As detailed herein, these conflicts became obvious at several points prior to trial and culminated in ineffective representation.

In March of 2018, while still on probation with the State Bar, Posin accused both Brass and his family of making "continued false promises of impending payment" in a motion to withdraw, yet failed to advise Brass that he was moving to withdraw and failed to even *appear* in court when the hearing was first scheduled, leaving Brass to fend for himself.[13] (I:27,234).

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[12] Cf. RPC 1.8 (f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) The client gives informed consent; (2) *There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship*; and (3) Information relating to representation of a client is protected as required by Rule 1.6.") (emphasis added).

[13] Cf. 1.16(b)(5) (allowing a lawyer to withdraw if "[t]he client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services *and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.*") (emphasis added).

Although Posin *should have* withdrawn at that point, he chose to string Brass and his family along for two more years, holding Brass's legal defense hostage as he extracted piecemeal payments from members of Brass's extended family. The conflict became even more apparent in November of 2018, when Posin sought a third continuance after admitting he was unprepared for trial *because of "financial reason[s] of my client's family*" that caused him to wait until the eve of trial to obtain and review discovery that the State had made available to the defense *four months earlier*. (I:104-05,118;II:359).

When Posin requested a fourth continuance in May of 2019, he still had not noticed a *single defense witness* or subpoenaed necessary evidence. (II:369). When Brass advised the court that Posin had failed to communicate with him about the substance of the case and was unprepared for trial, Posin did not deny those accusations. (II:387). Instead, Posin blamed his failure to prepare a defense and communicate with Brass on a former investigator who would not call him back. (II:389-91). The court found this to be an unreasonable excuse, but granted a continuance because it recognized that without one, Posin would have been ineffective. (II:409;413).

Unfortunately, after obtaining that fourth continuance, Posin did nothing to prepare for this twenty-two-count child sexual abuse trial, other

than "consulting with [his] investigator and reviewing the documents." (II:426,454). He noticed no witnesses for the defense – not even Investigator Lawson, who could have testified that Brass never checked into The Palm Hotel during the relevant time period. (II:399-400;III:646-49). He filed no pretrial motions. He issued no subpoenas. (III:652). He did nothing to follow up on defensive leads generated by his investigators. (III:654). And according to Investigator Lawson, Posin "had literally no knowledge of this case" and would be incompetent if he proceeded to trial. (III:646-650).

Had Posin been acting in his client's best interests, he would have *asked to withdraw* at that point. See RPC 1.16(a)(1) (requiring withdrawal if continued representation will result in violation of the rules of professional conduct); RPC 1.1 (requiring "competent representation", including "the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation"). Instead, when the court asked, "if everything or a substantial portion of what Mr. Lawson and Mr. Brass have told me is true, then do I need to refer you to the State Bar?", Posin chose to defend *himself*, begging the court *three times* not to refer him to the State Bar and falsely claiming he was "prepared" for trial. (III:656-658).

At this point during the *ex parte* proceeding, Posin had a duty to inform the court of his prior bar discipline, as it was directly relevant to the

court's inquiry about what it "should do" with Posin. See RPC 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."). Yet, Posin never disclosed his disciplinary history to the court *or* to Brass.

Ultimately, the court failed to consider Posin's obvious conflicts of interest: the one created by the payment arrangement with Brass's family, and the other created by Posin's *expressed desire* to avoid additional discipline from the State Bar. Where the record amply demonstrates that Posin was unprepared for trial and had actual conflicts of interest, the court abused its discretion by crediting Posin's claim that he was "prepared" for trial and finding that his conflict with Brass related solely to "potential strategy differences." (III:470). And where these conflicts of interest so obviously impacted Posin's performance in this case, reversal is required. See Clark, 108 Nev. at 326, 831 P.2d at 1376 (actual conflict of interest requires reversal without showing of prejudice); Cuyler v. Sullivan, 446 U.S. 335 (1980) (same); accord United States v. Wadsworth, 830 F.2d 1500, 1510 (9th Cir.1987) (defendant's right to due process and right to counsel were violated at hearing on defendant's motion to substitute counsel where defendant's attorney took an antagonistic position on defendant's motion);

U.S. v. Morris, 259 F.3d 894 (9th Cir. 2001) (actual conflict of interest when attorney argued his own ineffectiveness in connection with a motion to withdraw guilty plea); United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996) (actual conflict of interest when trial court forced counsel to prove his own ineffectiveness to support a motion for new trial).

B. Brass's motion was timely and not a "ploy" to cause a delay.

In denying Brass's motion to substitute counsel, the court determined that his request was an untimely "ploy" to cause a delay because Brass and Investigator Lawson were present at "multiple status checks" but did not complain about Posin until calendar call (February 20, 2020) and the first day of trial (February 24, 2020). (III:470-71,473). Yet, Brass *first* made his concerns with Posin known to the court back in May 2019 – nine months before his trial. (II:387). And the court agreed, at that time, that Posin was *personally responsible* for the delay (II:392-93), and that Posin's unpreparedness required a continuance under Strickland v. Washington, 455 U.S. 668 (1984). (II:413).

Importantly, at each of the status checks between May 2019 and January 2020, *Posin assured the court* that he was preparing for trial (II:417,422,425-26,429), and Brass relied on those representations. (II:455). Brass did not know the full extent of Posin's failure to prepare until

Investigator Lawson visited him at CCDC and advised him of the dire situation. But as soon as he became aware that Posin had failed to follow up on any of Lawson's investigative leads or issue subpoenas, Brass filed a written motion to dismiss counsel and raised the issue both at calendar call and on the first day of trial. (I:154-58;). Under those circumstances, his motions should not have been considered untimely. Compare Young, 120 Nev. at 970, 102 P.3d at 577 (substitution motion was timely even though the final request was made on the first day of trial where defendant *previously* informed court of concerns), with Garcia v. State, 121 Nev. 321, 113 P.3d 836 (2005) (finding dilatory motive where "at no time did Garcia attempt to notify the court that there was a conflict with his counsel").

C. The court's inquiry into Brass's complaints was inadequate.

The court justified its denial of Brass's final motion to dismiss Posin by finding that it "adequately" inquired into the conflict by questioning Brass, Posin and Lawson. (III:473). The court basically found that, by holding an *in camera* proceeding and listening to what everyone had to say, it necessarily had discretion to deny Brass's motion under the third Young factor. Unfortunately, the court's inquiry was inadequate where the evidence of Posin's incompetence and lack of preparation was overwhelming.

Investigator Lawson testified at length about Posin's lack of knowledge about Brass's case and his complete failure to prepare a defense. (III:646-50). Posin admitted that his only trial preparation consisted of reviewing documents and preparing his opening statement and cross-examinations. (III:652). Posin said nothing to indicate that he'd prepared questions for Brass's direct examination or even *discussed* the possibility of Brass testifying at trial. Posin admittedly ignored Lawson's investigative leads and issued no subpoenas, even though the court had granted a continuance the previous May to remedy those very deficiencies. (III:654). Had the court looked in Odyssey, it would have seen that Posin noticed *no witnesses* for the defense, and filed no substantive motions in advance of trial,[14] even though this was a twenty-two count child sexual abuse case where his client faced multiple life sentences.

When Posin repeatedly begged the court not to refer him to the State Bar (III:656-658), this should have been a huge red flag to the court undermining Posin's credibility at the final *in camera* hearing. Yet, the court simply accepted Posin's claim that his trial "strategy" involved cross-

[14] The court denied Posin's mid-trial request for a Miller hearing to address allegations that R.M. falsely accused V.M. of "touch[ing] his butt" because Posin failed to file a pre-trial motion requesting a Miller hearing. (VI:1260-65). Posin was unfamiliar with the Miller case when this issue came up at trial. (V:1138-39). And Posin never requested a Summitt hearing either, despite evidence suggesting one was necessary. See Footnote 5, supra.

examination instead of presenting affirmative evidence. (III:471,651). The court never asked Posin any questions to determine *how* he decided upon that strategy, or *why* Posin decided not to follow up on any of Lawson's investigative leads. The court never asked Posin to *explain* his theory of defense or how he sought to *prove* that defense without affirmative evidence. The court never asked Posin *why* he kept saying he was going to retain an expert but suddenly changed course a month before trial. The court never asked Posin about his *efforts* to secure an expert – about the identity of the experts he had considered retaining, or whether he even *spoke* with an expert before suddenly changing course. And the court never asked Posin how many *hours* he spent preparing for trial, whether he intended to have Brass testify on his own behalf or whether he had even *spoken* with Brass about testifying. Because the court failed to make these basic inquiries, the court had no basis to credit Posin's self-serving claim that he had a "strategy" over Investigator Lawson's specific and credible complaints about Posin's competence. Under the circumstances, the court's inquiry into the conflict between Posin and Brass was inadequate. Reversal is required.

II. The State presented insufficient evidence of guilt for lewdness and dissuading.

The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of

every fact necessary to constitute the crime with which he is charged. Carl v. State, 100 Nev. 164, 165, 678 P.2d 669 (1984); U.S.C.A. VI, XIV. The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Here, the State presented insufficient evidence of guilt as to two of Brass's lewdness convictions and his dissuading conviction.

A. Insufficient evidence of lewdness.

Lewdness convictions that are "incidental" to sexual assault convictions cannot stand. Gaxiola v. State, 121 Nev. 638, 653, 119 P.3d 1225, 1235 (2005). An act of lewdness is generally considered "incidental" to a sexual assault when performed "to arouse the victim and create willingness to engage in sexual conduct." Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004) (reversing dual convictions for lewdness and sexual assault when the conduct supporting the lewdness conviction was a mere prelude to a sexual assault that occurred immediately thereafter). However, an act of lewdness will not be deemed "incidental" if there is clear evidence of an interruption between an act of lewdness and a subsequent

sexual assault. See, e.g., Townsend v. State, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987); Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990). The State bears the burden of proof as to whether an act of lewdness is "incidental" to a sexual assault. Gaxiola, 121 Nev. at 653, 119 P.3d at 1235. Thus, to sustain dual convictions for sexual assault and lewdness that occur during a single episode, there must be specific testimony indicating a clear interruption between the events. Id.

Here, Brass's lewdness convictions (Counts 1 and 5) must be reversed because they were incidental to sexual assault convictions that occurred during the same episodes. Counts 1 and 5 were identical lewdness charges alleging that Brass caused "V.M. to sit on his lap and/or on top of him while V.M. and/or Defendant were naked, and/or by undressing and/or kissing and/or touching the buttocks and/or genital area of V.M." with lascivious intent. (I:179,180).

Although V.M. testified that Brass performed acts of this nature, the acts were *always* accompanied by a subsequent sexual assault,[15] and V.M. did not testify to any "interruption" between the acts of lewdness and the accompanying sexual assaults. See, e.g., (V:1165-73) (describing a

[15] See, e.g., Count 2 (vaginal intercourse), Count 3 (fellatio), Count 4 (cunnilingus), Count 6 (digital penetration), Count 10 (fellatio), Count 11 (vaginal intercourse), Count 22 (anal intercourse), for which Brass was convicted. (I:179-185,217).

continuous incident in the living room without the fireplace that culminated in sexual assault); (V:1174-85) (describing a continuous incident in the living room with the fireplace that culminated in sexual assault); (VI:1221-24) (describing a continuous incident where V.M. sat naked on Brass's lap that culminated in anal intercourse); (VI:1185-1192) (describing a continuous episode at a hotel where Brass put his hand on her private that culminated in digital penetration).

In closing, the State asked the jury to convict Brass of Counts 1 and 5 because he "made her undress . . . so he can have sex with her." (VII:1541-42). However, undressing was a necessary prelude to sex and clearly incidental to each of the sexual assaults in Counts 2, 4, 6, 11 and 22. In closing, the State asked the jury to convict Brass because he "made her sit on his lap while she was naked" but this immediately preceded an act of anal intercourse for which he was convicted in Count 22. (VII:1542). In closing the State asked the jury to convict Brass of both counts for touching "her bottom and her V" and "kissing her all over her body" (VII:1541-42), but there was no testimony to indicate *any* distinction between the kissing and the cunnilingus alleged in Count 4. (V:1165-92).[16] And there was no

[16] V.W. did not testify about <u>any</u> "kissing" at trial. (V:1155-VI:1241). At preliminary hearing, she testified that Brass kissed her on her mouth, chest and private part during the same incident without interruption. (II:274-281).

testimony to indicate that "touch[ing] her bottom and her V" differed in any way from the digital penetration involved in Count 6 which related to "both the genital and the anal opening." (I:180-81;VII:1541-42). Counts 1 and 5 are redundant and must be reversed.

B. Insufficient evidence of dissuading.

NRS 199.305(1) provides:

> A person who, by intimidating or threatening another person, prevents or dissuades a victim of a crime, a person acting on behalf of the victim or a witness from:
>
> (a) Reporting a crime or possible crime to a:
>
> (1) Judge;
>
> (2) Peace officer;
>
> (3) Parole or probation officer;
>
> (4) Prosecuting attorney;
>
> (5) Warden or other employee at an institution of the Department of Corrections; or
>
> (6) Superintendent or other employee at a juvenile correctional institution; . . .
>
> or who hinders or delays such a victim . . . is guilty of a category D felony....

Based on the plain language of NRS 199.305(1), the State had to prove that Brass prevented or dissuaded a victim or witness from reporting a crime to one of six enumerated classes of person. Here, Brass was charged

with committing this crime via "intimidation or threats" which dissuaded V.M. and A.W. from reporting crimes to a "peace officer". Count 12 involved V.M. and Count 19 involved A.W. (V:182,184).

In support of Count 12, V.M. testified that during a sexual encounter with Brass in her home, Brass told her "something bad would happen if she told" and so she didn't tell anybody what happened. (V:1170,1173). V.M. also testified that immediately following another sexual encounter with Brass in her home, Brass told her "not to tell [her] mom" or "something bad would happen. (V:1185). In support of Count 19, A.W. testified that during an incident at a hotel where Brass sexually assaulted both A.W. and V.M. Brass told them he would "kill" them and hurt their families if they "told." (IV:960).

Yet, Brass never told V.M. or A.W. not to report him to the "police" or to a "peace officer" as required to violate NRS 199.305. And there was no evidence that V.M. or A.W. had the present ability or intent to report Brass to the "police" or a "peace officer" at the time of Brass's alleged threats. At best, the evidence showed that the children were dissuaded from reporting to their *parents*. But "parents" are not an enumerated class within this statute. Allowing a general threat not to "tell anyone" to satisfy this statute would render meaningless the specific statutory language identifying six classes of

individual to whom a crime may be reported. C.f. Valenti v. State, Dep't of Motor Vehicles, 131 Nev. 875, 883, 362 P.3d 83, 87–88 (2015) ("no part of a statute should be rendered nugatory, nor any language turned to mere surplusage if such consequences can properly be avoided."). Therefore, even if V.M. and A.W.'s allegations were true, they would not establish a violation of NRS 199.305.

III. Improper jury instructions contributed to Brass's convictions for lewdness and dissuading.

Even if this Court finds sufficient evidence of lewdness and dissuading, Brass is still entitled to a new trial on those counts because improper jury instructions lowered the jury's burden of proof as to those charges, violating his state and federal constitutional rights to due process of law, a fair trial and the right to present a defense. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.

The district court is required to ensure that a jury is fully and correctly instructed on the law. Crawford v. State, 121 Nev. 744, 755, 121 P.3d 582, 589 (2005); NRS 175.161. Furthermore, "[a]n accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error", even if counsel fails to object. Rossana v. State, 113 Nev. 375, 382, 934 P.2d 1045, 1049 (quoting Dougherty v. State, 86 Nev. 507, 509, 471 P.2d 212, 213 (1970)).

A. Improper instruction on liability for lewdness/sexual assault during a single encounter.

As explained in Gaxiola, 121 Nev. at 653, 119 P.3d at 1235, "the State has the burden, at trial, to show that the lewdness was not incidental to the sexual assault." But here, the jury was never instructed that it could not convict Brass of lewdness intended "to predispose the alleged victim" to sexual assault without specific evidence of an interruption between an act of lewdness and a subsequent assault. Instead, the jury was given an inaccurate instruction that relieved the State of its burden of proof regarding redundant lewdness charges.

Instruction 18 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*." (I:200) (emphasis added). While this instruction may have been correct had it applied solely to sexual assaults, it was an incorrect statement of law when expanded to include lewdness. See Gaxiola, 121 Nev. at 651-54, 119 P.3d at 1234-1236. The instruction permitted jurors to convict Brass of lewd acts that were incidental to sexual assaults during a single criminal encounter without finding any interruption between the lewd act(s) and the subsequent sexual assaults. Because the instructional error is plain from a review of the record and caused "actual prejudice or a miscarriage of justice", reversal of *all four*

lewdness convictions (Counts 1, 5, 9, and 14) is required notwithstanding Posin's failure to object. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

B. Improper instruction on dissuading a witness.

NRS 199.305 criminalizes the act of "intimidating or threatening another person" in a manner that "prevents or dissuades a victim of a crime" from "[r]eporting a crime or possible crime" to six enumerated classes of person. NRS 199.305(1). Because this statute does not contain an express scienter requirement (or any "'bad mind' adverbs or phrases"), it would appear to create an unconstitutionally vague and overbroad "strict liability" offense. See Ford v. State, 127 Nev. 608, 613-14, 262 P.3d 1123, 1126-27 (2011) (addressing constitutionality of Nevada's pandering statute which contained no express scienter requirement). Without a specific intent requirement, NRS 199.305(1) would criminalize conduct based solely on the effect it had on others and would be unconstitutionally indeterminate. See Silvar v. District Court, 122 Nev. 289, 129 P.3d 682 (2006). Thus, a verbal threat, made without any intent to dissuade a listener from reporting a crime, would give rise to felony liability if the listener were delayed in reporting a crime.

So just like Nevada's pandering statute, NRS 199.305 can only survive a vagueness challenge if this Court interprets the statute to require *specific intent* to dissuade a victim of a crime from reporting to one of the six enumerated classes of individual. See id. (agreeing that if "NRS 201.300(1)(a) provides for strict liability, the statute is unsustainable" but saving the statute by interpreting it to require specific intent).

Here, the jury was never instructed on the specific intent element and, just as in Ford, the failure to so-instruct constitutes reversible error, notwithstanding Posin's failure to object. See Ford, 127 Nev. at 625-26, 262 P.3d at 1134.

IV. The court failed to give Tavares instructions before admitting unduly prejudicial bad act evidence that was not proven by clear and convincing evidence.

The use of prior bad act evidence is "heavily disfavored in our criminal justice system." Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001), holding modified by Mclellan v. State, 124 Nev. 263, 182 P.3d 106 (2008). "The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because the jury believes the accused is a bad person." Id. at 730, 30 P.3d at 1131 (citing Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000)).

A defendant's prior bad acts are presumptively inadmissible at trial. Id. However, the district court has discretion to admit such evidence for "limited purposes other than showing a defendant's bad character *so long as certain procedural requirements are satisfied and certain substantive criteria are met.*" Id. (emphasis added); see also NRS 48.045(2).

The State must first obtain the court's permission to present evidence of a defendant's prior bad acts. A court may admit such evidence only if the State establishes, at a Petrocelli[17] hearing, that "(1) the evidence is relevant to the crime charged, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Bigpond v. State, 128 Nev. Adv. Op. 10, 270 P.3d 1244, 1249 (2012). Here, the State never requested a hearing on the admissibility of *any* bad acts and the court admitted numerous, highly prejudicial accusations against Brass that were not, *and never could have been*, established by clear or convincing evidence.

A focal point of the State's case-on-chief was A.W.'s belief that Brass put "something" in her water and did something to her while she slept – an allegation that was never charged because the State lacked sufficient evidence to prove it. A.W.'s *own mother* believed she was lying about this

[17] Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1995).

claim. (V:1029). And a review of A.W.'s statement to forensic examiner Espinoza shows her beliefs that she and Kim had been "drugged" were *completely speculative*. A.W. initially told Espinoza that the night they were both drugged,

> Kim wanted more food. And she was gonna go get it, and then [Brass] was like, No I'll get – I'll go get it. And he had pills. And he put pills inside of her food. But I didn't know – I didn't see it.[18] I just saw he had pills. I didn't see what they were, but I think they were sleeping pills because after that, she went to sleep. Like she was knocked out for a good while.

(VIII:1775). A.W. repeatedly told Espinoza that she believed Brass had drugged her that night because Brass gave her water, she felt weird, and then woke up with pain in her side. (VIII:1776).[19] But it was only after suggestive questioning that A.W.'s claim expanded to include the allegations that her buttons were undone and her zipper was down. See Footnote 10, supra. (referencing VIII:1820-24). This highly speculative allegation should *never* have been presented to the jury, but the State made it a focal point of its case, highlighting it in its opening and closing arguments to bolster A.W.'s

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[18] By the time of the preliminary hearing, the story evolved and A.W. claimed she *saw* Brass drug Kim by putting a long, white skinny pill in her drink, rather than in her food. (VIII:1855-56).

[19] This allegation came to light during the same year that Bill Cosby's sexual assault trial was all over the news.

credibility. (IV:917;VII:1551,1578). The State devoted an entire PowerPoint slide to the incident. (IX:1942).

The State presented numerous uncharged bad acts to the jury via A.W.'s and V.M.'s forensic interview statements and videos, which were played in court (VI:1341-62,1375-1460) and sent back to the deliberation room. From these statements, the jury learned that A.W. accused Brass of other serious crimes, including putting sleeping pills into Kim's food to make her go to sleep (VIII:1775),[20] trying to "kill Kim" (VIII:1778;1784), drugging Kim and turning on the gas and lighting a fire while the family slept in an attempt to kill them all (VIII:1778-79),[21] punching R.M. in the face and bruising him (VIII:1780-81,1825), stalking her like a "lion going after his prey" by driving repeatedly by her house and flashing a gun at her and throwing rocks at her window (VIII:1781-83,1786-89,1830), driving them around while high on drugs and alcohol (VIII:1783-84), and "tapping" her phone so that he could look through her camera and listen anytime he wants, and deleting her messages, pictures and apps. (VI:1437;VIII:1787).

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[20] The jury received A.W.'s preliminary hearing testimony about the drugging in State's Exhibit 34. (VIII:1838).

[21] This allegation also appeared in the preliminary hearing transcript that the jury received in evidence. (VIII:1856-58).

A.W. also claimed that Brass "does drugs . . . I know he smokes weed, but I know he does drugs." (VIII:1784).

From V.M.'s forensic interview, the jury obtained corroboration for A.W.'s claim that Brass tried to kill them in their sleep in the form of inadmissible hearsay: "A couple of days ago, when I was at my friend's house . . . . my mom said [Brass], he left the gas on when they were asleep upstairs, and then he left." (VIII:1700).

In closing, the State relied heavily on the content of A.W. and V.M.'s forensic interviews to prove Brass's guilt, mentioning those interviews 26 times during closing arguments and asking the jury to review them again. (VII:1534-49,1556,1558,1575,1579). Therefore, notwithstanding Posin's failure to object (and Posin's utterly inexplicable stipulation to admit the unredacted forensic interview transcripts and videos into evidence (IV:901)),[22] the district court's admission of unduly prejudicial and unprovable bad acts evidence violated Brass's state and federal constitutional rights to due process and a fair trial. See U.S.C.A. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8; Roever v. State, 114 Nev. 867, 873, 963 P.2d 503, 506 (1998) ("prior bad act evidence was improperly admitted and served only to violate Roever's fundamental right to a fair trial"); Donnelly

[22] See Buck v. Davis, 137 S.Ct. 759, 775-76 (2017) ("No competent defense attorney would introduce such evidence about his own client.").

v. DeChristoforo, 416 U.S. 637, 643 (1974); accord Romano v. Oklahoma, 512 U.S. 1, 12-13 (1994).[23]

Even if this Court finds that Posin forfeited Brass's objection to the introduction of bad acts testimony by stipulating to admit the forensic interview transcripts and videos into evidence, the court's admission of the aforementioned bad acts evidence without *any contemporaneous limiting instructions* requires reversal under Nevada law. In Tavares, this Court required district courts to give a "specific" limiting instruction *immediately prior* to the admission of bad acts evidence, and a "general instruction at the end of trial reminding the jurors that certain evidence may be used only for limited purposes." Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

A district court's failure to issue a limiting instruction prior to the admission of bad acts evidence is reviewed for "nonconstitutional error" under NRS 178.598. See Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 111 (2008). In this case, reversal is required because the repeated presentation of egregious bad acts evidence, without contemporaneous limiting instructions, had a "substantial and injurious effect or influence in

[23] To the extent the jury reviewed portions of the videos during deliberations that had not been played in court, it violated Brass's constitutional right to presence at all critical stages of trial, constituting structural error. See U.S. v. Noushfar, 78 F.3d 1442 (9th Cir. 1996).

determining the jury's verdict" in this case, where the State relied so heavily on the forensic interviews in closing. See Mclellan, 124 Nev. at 269–70, 182 P.3d at 111 (footnotes omitted).

V. The jury was improperly exposed to the prosecutor's notes and victim impact testimony.

It is misconduct for "third parties to attempt to influence the jury process" through improper contact. Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003) (citing 5 Wayne R. LaFave et al., *Criminal Procedure* § 24.9(f), at 602 (2d ed. 1999)). Because jury misconduct implicates the Sixth Amendment's Confrontation Clause and the Due Process Clause, it requires reversal unless harmless beyond a reasonable doubt. Barker v. State, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979); see also U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.

In this case, the State introduced into evidence a copy of A.W.'s forensic interview transcript that contained notations by the prosecutor as State's Exhibit 33. The jury received a transcript with the words, "he already tried to kill Kim" underlined. (VIII:1778). The transcript also contained a marking that drew attention to A.W.'s highly inflammatory statement describing Brass as a "stalker" and a predator "like a lion going after his prey, how it observes them, then it attacks . . . he observed me for a very long time. Like, he -- he knew what school I -- I went to He knew -- he -- he

knew where I lived." (VIII:1786). The transcript also contained markings beside a statement about one of the other charged incidents that the State deemed important. (VIII:1795).

The prosecutor's notations arguably influenced the jury during deliberations, violating Brass's Due Process and Confrontation Clause rights. See e.g., U.S. v. Walker, 1 F.3d 423 (6th Cir. 1993) (reversing where highlighted transcripts of videotaped deposition were sent to jury room); State v. Sawyer, 263 Wis. 218 (Wis. 1953) (reversing where prosecutor's notes were inadvertently taken into jury room); United States v. Wood, 958 F.2d 963 (10th Cir. 1992) (prosecutor's notes found in jury room, even if not studied in detail by jury, required new trial).

Additionally, in A.W.'s forensic interview statement, A.W. told Espinoza she wanted Brass to "get the death penalty" and "get killed" for what he did. (VIII:1834). In V.M.'s forensic interview statement, V.M. said she wanted Brass to "get in trouble" or be "arrested." (VIII:1700-01). There was no basis for admitting these types of inflammatory statements during the guilt phase of trial. See Valdez, 124 Nev. at 1184-86, 196 P.3d at 473-75 (jurors may not consider punishment during the guilt phase of the trial); Thompson v. Com., 2018 WL 2979952 (Ky. June 14, 2018) (unpublished) ("A victim should not make such a recommendation of a sentence and it

should definitely not have occurred during the guilt phase of the trial"). As with the prosecutorial notations, these inflammatory statements so infected the trial with unfairness as to make the resulting convictions a denial of due process. See Donnelly, 416 U.S. at 643; accord Romano, 512 U.S. at 12-13.

Brass recognizes that jury misconduct claims are typically brought via motions for new trial and that Posin did not file such a motion in this case; to the contrary, Posin *stipulated* to admit the improper exhibits into evidence without any redactions. (IV:901). Although Brass expects this Court may deem these issues forfeited or waived, there is no *possible* strategic reason for Posin to have permitted the State's annotations or punishment recommendations to go to the jury. Therefore, this Court should reverse based on Posin's ineffective assistance of counsel. See Mazzan v. State, 100 Nev. 74, 675 P.2d 409 (1984) (finding, on direct appeal, that counsel was "ineffective" during death penalty phase where court was "unable to perceive any reason or motive for counsel's actions which would be consistent with a modicum of effective adequacy"); accord Buck, 137 S.Ct. at 775-76.

VI. The jury heard inadmissible hearsay testimony about "Google maps" data.

Hearsay is an "out-of-court statement 'offered in evidence to prove the truth of the matter asserted' and is inadmissible unless within an

exemption or exception." Coleman v. State, 130 Nev. 229, 235, 321 P.3d 901, 911 (2014) (citing NRS 51.035 and NRS 51.065). "The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." Chambers v. Mississippi, 410 U.S. 284, 298 (1973).

If an "electronic or computer-generated writing is used to prove the truth of its contents, the hearsay rule must be satisfied." 2 McCormick on Evid. § 227 (7th ed.) title 9, Writings, Chapter 22, Authentication (June 2016 update.). GPS data regarding individuals' locations on a map are hearsay and only admissible pursuant to an exception. See, e.g., Jackson v. Allstate Ins. Co., 785 F.3d 1193, 1204 (8th Cir. 2015); State v. Jackson, 748 S.E.2d 50, 53 (N.C. Ct. App. 2013); U.S. v. Brooks, 715 F.3d 1069, 1073 (8th Cir. 2013); Ruise v. State, 43 So.3d 885, 886 (Fla. 1st DCA 2010).

Here, Kim testified that she looked on her daughter's phone and saw on "Google maps" that V.M. and A.W. went to Brass's brother's house together and that A.W. went to Brass's brother's house alone. (VI:1312-13). Kim's hearsay claims were repeated in the 911 call played for the jury. (V:1020-21). The State argued in closing that Brass may have taken A.W. to his brother's home, instead of a hotel. (VII:1551-52). To the extent the jury

may have relied on the contents of these computer-generated writings that were never introduced in evidence to find that Brass raped A.W. at his brother's house, the evidence was inadmissible and unduly prejudicial, and should have been excluded. The testimony also implicated the best evidence rule, because it was based on a writing that was never introduced at trial. See Stephans v. State, 127 Nev. 712, 719, 262 P.3d 727, 732-33 (2011). Where the police could not even *find* any evidence corroborating Kim's hearsay claims on A.W. or V.M.'s phones (V:1101), the "Google maps" data so infected the trial with unfairness as to make the resulting convictions a denial of due process. See Donnelly, 416 U.S. at 643; accord Romano, 512 U.S. at 12-13. Posin should have objected to this testimony, and his failure to do so constituted ineffective assistance of counsel. See Mazzan v. State, 100 Nev. 74, 675 P.2d 409 (1984).

VII. Violation of Brass's rights to due process and an impartial jury.

Brass's constitutional rights to due process and an impartial jury were violated when four biased jurors were seated: Juror Nos. 334, 484, 492 and 369.[24] See Ross v. Oklahoma, 487 U.S. 81, 85 (1988); U.S.C.A. V, VI, XIV; Nev. Const. Art 1, Secs. 1 & 8.

[24]Jury list is in the record at (I:159).

Juror 334 told the court she was sexually assaulted as a 10-year old child and made the equivocal statement, "I *think* I can be unbiased" (III:501) (emphasis added). Juror 492 told the court he was *not sure* he could be fair due to the nature of the charges but "believe[d]" he could "try". (III:641). Juror 484 told the court that his mother-in-law had been raped and he *did not "know"* if he could be fair and impartial. (III:536) (emphasis added). And Juror 369 had been injured by a drunk driver and *repeatedly* stated "there should be harsher penalties" and that he would have to "try" to be impartial in this case. (III:604-06,782-83). Juror 369 also said he would presume the victims were telling the truth unless the presumption were overcome. (IV:840-54).

All four jurors should have been stricken for cause. See, e.g., Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005) ("court erred in denying Weber's challenges" where neither juror "was able to state without reservation that she or he had relinquished views previously expressed which were at odds with their duty as impartial jurors"); Preciado v. State, 130 Nev. 40, 44, 318 P.3d 176, 178-79 (2014) (court should have granted cause challenge where prospective juror's "statement that a graphic photo would make her believe the defendant was guilty . . . cast doubt on her impartiality"); Sayedzada v. State, 134 Nev. 283, 419 P.3d 184 (Nev. App.

2018) (recognizing "inferable bias" where a juror discloses a fact, such as prior victimization of a crime similar to the charged crime, that "bespeaks a risk of partiality").

Brass is aware that this Court will likely deem these challenges waived under Sayedzada, 134 Nev. at 288, 419 P.3d at 191. Posin does not appear to have ever challenged Juror 369 before passing him for cause. The district court denied Posin's initial motions to strike jurors 334, 484, and 492 without prejudice, giving Posin an opportunity to follow up with the jurors during his own examination. (III:504,558-59,694-95). But when given the opportunity to question the jurors about their biases, Posin asked them *no questions* about their partiality and passed *all four jurors* for cause. (IV:833-867). Because there is "no reason or motive for counsel's actions which would be consistent with a modicum of effective adequacy", Brass asks this Court to find Posin ineffective on direct appeal for failing to follow up with the jurors and renew his challenges for cause. See Mazzan, 100 Nev. 74, 675 P.2d 409; Virgil v. Dretke, 446 F.3d 598, 609-10 (5th Cir. 2006) (counsel ineffective for failing to challenge two biased jurors for cause).

VIII. Violation of Brass's right to public trial.

The Sixth Amendment grants criminal defendants the "right to a speedy and public trial." Feazell v. State, 111 Nev. 1446, 1448, 906 P.2d

727, 728 (1995); accord Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 2215 (1984) (public trial is necessary to ensure fairness in criminal proceedings). In Presley v. Georgia, 558 U.S. 209, 210-216, 130 S.Ct. 721, 722-25 (2010), the Supreme Court held that the public trial right could be violated by the exclusion of *even one* spectator during voir dire.

The right to a public trial is not absolute and, in some situations, the court *may* close the courtroom. However, "before a trial court can exclude the public from trial proceedings", the court must "consider alternatives to partial closure of the courtroom" and "make findings adequate to support the closure." Feazell, 111 Nev. at 1448 & n.3, 906 P.2d at 729 & n.3; accord Presley, 558 U.S. at 213, 130 S.Ct. at 724. The court did neither of these things before closing the courtroom in this case.

On February 26, 2020, the State requested a partial courtroom closure while the minor children testified, because A.W. claimed Brass's family had been "staring" and "taking pictures" of her at the preliminary hearing two years earlier. (IV:897-98). The preliminary hearing transcript contained no indication that this ever happened. (II:264-339). And the prosecutor admittedly did not remember this happening at the preliminary hearing. (II:897).

When Posin took issue with the State's representations about Brass's family (II:898), the State responded that the A.W. "just informed us that [Brass's] family members were taking pictures of them today." (IV:899). The two family members were identified as two women sitting in court, Tosima Jones, a CCSD teacher, and Brass's sister Jamequa. (IV:899-90). The two women explained that they literally "just arrived" in court and they had no idea what the State was talking about. (IV:899-90). The court acknowledged that "I can't rule or make a finding about any witness intimidation", but nevertheless granted the State's request for a partial courtroom closure without considering reasonable alternatives. (II:253;IV:899-90).

The court committed a structural error by failing to make adequate findings to justify the partial courtroom closure or consider any reasonable alternatives. See Feazell, 111 Nev. at 1448 & n.3, 906 P.2d at 729 & n.3; accord Presley, 558 U.S. at 213, 130 S.Ct. at 724. Yet inexplicably, Posin declined to object. (IV:898). As such, under Jeremias v. State, 134 Nev. 46, 412 P.3d 43 (2018), plain error review will apply to this structural error, and the Court will likely reject Brass's contentions on appeal. But because there was "no reason or motive for counsel's actions which would be consistent with a modicum of effective adequacy", Brass asks this Court to find Posin

ineffective on direct appeal for failing object to the State's requested courtroom closure when the evidence did not support the State's request. See Mazzan, 100 Nev. 74, 675 P.2d 409.

IX. Violation of Brass's Confrontation Clause rights in connection with Sandra Cetl's testimony and SNCAC exam documentation.

The Sixth Amendment Confrontation Clause provides criminal defendants the right to confront and cross-examine 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). Specifically, the Confrontation Clause bars the use of testimonial statements by unavailable witnesses unless the defendant had a prior opportunity to cross-examine the witness regarding those statements. Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 476 (2005) (citing Crawford). Because Sexual Assault Nurse Examiners ("SANE nurses") are tasked with gathering evidence of a crime, statements made to SANE nurses are deemed testimonial for Sixth Amendment purposes. Medina, 122 Nev. at 350, 143 P.3d at 473. Thus, it stands to reason that statements made *by SANE nurses* during sexual assault investigations would also be deemed testimonial. Furthermore, "document[s] created solely for an 'evidentiary purpose,'... made in aid of a police investigation, rank[] as testimonial."

Bullcoming v. New Mexico, 564 U.S. 647, 664 (2011). This would include documents prepared by SANE nurses during their investigations.

Although the Confrontation clause "'reflects a *preference* for face-to-face confrontation at trial,'. . . that preference 'must occasionally give way to considerations of public policy and the necessities of the case.'" Lipsitz v. State, 135 Nev. 131, 136, 442 P.3d 138, 143 (2019) (quoting Maryland v. Craig, 497 U.S. 836, 849 (1990)). Therefore, if the State wishes to have a witness testify remotely via two-way video transmission, the court must "hear[] evidence and make[] a case-specific finding that the procedure is 'necessary to further an important state interest.'" Id. (citing Craig, 497 U.S. at 852-855).

In this case, the district court violated Brass's Confrontation Clause rights in three ways: by allowing Dr. Sandra Cetl to testify against him remotely via two-way audiovisual means without finding her lack of presence "necessary to further an important state interest", by allowing Cetl to testify about testimonial statements contained in SNCAC paperwork prepared by SANE nurse Alexis Pierce, and by allowing the jury to see the SNCAC paperwork containing Ms. Pierce's testimonial statements.

Although Posin did not object when the State sought to present Cetl via two-way audiovisual means (II:356;V:1108-31), *nor* did he object to the

unredacted medical examination paperwork for R.M. V.M. and A.W. which contained testimonial hearsay and findings of "probable abuse" (V:1119,VIII:1611-39), *nor* did he object when Cetl testified about Pierce's statements or conclusions contained in the paperwork (V:1119,1124-29), plain error review applies to otherwise forfeited Confrontation Clause errors. Flowers v. State, 136 Nev. 1, 8, 456 P.3d 1037, 1045 (2020). Here, the Confrontation Clause violations require reversal because they caused "actual prejudice or a miscarriage of justice." Id.; see Donnelly, 416 U.S. at 643; Romano, 512 U.S. at 12-13.

X. Prosecutorial Misconduct.

Prosecutorial misconduct violated Brass's state and federal constitutional rights to a fair trial by an impartial jury and to due process of law. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8; Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir. 1995). "When considering claims of prosecutorial misconduct, this [C]ourt engages in a two-step analysis. First, [it] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [it] must determine whether the improper conduct warrants reversal." Valdez, 124 Nev. at 1188, 196 P.3d at 476. Although Posin failed to object to any of this prosecutorial misconduct, Brass is entitled to a new trial because the State's misconduct

"'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Valdez, 124 Nev. at 1189, 196 P.3d at 477; Darden v. Wainwright, 477 U.S. 168, 181 (1986)).

A. Generic tailoring arguments.

Brass exercised his right to testify on his own behalf during trial. (VII:1465-97). During closing argument, the State accused Brass of "tailoring" his testimony because he "had the chance to sit through every single other person's testimony before he took the stand." (VII:1539;1574). The State presented a PowerPoint slide entitled, "Credibility/Believability", which suggested that Brass's testimony was less credible because he "Has had the chance to sit through everyone's testimony." (IX:1919). Then, on rebuttal, the State reiterated,

> He's the one that sat here and watched every single witness testify, and then he goes and he says something about a different date about when he's heard about [T.] from Kim, which doesn't match up to anything, which wasn't asked to him or anything like that. Nobody asked him, you know, was it in 2016 that this happened and that [T.] said that? Nobody asked her, because he waited until everybody testified, and he came up here and told you that. What's his motive to lie? He has every motive in the world to lie.

(VII:1574).

This Court has recognized that tailoring arguments could violate a defendant's rights to appear and defend in person under Article I, Section 8

of Nevada's Constitution if made in the absence of "specific" evidence of fabrication. See Woodstone v. State, 2019 WL 959244, 435 P.3d 657 (Nev. February 22, 2019) (unpublished); Portuondo v. Agard, 529 U.S. 61, 71, 77 (2000) (distinguishing between "generic" tailoring arguments tied solely to a defendant's presence at trial from "specific" tailoring arguments supported by "specific evidence of actual fabrication.").

There was no "specific" evidence of fabrication in this case. Although the State had Brass's statements to police, and referenced those statements *repeatedly* during Brass's cross-examination (VII:1487-94), the State never attempted to show that Brass changed his story about *when* V.M. disclosed abuse by T. to her mother. (VII:1488-89). There was *no evidence* that Brass altered or embellished the version of events he originally gave to detectives after hearing the testimony at trial. As such, the State's generic tailoring arguments violated Brass's rights to appear and defend in person under Nevada's Constitution. See Nev. Const. Art 1, Sec. 8.

B. Asking Brass if witnesses were lying.

Nearly 20 years ago, this Court adopted "a rule prohibiting prosecutors from asking a defendant whether other witnesses have lied". Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003). Yet, the State repeatedly violated this rule, asking Brass to discuss his statements to police

about whether V.M. and A.W. were lying. (VII:1493). Then, the State forced Brass to respond "yes or no" to the question, "So both Kim and [V.M.] are lying when they said they both found out about the allegations that [V.M.] said about [T.] in January 2017." (VII:1496). Brass was prejudiced when the State argued that this improper line of questioning undermined Brass's credibility:

> He testified he can't think of a reason why [V.M.] would lie. When I confronted him with his statement to police, that's what he told police, that's what he said on the stand yesterday. He doesn't know why [V.M.] would lie. He doesn't know [A.W.] that well; he doesn't know why she would make it up, but I didn't do it.

(VII:1538).

C. Speculation regarding unproven uncharged bad act.

A prosecutor may not make statements unsupported by the evidence presented at trial. See Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1981); Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1154 (1988). Before trial, the State admitted it had *no evidence* to indicate that Brass remotely deleted the contents of A.W. and V.M.'s phones, as A.W. claimed during her forensic interview. (II:430) ("The victims do believe that he was remotely connecting into their phones... There's really no evidence that I have of that... That's what they believe, but there's no data, no examination, no anything for another expert to go through.").

Without evidence to support A.W. and V.M.'s speculative beliefs that Brass hacked their phones and deleted evidence, in rebuttal closing, the State argued, "he received training from two different phone companies, both Sprint and Apple. *If anybody could do what [A.W.'s] saying that he did, it's probably him.*" (VII:1574-75) (emphasis added). Brass was prejudiced by the State's improper speculative argument regarding this uncharged bad act.

D. Improper vouching.

"A prosecutor may not vouch for the credibility of a witness or accuse a witness of lying". Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Here, the State vouched for the credibility of V.M., R.M. and A.W. by arguing that they "were sworn to tell the truth, and that's exactly what they did." (VII:1577). The State also vouched for V.M.'s statements during her forensic interview by saying, "She doesn't lie" and it "wasn't a lie." (VII:1575). As with the other misconduct, the State's vouching rendered Brass's trial fundamentally unfair and warrants reversal. Valdez, 124 Nev. at 1189, 196 P.3d at 477; Darden, 477 U.S. at 181. The court should have exercised its discretion "to control obvious prosecutorial misconduct *sua sponte*." See Collier, 101 Nev. at 477, 705 P.2d at 1128.

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XI. Ineffective Assistance of Counsel

Ineffective assistance of counsel is a violation of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984). The test for ineffective assistance of counsel has two components: error and prejudice. Error is present when the attorney performs below a reasonable level of competence, as measured by prevailing law and professional norms. 466 U.S. at 690. Counsel is entitled to deference when making strategic decisions. However, an absence of strategy or unreasonable strategic decisions constitute error. 466 U.S. at 690-91.

This Court may consider ineffective assistance of counsel claims on direct appeal where an evidentiary hearing would be unnecessary. Archanian v. State, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006). An evidentiary hearing is unnecessary in this case because the record shows that Mr. Posin had *no strategy* for defending Brass and that Brass suffered demonstrable prejudice as a result. Prior to trial, Mr. Posin noticed no witnesses, filed no pretrial motions, ignored investigative leads, and issued no subpoenas, even though Mr. Brass faced 22 serious charges. See **Section I**, supra. After four seated jurors gave answers suggesting that they would not be fair and impartial, Posin did not question their partiality and passed them all for cause. See **Section VII**, supra. Posin failed to object to the

State's request for a partial courtroom closure, despite a dearth of evidence to support the closure. See **Section VIII**, supra. Posin stipulated to admit unredacted forensic interview transcripts and videos referencing unfairly prejudicial prior bad acts, and containing the prosecutor's annotations and punishment recommendations. See **Sections IV** and **V**, supra. Posin stipulated to admit unredacted medical examination paperwork relating to SANE exams for R.M., V.M. and A.W. that contained prejudicial testimonial hearsay. See **Section IX**, supra. Posin failed to object to inadmissible hearsay testimony about "Google maps" data. See **Section VI**, supra. Posin failed to object on hearsay or Confrontation Clause grounds when Cetl testified about SANE examinations conducted and documented by an absent coworker. See **Section IX**, supra. Posin agreed to plainly erroneous jury instructions. See **Section III**, supra. And Posin failed to object to prosecutorial misconduct. See **Section X**, supra.

Posin's conduct throughout trial proves that Investigator Lawson's initial impressions were correct: "Posin had literally no knowledge of this case" and as a result, Brass was not "getting any kind of a defense, let alone a bad defense." (III:646-650) Considered together, these multiple claims of constitutionally deficient counsel establish prejudice that is apparent without need for an evidentiary hearing. See McConnell v. State, 125 Nev. 243, 212

P.3d 307 (2009) (recognizing the possibility that multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of Strickland).

XII. Cumulative Error.

The cumulative effect of trial errors may violate a defendant's state and federal constitutional right to due process and a fair trial, although the errors are harmless individually. Valdez, 124 Nev. at 1195-96, 196 P.3d at 481; Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973). To establish cumulative error, Brass incorporates all factual allegations and legal arguments contained in this appeal as if fully set forth herein. The totality of these multiple errors and omissions resulted in substantial prejudice requiring reversal.

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CONCLUSION

For the reasons set forth herein, Brass requests that his convictions be vacated and that he be granted a new trial on all counts except for Counts 1, 5, 12, and 19 which must be dismissed. In addition, Brass respectfully requests that this Court refer Mitchell L. Posin to the State Bar of Nevada for disciplinary proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

2. I further certify that this brief does not comply with the page or type-volume limitations of NRAP 32(a)(7) and the appropriate motion has been filed, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the opening brief contains 15,623 words and 1,502 lines of text which exceeds the limitations set forth in NRAP 32(a)(7).

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 26th day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th 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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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY */s/ Carrie M. Connolly*
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