IN THE SUPREME COURT OF THE STATE OF NEVADA

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DEQUINCY BRASS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 81142

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(2) because it is a direct appeal from a Judgment of Conviction based on a jury verdict for Category A and B felonies.

STATEMENT OF THE ISSUES

1. Whether the district court properly denied Brass's request to substitute counsel?
2. Whether there was sufficient evidence of Open or Gross Lewdness and Dissuading a Witness?

3. Whether the jury was properly instructed regarding Open or Gross Lewdness and Dissuading a Witness?
4. Whether the district court properly instructed the jury regarding bad act evidence?
5. Whether the jury was not exposed to prosecutor notes and victim impact testimony?
6. Whether "Google maps" data was properly admitted?
7. Whether Brass was convicted by an impartial jury?
8. Whether Brass was afforded his right to a public trial?
9. Whether Dr. Cetl's testimony was proper?
10. Whether there was no prosecutorial misconduct?
11. Whether trial counsel was effective?
12. Whether there was no cumulative error?

STATEMENT OF THE CASE

On February 12, 2018, Appellant Dequincy Brass ("Brass") was charged with Counts 1, 5, 9, 16, and 20 – Lewdness with a Child Under the Age of 14; Counts 2-4, 6, 10-11, 14, 18, and 21-22 – Sexual Assault with a Minor under Fourteen Years of Age; Count 7 – Child Abuse, Neglect, or Endangerment; Counts 8, 13, and 15 – First Degree Kidnapping of a Minor; Counts 12 and 19 – Preventing or Dissuading

Witness or Victim from Reporting Crime or Commencing Prosecution; and Count 17 – Battery with Intent to Commit Sexual Assault. 1AA14-20.

On February 14, 2018, Brass pled not guilty and waived his right to a trial within 60 days. 1AA233.

On March 12, 2018, counsel for Brass, Mitchell Posin, Esq. ("Posin"), filed a Motion to Withdraw. 1AA25-28. On March 29, 2019, Posin withdrew his Motion to Withdraw. 1AA235.

On April 3, 2018, Posin requested a continued trial date. 1AA236. On July 19, 2018, Posin requested a second continued trial date. 1AA237.

On October 18, 2018, the State filed a Notice of Motion and Motion to Allow Dr. Sandra Cetl to Appear by Simultaneous Audiovisual Transmission Equipment. 1AA94-103. On October 30, 2018, the district court granted the State's Motion as Unopposed.

On November 8, 2018, Posin requested a third trial continuance so he could review recently obtained discovery. 1AA239. Trial was reset to May 13, 2019, to accommodate the State's trial availability. Id.

On January 23, 2019, Brass filed a Motion for Own Recognizance Release, or in the Alternative, for Setting of Reasonable Bail ("Bail Motion"). 1AA108-14. On January 31, 2019, the State filed an Opposition to Brass's Bail Motion. 1AA116-23. Brass's Bail Motion was denied on February 7, 2019. 1AA129-30.

On May 7, 2019, Posin requested a fourth continued trial date due to issues with his investigator. 1AA243. On May 13, 2019, the district court granted Posin's request. 1AA245-46.

On Thursday, February 20, 2020, at Calendar Call, Brass informed the district court and the State that he filed a Motion to Dismiss Counsel and Appoint Alternate Counsel ("Motion to Dismiss"). On February 20, 2020, the district court held a sealed hearing, outside the presence of the State, regarding Brass's Motion to Dismiss and subsequently denied Brass's Motion to Dismiss. 1AA167-69. An order reflecting that decision was filed on February 28, 2020. Id. On Friday, February 21, 2020, Brass's Motion to Dismiss was filed. 1AA154-58.

Brass's jury trial began on Monday, February 24, 2020. 2AA252. That same day, the district court held a second hearing, outside the presence of the State, regarding Brass's Motion to Dismiss and denied his Motion a second time. 3AA466-73. On March 3, 2020, the jury found Brass guilty of Counts 1-19, and 22; and not guilty of Counts 20 and 21. 1AA171-75.

On April 23, 2020, Brass was sentenced to and aggregate total of 115 years to life. 2AA261-63.

Brass's Judgment of Conviction was filed on April 30, 2020. 1AA216-19.

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STATEMENT OF THE FACTS

During V.M.'s third grade school year (September 2015 – June 2016), Brass began dating V.M.'s mother, Kimberly, and moved into Kimberly's house where she lived with her children, V.M., and R.M. (V.M.'s younger brother). 5AA1160-61. Brass repeatedly sexually abused V.M. when she was in both third and fourth grades. 5AA1163.

On one occasion, V.M. was at home in the living room without a fireplace, on the couch watching television when Brass sat down next to her. 5AA1168. Brass put his hand on V.M.'s leg and ran it up her leg and touched her vagina over her clothes. 5AA1168-70. Brass said, "shh," and told V.M. not to tell anyone or something bad would happen. 5AA1170. Brass told V.M. to take off her clothes, and scared, V.M. complied. Id. Brass then took off his pants and underwear and told V.M. to sit on his lap. 5AA1171. V.M. sat on Brass' lap with her bare chest facing Brass. 5AA1172. Brass next instructed V.M to get on top of him and he put his penis inside V.M.'s vagina. Id. While Brass did so, he put his hands on V.M.'s chest. Id. The entire time V.M. was scared and in pain. 5AA1173. After, V.M. did not tell anyone what Brass did to her because Brass told her that something bad would happen if she did. Id.

On a second occasion, V.M. was on the floor in the living room with the fireplace watching television when Brass sat down next to her. 5AA1175. Brass took his clothes off, and instructed V.M. to take her clothes off, which she did. 5AA1175-

76. Brass first put his penis inside V.M.'s anus, then Brass digitally penetrated V.M.'s vagina. 5AA1178-79. Brass next turned V.M. to face him and put his penis inside her vagina. 5AA1181-83. Brass then told V.M. to put his penis inside V.M.'s mouth, and V.M. did what Brass told her to do. 5AA1183-84. V.M. was crying, and Brass instructed V.M. not to tell her mom. 5AA1185. Because V.M. believed that Brass would make good on his threats, V.M. did not report Brass's actions. Id.

On a third occasion, V.M. and Brass were downstairs while Kimberly was asleep upstairs. 6AA1223. Brass instructed V.M. to take off her clothes and put her legs around Brass. Id. Brass then put his penis inside V.M.'s anus. Id. A couple of days later, Brass instructed V.M. to put his penis inside her mouth and V.M. did so. 6AA1224.

On a fourth occasion, Brass and V.M. were in the living room when he made V.M. take off her clothes, open her legs, and Brass put his mouth on her vagina. 6AA1228. Brass then put his penis inside her vagina. 6AA1229.

On yet another occasion, Brass picked V.M. up early from school under the pretense of taking her to the doctor. 5AA1199. Instead, Brass took V.M. to a different hotel. 5AA1195. There, Brass made V.M. take off her clothes, and lie on the bed. 5AA1196. Brass then removed his clothes, put V.M. on her stomach and put his penis inside her anus. 5AA1196-97. Brass next flipped V.M. onto her back

and put his penis inside her vagina. 5AA1197. When V.M. started screaming and crying, Brass told her to be quiet. Id.

Another time, Brass showed V.M. a pornographic video in the living room of her home. 5AA1200-01. While Brass made V.M. watch that video, Brass told V.M. to take off her clothes, bent her over the couch and put his penis inside her anus. 5AA1203-06. Brass then turned V.M. over and put his penis in her vagina. 5AA1206-07. And on yet another occasion, Brass caused V.M. to sit on his lap while both he and V.M. were naked, and again forced his penis inside V.M.'s vagina.

On yet another occasion, V.M. heard her brother R.M. crying in Kimberly's room and when she went to check on him. 5AA1208-09. When V.M. opened the door, she saw R.M. laying on his stomach on the bed with his pants off and saw Brass's hand touching R.M.'s butt. 5AA1211-6AA1213. At trial, R.M. testified that Brass touched his butt on one occasion.1 6AA1283.

A.W. and V.M. were close friends and spent time together, and A.W. would often go over to V.M.'s house. 4AA935-36. Both girls attended The Boys and Girls Club in Henderson. 4AA937-38. A.W. is older than V.M., and A.W. was in eighth grade when V.M. was in fourth grade. 4AA935-36. A.W.'s eighth grade school year was September 2016 – June 2017. 4AA932-33.

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1 The jury found Brass not guilty of all charges involving R.M.

On one occasion when A.W. was in eighth grade and V.M. was in fourth grade, Brass took both A.W. and V.M. to a hotel room and sexually abused both girls there. 4AA951-53; 5AA1186-87. At the hotel, Brass instructed both A.W. and V.M. to take off their clothes. 4AA955; 5AA1188. A.W. was terrified, said she had to go to the bathroom, and locked herself and V.M. in the bathroom. Id. V.M. told A.W. that they "had" to do what Brass told them to do, and so both girls came out of the bathroom and complied with Brass's demands. Id. Both girls took their clothes off, and Brass started touching V.M.'s chest and vagina and licking her chest. 4AA956-58; 5AA1188. Brass then came over to A.W. and touched her vagina, butt, and chest. 4AA958; 5AA1189-91. Brass then put his penis inside V.M.'s vagina. 4AA959; 5AA1189-91. Brass thereafter forced his penis inside A.W.'s vagina while he continued touching V.M. 4AA959-60; 5AA1189-91. After Brass ejaculated, all three got dressed and left the hotel room. 4AA960; 5AA1189-91. Brass told A.W. that he would kill her and V.M. if they ever told what happened. 4AA960; 5AA1189-91. After, V.M. explained that she experienced sharp pains in her vagina for the next several weeks. 4AA962.

On another occasion when A.W. was still in eighth grade, Brass texted A.W. and told her to meet him at a locksmith building close to her home in Henderson. 5AA963-64. A.W. was scared of what Brass might do if she did not comply with his demands and met him at the locksmith building. 5AA965-66. Brass picked A.W. up

in his car and drove her to a hotel room. 5AA966-68. Brass told A.W. to take off her clothes and when she refused, Brass threw her on the bed and punched her in the face. 5AA968. Brass then then took off both his clothes and A.W.'s clothes and proceeded to touch V.M.'s chest and force his penis inside A.W.'s vagina. 5AA969-70. After Brass was finished, Brass dropped A.W. off at the locksmith's and A.W. ran home. 5AA969.

Kimberly first began suspecting that Brass was abusing V.M. in January of 2017. 6AA1303-04. Kimberly, Brass, and V.M. were watching a movie when Kimberly noticed Brass staring at V.M. and V.M looking at Brass. 6AA1303. Because the interaction felt strange, Kimberly told V.M. to go upstairs and when Kimberly put her legs over Brass's lap, she realized that Brass had an erection. 6AA1304-05. Kimberly told Brass he needed to leave their house. 6AA1306.

When Kimberly asked V.M. if Brass had inappropriately touched her, V.M. initially denied it and claimed that her cousin had abused her. 6AA1216. V.M. did so because she was afraid of what Brass would do to her. 6AA1216-17. However, after Kimberly made it clear to V.M. that she wanted to know the truth so she could help, V.M. told Kimberly about the abuse, and Kimberly called the police. 6AA1217; 6AA1310. When V.M. subsequently spoke to the police about Brass's abuse, she initially did not tell them about the abuse involving A.W. 6AA1218-19.

Nevertheless, after speaking with the police, while V.M. felt relieved, she was still worried that Brass would make good on his threat and hurt her family. 6AA1226.

On February 27, 2017, Henderson Police Department ("HPD") responded to Sunrise Hospital in response to Kimberly's call about Brass's sexual abuse perpetrated upon V.M. and R.M. 5AA1082-83. On March 2, 2017, were forensically interviewed at the Children's Assessment Center. 5AA1086-87. V.M.'s interview was video, and audio recorded. 5AA1087. During that interview, V.M. wrote and drew the things Brass did to her that she was too nervous to verbalize. 5AA1088. In comparison, R.M.'s forensic interview was cut short because R.M. would not sit still and it was too difficult to get him to communication about anything. 5AA1092-93.

Both V.M. and R.M. were medically examined at the Southern Nevada Children's Assessment Center that same day. 5AA1092. Alexis Pierce, PA-C conducted the examination of both children, with Dr. Sandra Cetl present during the exams. 5AA1119. V.M.'s examination revealed erythema (redness) to her vaginal opening and labia minora, non-specific findings consistent with sexually abused children.5AA1129-30. R.M.'s examination was normal but noted that his report should have noted that abuse was probable. 5AA1127.

A couple of weeks later, Kimberly was looking through V.M.'s phone and saw an email chain between V.M. and A.W. looking for abortion clinics as well as location data showing that the girls had been at Brass's brother's house. 6AA1312.

When Kimberly asked V.M.'s if anyone else had been involved, V.M. told her that A.W. was abused by Brass as well. 6AA1313. Kimberly immediately went to A.W.'s home to speak with A.W.'s mother, Shontai Whatley. 6AA1313.

Meanwhile, A.W. did not tell anyone what happened, became suicidal and was sent to a mental health institution as a result. 5AA1014. Despite A.W.'s suicidality, she said nothing to her mother. 5AA970-72. On March 17, 2017, Kimberly arrived at Shontai's home and told her that Brass had been sexually abusing V.M. and likely A.W. as well. 5AA1015; 5AA1031-32. When Shontai discovered what was happening, she and Kimberly called 911 on March 17, 2017. 5AA1017-32. Afterwards, Shontai took A.W. to Kim's house where they ultimately spoke with police. 5AA1032.

When Shontai confronted her about whether Brass sexually abused her, A.W. became hysterical and still would not tell Shontai what happened. 5AA972-73; 5AA1016. Nevertheless, Shontai and Kimberly, called the police and A.W. ultimately disclosed Brass's abuse during a forensic interview. 5AA973-76. A.W. subsequently underwent a sexual assault exam. 5AA977.

On March 18, 2017, HPD responded to A.W.'s house in response to A.W.'s mother call about Brass's sexual abuse perpetrated upon A.W. AA1093. On April 3, 2017, A.W. was forensically interviewed and medically examined at the Southern

Nevada Children's Assessment Center. 5AA1096. Similar to V.M., A.W. also made drawings describing the assaults. Id.

Doctor Sandra Cetl conducted A.W.'s examination. 5AA1118. A.W.'s examination revealed a deep hymenal notch—a finding indicative of abuse or trauma and a finding that has been noted in children with documented sexual abuse—as well as a fimbriated hymenal and vaginal canal tissue with possible petechial type macules—a non-specific finding consisted with sexually abused children. 5AA1120-22.

After, V.M., A.W., and R.M. were interviewed and examined, HPD next contacted Brass and spoke with him on July 20, 2017. 5AA1098-99. Brass was subsequently arrested on September 30, 2017. 5AA1102.

SUMMARY OF THE ARGUMENT

First, the district court properly denied Brass's eleventh-hour attempt to remove Posin as counsel of record. The district court properly concluded that the conflict between Brass and Posin pertained to trial strategy and had nothing to do with any specific or articulable investigation Posin failed to follow up on. The district court further did not err in concluding that Brass's Motion to Dismiss, filed less than two days before Calendar Call, was a ploy to cause delay. Finally, the district court properly inquired into Brass's complaints by inquiring what

investigation and trial preparation Posin had completed, what his trial strategy was, and what Brass believed still needed to be done.

Second, there was sufficient evidence of Counts 1, 5, 12, and 19. As to Counts 1 and 5, there was overwhelming evidence that each act of lewdness was not incidental to the sexual assault charged for the same sexual encounter. Specifically, both charged acts of lewdness pertained to commands issued by Brass, which each victim complied with; whereas the acts charged as sexual assaults pertained to a physical act engaged in by Brass. As to Counts 12 and 19, because the law does not require evidence that Brass specifically told the victims not to call or contact law enforcement, evidence that Brass told both A.W. and V.M. not to tell anyone sufficiently proved that Brass was guilty of dissuading a victim from reporting a crime.

Third, all jury instructions were proper. Jury instruction 18 correctly informed the jury that before they may convict Brass of both lewdness and sexual assault, they must conclude that the lewdness was not incidental to the sexual assault. Jury instruction 24 was also accurate in that it was a word for word recitation of the statutory language contained in NRS 199.305, which did not require a jury to conclude that Brass have the specific intent to prevent either A.W. or V.M. from reporting his crimes.

Fourth, all evidence was properly admitted. At no point did A.W. testify to any uncharged bad act, and any testimony regarding Brass's actions towards her was admissible *res gestae*. Similarly, both A.W.'s and V.M.'s forensic interviews were properly admitted and did not contain references to uncharged criminal acts. Instead, the substance of those interviews put Brass's actions into context and explained why A.W. and V.M. feared Brass. Further, given that the State never argued that any alleged uncharged criminal act established that Brass was guilty for the crimes charged, any claim of prejudice fails. Indeed, the record is clear that A.W.'s and V.M.'s forensic interviews were admitted pursuant to agreement by the parties and that both the State and Brass used the interviews to argue their respective sides of the case. Finally, the district court did not err for not issuing a Tavares instruction because no uncharged criminal acts were admitted into evidence.

Fifth, the jury was not exposed to prosecutor notes or victim impact testimony. All marks made on A.W.'s and V.M.'s forensic interviews were not statements or opinions of the State. Moreover, as neither A.W. nor V.M. testified to what sentence they believed was appropriate, and statements in their forensic interview as to what they thought should happen to Brass were appropriately admitted at trial.

Sixth, Google Maps data was properly admitted. Kimberly testified that after she saw location data on V.M.'s phone indicating that A.W. was also a victim of Brass's abuse, she informed A.W.'s mother. The substance of what she saw on

V.M.'s phone was not admitted for the truth of the matter asserted, nor was electronically generated data considered a statement. Additionally, Kimberly's testimony did not violate the best evidence rule because the substance of the data she testified to was not material to Brass's guilt, nor did the State attempt to admit a copy of that data at trial.

Seventh, Brass was convicted by an impartial jury. All challenged jurors made clear that they would remain unbiased and base their verdict on the evidence presented.

Eighth, Brass was not denied his right to a public trial. The district court properly concluded that given the traumatic and sensitive nature of all of the minor victims' testimony, a partial courtroom closure was appropriate. moreover, Brass has not established or alleged that closure in any way impacted the verdict.

Ninth, Dr. Cetl's testimony was proper. Dr. Cetl's audio visual testimony did not violate Brass's right to confront witnesses, and Brass has not otherwise explained why in person testimony would have been necessary. Further, Dr. Cetl was present during V.M.'s and R.M.'s medical examination and did not testify to any testimonial hearsay statement. Moreover, Dr. Cetl's testimony was proper as she was an expert witness. All SNCAC reports were properly admitted and did not contain any testimonial hearsay because there was no statement made to police and any other

statement was properly admitted as having been made for purposes of medical treatment.

Tenth, there was no prosecutorial misconduct. The State did not accuse Brass of tailoring his testimony to what the witnesses said and did not ask Brass whether any other witness lied during their trial testimony. Instead, all arguments pertained to whether Brass's testimony was credible and whether any other witness had a motive to lie. Additionally, the State did not speculate about unproved and uncharged bad acts because its argument regarding whether Brass could have remotely accessed A.W.'s phone was a proper response to Brass's own closing argument. Finally, the State did not vouch for any witness when they argued that all victims had been truthful.

Eleventh, because claims of ineffective assistance of counsel must first be raised in a post-conviction petition for writ of habeas corpus, Brass's claim of ineffective assistance of trial counsel must fail.

Twelfth, because there were no errors, there are no errors to cumulate.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED BRASS'S REQUEST TO SUBSTITUTE COUNSEL

Brass argues that the district court erred by denying his Motion to Substitute Counsel pursuant to Young v. State, 120 Nev. 963 (2004). Brass claims that the district court failed to recognize that Mr. Posin allowed his financial interests to

impact his representation and did nothing to prepare for trial. AOB30-35. Brass claims that the district court improperly concluded that Brass's motion was a "ploy" to cause a delay because Brass timely requested new counsel once he realized that Posin had not prepared for trial and that the district court failed to conduct an adequate inquiry into Brass's claims. AOB35-38.

This Court reviews a district court's denial of a defendant's motion for substitute counsel for abuse of discretion. Young v. State, 120 Nev. 963, 968 (2004). When evaluating Sixth Amendment Claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." United States v. Cronic, 466 U.S, 648, 657 n.21 (1984). "[T]he essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." See Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

Determining whether friction between a defendant and his attorney justifies substitution of counsel is within the sound discretion of the trial court, and this Court will not disturb such a decision on appeal absent a clear abuse of discretion. Thomas v. State, 94 Nev. 605, 607 (1978). This Court has articulated three factors to consider when reviewing a district court's denial of a motion to substitute counsel: (1) the extent of the conflict; (2) the timeliness of the motion and the extent to which it

would result in inconvenience or delay; and (3) the adequacy of the court's inquiry into the defendant's complaints. Young, 120 Nev. at 968-69.

The district court properly denied Brass's untimely Motion to Dismiss. Brass's trial had already been continued five times at his request. 1AA236-247. When Brass requested his fourth continuance scheduled on May 7, 2019, the State objected to his request and announced ready. 1AA244. However, after Posin explained that his investigator had been fired and had not done any of the requested work, the district court granted Brass's request to continue the trial and set several status checks where Posin appeared and explained what he had been doing to prepare for trial. 1AA247-2AA251. At the last scheduled status check on January 14, 2020, Brass assured the district court and the State that he would be ready for trial. 2AA254. Brass was present for all of these hearings and never said a word about being concerned that Posin was not preparing for trial.

Instead, Brass conveniently waited to file his Motion to Dismiss until February 21, 2020, the Friday before trial. 1AA154-58. When a motion to substitute counsel is made mere days before trial, the district court may summarily deny the motion without conducting a Young hearing. Mojica v. State, 472 P.3d 1206 (Nev. 2020) (unpub.) While the district court would have been within its rights to summarily deny Brass's untimely motions, the court instead conducted *two* detailed Young hearings.

On Thursday, February 20, 2020, which was the Calendar Call for the fourth trial setting, the State announced ready, and Brass informed the district court at that time that he already filed his Motion to Dismiss Counsel. 2AA437-38.

The district court told Brass that he did not receive that Motion and noted the following Monday—February 24, 2020—that Brass's Motion to Dismiss was eventually filed the day after Calendar Call (Friday, February 21, 2020). Nevertheless, on Thursday, February 20, 2020, the district court conducted a sealed Young hearing where it took testimony from both Posin and Brass, despite the fact that it had not actually received Brass's Motion to Dismiss. 2AA452. Brass argued Posin was not prepared for trial because he had not subpoenaed any witnesses, filed any motions, and had not visited Brass to discuss trial strategy. 2AA452-53. Brass believed that Posin should call Brass's brother as a witness—who would testify only to Brass's character—and claimed that the investigator assigned to the case, Mr. Lawson, told Brass he interviewed other witnesses that Posin had not subpoenaed. Id. According to Brass, Posin was misleading the court every time Posin provided an update regarding preparing for Brass's trial. 4AA455.

In response, Posin explained that he met with Brass a month prior, and that he met with the investigators several times and was prepared to go to trial. 2AA453-54. While Posin declined to get into the specifics of his trial strategy or discussions with Brass, he explained the differences between Posin's trial strategy and Brass's

strategy. 4AA454-57. Specifically, Posin informed the court that his strategy was to cross examine State witnesses, as opposed to calling his own, whereas Brass believed counsel should call character witnesses to bolster his character and tear down the victim's character. 4AA459.

The district court denied Brass's motion and specifically noted that Brass failed to meet any of the three Young factors. 2AA443-66. The court noted that Brass's explanation of the conflict between himself and Posin was "about as vague as you could possibly be," and was simply an attempt to avoid trial, which "is not a sufficient reason to have to appoint new counsel." 2AA445. Brass's motion was incredibly untimely, and suspect given the numerous times Brass appeared in front of the district court and made no mention of being unhappy with Posin's representation. 2AA444-45. Finally, the district court noted that, given the extent of the Young hearing and the reasons set forth by Brass during that hearing, it had made a substantial inquiry into the matter. 2AA446. The court informed both Brass and the State that jury selection would begin on Monday, February 24, 2020 at 10:30 AM. 2AA449-50.

Nevertheless, on Monday, with the jury panel in the hallway, Posin renewed Brass's Motion to Dismiss. 3AA465-67. The district court noted that despite Brass's claim at the first Young hearing that he filed the Motion to Dismiss the week prior, it was not filed until the Friday after the Young hearing and was dated as having

been written only two days prior to the Young hearing. 3AA467. Nevertheless, despite the fact that the jury panel was waiting in the hallway, the district court conducted a second sealed Young hearing. 3AA466-67.

At that second Young hearing, Posin argued that while he believed that he was prepared to go to trial, the communication breakdown between himself and Brass necessitated appointment of alternate counsel. 3AA645. The court heard from Posin, Investigator Lawson, and Brass. Specifically, Posin explained that while his trial strategy was to cross-examine State witnesses, both Brass and Mr. Lawson believed that he should have subpoenaed witnesses to testify on Brass's behalf. 3AA645-46. However, when the court asked Mr. Lawson who these witnesses were and what they would testify to, Mr. Lawson could not provide the names of any of these people. 3AA647. Instead, Mr. Lawson simply claimed that he found unspecified witnesses who could call into question the truthfulness of the victims' stories, confirm when Brass was on his work computer, and potentially introduce CPS records that might have been relevant to Brass's defense. 3AA647-48.

Posin explained that he was more prepared than Mr. Lawson believed and made clear to the court that he was ready for trial. 3AA651. Posin confirmed that he reviewed all the evidence and transcripts, all of the discovery provided by the State, and had met with both Brass and Mr. Lawson multiple times where they discussed defense strategy. 3AA651-53. Nevertheless, Posin claimed that he needed a trial

continuance because he wanted to change his defense strategy and call "possible witnesses" and gather "other information." 3AA655.

Following testimony, the district court denied Brass's Motion to Dismiss a second time for the same reasons it had already done so and pursuant to Garcia v. State, 121 Nev. 327 (2005). The district court reasoned that, like Garcia, Brass waited until calendar call to request new counsel, had never complained about counsel before, and the record showed that Posin had discussed the case with both Brass and Mr. Lawson on multiple occasions. 3AA470-73. Additionally, the court found Brass's testimony was not credible given the fact that the time Brass told the court he filed the Motion to Dismiss did not match the date the Motion showed as having been authored. 3AA470. The court further explained that this was not Brass's or Mr. Lawson's first opportunity to express concern with Posin's representation. Id. The court found that the conflict between Posin and Brass "boils down to potential strategy differences, which is not sufficient under these circumstances to grant the motion to continue the trial." 3AA471. Moreover, given Posin's representations that he was ready for trial, and had communicated on several occasions with both Brass and Mr. Lawson prior to trial, Brass failed to establish good cause to continue the trial or be appointed new counsel. 4AA471-72. Finally, the court held that it had adequately inquired into the matter because it had considered testimony from Brass, Posin, and Mr. Lawson. 4AA473. This conclusion was not an abuse of discretion.

A. The district court properly considered the extent of the conflict.

Brass argues that he and Posin had irreconcilable differences and that the district court failed to consider the extent of the conflict. AOB30-34. According to Brass, Posin had two obvious conflicts of interest: (1) the payment arrangement with Brass's family; and (2) the desire to avoid further bar discipline. AOB34. First, Brass alleges that Posin should not have agreed to accept money from Brass's family in exchange for representation. AOB31-33. Second, Brass alleges that Posin was so afraid of additional discipline from the State Bar that he falsely told the district court he was prepared for trial when he had not done anything to prepare for trial. AOB33-34. Taking each claim in turn, both fail.

Brass failed to raise either claim before the district court and he has waived appellate review. Guy v. State, 108 Nev. 770, 780 (1992), cert. denied, 507, U.S. 1009 (1993). This Court has consistently reaffirmed that "[t]he failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below." Pantano v. State, 122 Nev. 782, 795 n. 28 (2006) (quotation omitted). Appellate review requires the district court be given a chance to rule on the legal and constitutional questions involved. Lizotte v. State, 102 Nev. 238, 239-40 (1986). As such, the issue may only be reviewed for plain error. Maestas v. State, 128 Nev. 124, 146 (2012). "Reversal for plain error is only warranted if the

error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." Martinorellan v. State, 131 Nev. 43, 49 (2015).

There is no constitutional guarantee to a meaningful relationship between a criminal defendant and his counsel. Morris v. Slappy, 461 U.S. 1, 14 (1983). The trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call and what defenses to develop. Rhyne v. State, 118 Nev. 1, 8 (2002). The mere fact that the accused lacks trust or confidence in counsel, or disagrees with counsel, or fails to cooperate in good faith with counsel, or that there is a lack of communication between the accused and counsel caused by the accused, does not justify discharge or substitution of counsel. See Thomas, 94 Nev. at 608. Because counsel alone is responsible for tactical decisions regarding a defense, a mere disagreement between counsel and defendant regarding such decisions cannot give rise to an irreconcilable conflict justifying substitution. See Rhyne, 118 Nev. at 8. In particular, where a defendant disagrees with counsel's reasonable defense strategy and wishes instead to present his own ill-conceived strategy, no conflict of interest arises. See Gallego, 117 Nev. at 363. Rather, attorney-client conflict warrants substitution "only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Id.

First, Brass's claim that Posin was more concerned with financial gain than preparing for trial fails. Initially, Brass only retained Posin to represent him at the

preliminary hearing. 1AA25-28. Once Brass's case exceeded the scope of that representation, Posin filed a Motion to Withdraw, but withdrew the motion when Brass's family retained him to represent Brass at trial. 1AA235. This is not unusual, and Brass's claim that this created a conflict of interest is risible. While Posin requested a trial continuance on November 18, 2018, because he was unable to review discovery due to "financial reasons of my client's family," Brass has not established that this interfered with his lawyer-client relationship with Posin, particularly considering that Posin never filed another motion to withdraw on the grounds of nonpayment, and instead continued representing Brass for nearly an additional year and a half. Therefore, any claim that Posin was refusing to prepare for Brass's trial due to financial reasons is a bare and naked claim suitable only for summary denial. Hargrove v. State, 100 Nev. 498, 502 (1984).

Second, Brass's claim that Posin lied to the district court to avoid further discipline from the State Bar fails. While Posin may have been on probation with the State Bar while he was representing Brass, Brass has not established that any prior discipline was in any way material to the facts of Brass's case. Moreover, Brass has not provided any of this documentation to this Court for review and failed utterly to raise the claim below. Brass provides no specific facts underlying any discipline and fails to demonstrate that a separate disciplinary proceeding should have been disclosed to the court or to Brass. Id.

The district court found Brass's assertion that Posin lied to the court regarding his preparedness for trial was not credible and was not supported by substantial evidence. During the second Young hearing on Monday February 24, 2020—the morning of trial—Posin argued that his request for a continuance and appointment of alternate counsel was putting his own interests aside, and made it clear that he was explaining to the court the specifics of why Brass believed he was deficient in his attempt to have the court continue trial and appoint another attorney. 3AA656. However, Posin made clear that he was prepared for trial:

> MR. POSIN: Well again, Your Honor, I -- it's my -- my feeling is that I have a very different perspective as to, you know, what I have been doing and the value of what I have been doing to prepare for this case. And this is -- this case, like every other case, I -- you I feel that I -- it's my duty and what I plan to do to zealously and affectively represent somebody and that's what –
> […]
> MR. POSIN: -- well I have done -- I have done plenty of work on this case. Perhaps Mr. Brass and Mr. Lawson don't see it. But I've done plenty of work on this case. In looking and relooking at it with Mr. Lawson yesterday, I thought it was appropriate to tell the Court where I see my own failings. And as I previously described it, I'm essentially throwing myself under the bus here. I don't -- and 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.
>
> I think I've been competently representing Mr. Brass. But where there is something that I have not done and I perhaps should have, I think it's appropriate to tell the Court. I don't think that's an issue -- again I certainly I hope it's not an issue for the Bar, but it's an issue for Mr. Brass.
>
> And I hate to inconvenience the Court, which I know it does. I hate to inconvenience all the other parties. But part of my appropriate representation I think is to bring this to the Court's attention. You

> know, for the most part the way a case is presented is up to the attorney.
>
> You know, the Defendant has a right to decide whether to testify or not. But other than that, most of those decisions are really mine and mine alone. Now where -- and I have been -- I have been working on this case and working up this case and getting prepared for trial. But where I see something that I could have and should have done better, you know, I certainly feel bad that I -- for the inconvenience. But 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.

4AA656-58.

Contrary to Brass's claim now, Posin did not make false claims in an attempt to avoid bar discipline. Indeed, at the Calendar Call on February 20, 2020, and at the second Young hearing on February 24, 2020, Posin was prepared to announce ready for trial. 2AA437; 3AA657. Posin was prepared to do so before any potential threat of State Bar discipline loomed over his head. Id. Therefore, any claim that Posin was more concerned with avoiding further discipline than with representing Brass at trial fails.

The district court appropriately concluded that Posin's and Brass's conflicts had to do with a disagreement with trial strategy and not with Posin's preparedness for trial. During both Young hearings, both Brass and Investigator Lawson claimed that Posin should have followed up on defense leads, filed motions, and subpoenaed witnesses. 2AA453. However, both Brass and Investigator Lawson failed to specify any motions, witnesses, evidence or investigation Posin had failed to file, contact,

or conduct that could have reasonably changed the outcome at trial. Id.; 3AA646-48.

The only consistent argument was that Brass wanted his defense strategy to bolster his own character while attacking the victims'. 2AA453. In response, Posin informed the court that he previously explained to Brass that his strategy would be to cross examine the State's witnesses, and that he did not feel as though it was necessary to call any witnesses. 2AA456; 2AA459. Posin's decision not to pursue such a strategy is not only an unchallengeable strategic decision, but Brass has not established that this alternate defense strategy would have succeeded. Therefore, any error would have been harmless.

B. The district court properly concluded that Brass's Motion to Dismiss was a ploy to cause delay.

Brass argues that the district court improperly concluded that Brass's request to substitute counsel was a "ploy" to continue trial. AOB35. Brass explains that he made several requests to substitute counsel well in advance of trial, and only withdrew those requests when Posin assured both Brass and the district court that he was preparing for trial. AOB35. According to Brass, he only waited until the week before trial to request to substitute counsel because that was when he first realized that Posin had failed to follow up on any investigative leads or otherwise prepare for trial. AOB35-36. Brass's claim fails.

Filing motions to dismiss counsel on the "eve of trial" can be "suggestive of a dilatory motive" that could result in "unnecessary inconvenience and delay, if granted." Garcia, 121 Nev. at 339, 113 P.3d at 843. A Young hearing is not required for untimely motions, but the district court held two. Mojica, 472 P.3d 1206 (Nev. 2020) (unpub.)

When a motion is made well in advance of trial, a court must balance a defendant's constitutional right to counsel against the inconvenience and delay that would result from the substitution of counsel. Young, 120 Nev. 963 (citing U.S. v. Moore, 159 F.3d 1154, 1158-69 (9th Cir. 1998). In Young, this Court concluded that the trial court abused its discretion in denying a motion for substitution where the motion was made three and a half months before the start of trial and there was no proof in the record that Young filed his motions for dilatory tactics or bad-faith interference with the administration of justice. Id. at 970. However, one year later, in Garcia, this Court concluded that the trial court did not abuse its discretion when denying a substitution motion filed at calendar call, just a few days before the trial was scheduled to begin. 121 Nev. at 336. This Court explained that consideration of the timeliness of the motion included the extent to which it will result in inconvenience or delay. Id. at 338-39. Garcia had months to express his concerns to the court but waited until the eve of trial and filed his motion in open court—a fact this Court noted was suggestive of a dilatory motive. Id. The record further indicated

that Garcia's motion, although timely in the sense that it was filed before the actual start of the trial, would have resulted in unnecessary inconvenience and delay, if granted. Id.

The district court properly concluded that Brass's Motion to Dismiss was a delay tactic. The court specifically found that Brass waited until calendar call of the fourth trial setting to complain about Posin for the first time despite over two years of representation. 3AA470-73. In those two years, the record showed that Posin discussed the case with both Brass and Mr. Lawson on multiple occasions, and that Brass had multiple opportunities to raise his concerns to the district court. 3AA471-73. Additionally, the court found that Brass's testimony was not credible given the fact that Brass misled the court about when he filed his Motion to Dismiss. 3AA470. Brass's unexplained delay in requesting alternate counsel supports this Court's denial of his claim. Garcia, 121 Nev. at 338-39; Young, 120 Nev. at 969-70.

The district court correctly balanced Brass's right to counsel against the inconvenience and delay that would result from the substitution of counsel. The district court appropriately found Brass's and Mr. Lawson's claims regarding what investigation still needed to be done were nothing more than nonspecific attempts to create further delay. 3AA470-74. Not only were Brass and Mr. Lawson unable to identify specific witnesses who could testify to specific, relevant, and admissible

evidence; but the district court correctly noted that Brass had previously made nonspecific allegations in an attempt to obtain a trial continuance. Id.

Specifically, at the third scheduled Calendar Call on May 7, 2019, Posin informed the court that the investigator working on the case was no longer working with his primary investigator and Posin was working to determine what had been done. 2AA375. As a result, the district court continued the Calendar Call. 2AA376. At that continued Calendar Call date, Posin asked for a fourth trial continuance. 2AA378. Posin explained that he and his investigator, Mr. Lawson, met with the State and reviewed subpoenas issued but that the specific investigator working his case was fired and not responding to his phone calls for the last several weeks. Id. The district court denied Posin's request for a fourth continuance, and set trial to begin on Monday, May 13, 2019. 2AA380.

On Monday, May 13, 2019, the first day of Brass's fourth trial setting, Posin renewed his request for a continuance. 2AA384. Posin explained that the recently fired investigator had not followed up on several items counsel had been pursuing since December. Id. Mr. Lawson took responsibility for his employee's failures. 2AA399-401.

Posin and Mr. Lawson then explained what further investigation was needed and specifically referenced items of evidence the State explained were irrelevant. 2AA379; 2AA385-408. While Brass represented that Posin had not visited him since

December, he did not ask that Posin be replaced. 2AA387. Posin corrected Brass's assertion and informed the court that he had spoken with Brass on the phone and visited him on the Friday or Saturday prior to trial. Id. Posin also confirmed that his investigator had visited and consulted with Brass on multiple occasions. 2AA387-88.

The district court found that while Posin had not shown good cause for a trial continuance, the court was going to continue the trial to ensure Posin's effectiveness at trial. 2AA409. The court set regular status checks where Posin updated the court regarding his trial readiness. For the next nine months, Posin provided regular updates to the court, in the form of status checks where both Brass and the State were present, and assured the district court that he would be ready for the next scheduled trial date. 2AA422-37.

The district court did not abuse its discretion when, nine months later, Brass attempted to employ the same delay tactics. Nor did the court err when dismissing Brass's claim regarding failed unidentified investigative leads as nothing more than an attempt to continue the trial date. In doing so the court noted that the record was clear that Posin properly communicated with Brass during the pendency of his case. 3AA473.

Second, the district court balanced the denial of Brass's Motion to Dismiss with the inconvenience additional delay would cause. The court explained that

Brass's trial had been pending for two years, the three minor victims were prepared to testify at every scheduled trial date, and further delay would severely prejudice those victims. 3AA473-74. Accordingly, the district court did not abuse its discretion in concluding that the timeliness of Brass's Motion to Dismiss supported denial.

C. The district court properly inquired into Brass's complaints.

Brass argues that the district court did not properly inquire into Posin's preparedness during the Young hearing. AOB36-37. Brass claims that the district court did not sufficiently inquire into Posin's chosen defense strategy, his reasons for choosing that strategy, or what Posin had done to prepare for that strategy. AOB38-39. Brass's claim fails.

Absent a showing of good cause, a defendant is not entitled to the substitution of court-appointed counsel at public expense. Garcia, 121 Nev. at 337; Young, 120 Nev. at 968. This Court has defined good cause as "a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which [could] lead … to an apparently unjust verdict." Gallego v. State, 117 Nev. 348, 363 (2001) (overruled on other grounds by Nunnery v. State, 127 Nev. 749 (2011)). Good cause is "not determined solely according to the subjective standard of what the defendant perceives." Id. Nor is "[t]he mere loss of confidence in appointed counsel … good cause." Id. While a defendant's lack of trust in counsel is a factor in the determination, a defendant must nonetheless provide the court with legitimate

explanations for that lack of trust. Id. (citing McKee v. Harris, 649 F.2d 927, 932 (2nd Cir. 1981)).

Here, the district court adequately inquired into all of Brass's complaints. The district court held two Young hearings where it was clear that any "conflict" was merely an attempt to delay trial further and ensured that Posin had prepared and was ready for trial. The only conflict was that Brass believed the appropriate defense strategy was to bolster his own character while tearing down the victims'. Id. Further, much like Brass's testimony, Mr. Lawson did not identify a single person or piece of evidence that was exculpatory, admissible, and should have been presented to the jury. 3AA647.

Posin remained clear that his trial strategy was to cross examine the State's witnesses regarding their credibility instead of calling their own witnesses. 4AA459. Posin confirmed that he reviewed all the evidence and transcripts, all of the discovery provided by the State, and had met with both Brass and Mr. Lawson multiple times where they discussed defense strategy. 3AA651-53. While Posin did not elaborate as to why he chose that particular strategy, even on appeal Brass has failed to show that an alternate defense strategy would have succeeded. Much like both Brass's and Mr. Lawson's statements to the district court, on appeal, Brass continues to fail to identify a single specific witness or piece of evidence exculpating Brass. Accordingly, the district court properly inquired into Brass's complaints and

did not err when dismissing them as baseless attempts to continue his trial a fifth time.

II. THERE WAS SUFFICIENT EVIDENCE PRESENTED AS TO ALL CHALLENGED COUNTS

Brass argues that there was insufficient evidence of Counts 1 and 5 – Lewdness with a Minor Under 14; and Count 12 and 19 – Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution. AOB39-44. As to Counts 1 and 5, Brass claims that the acts the State charged were incidental to their corresponding sexual assault convictions and therefore cannot stand. AOB39-42. As to Counts 12 and 19, Brass claims that because there was no evidence that Brass told V.M. and A.W. not to call the police, the evidence presented at trial does not support the crimes charged. AOB43-44. Brass's claims fail.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258–59 (1974); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Brass v. State, 128 Nev. 748, 754 (2012). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20 (quoting Woodby v. INS, 385 U.S. 895 (1966)). Rather, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491 (1995) (quotation and citation omitted). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193 (1996) (emphasis removed). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319.

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381 (1998) (quoting McNair v. State, 108 Nev. 53, 56 (1992)). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319. Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531 (2002).

A. There was sufficient evidence of Counts 1 and 5 – Lewdness with a Minor under 14 years of age.

Brass argues that his convictions for Counts 1 and 5 are redundant because the lewd acts charged were incidental to the sexual assaults charged and convicted

as Counts 2 and 6. AOB40. As to both counts, Brass was charged for "causing V.M. to sit on his lap and/or on top of him while V.M. and/or [Brass] were naked, and/or by undressing and/or kissing and/or touching the buttocks and/or genital area of V.M." Id. (citing 1AA179-80). According to Brass, V.M.'s trial testimony established that these acts were always accompanied by subsequent sexual assaults, and there was no testimony indicating any distinction between the acts. AOB40-41. As a result, Brass claims his convictions for Counts 1 and 5 are redundant and cannot stand. Brass's claim fails.

This Court has held that "the crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand." Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002). However, separate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions "even though the acts were the result of a single encounter and all occurred within a relatively short time." Wright v. State, 106 Nev. 647, 650 (1990). A review of this Court's jurisprudence on the subject shows that what matters to the analysis is whether the acts were interrupted:

> In *Wright v. State,* the accused attempted to sexually assault the victim but stopped when a car passed by the area of the assault. After the car passed, the accused resumed his assault. This court affirmed convictions for both attempted sexual assault and sexual assault despite the short time period between the acts. In *Townsend v. State,* this court affirmed separate convictions for fondling a victim's breasts and digitally penetrating the victim's vagina. This court stated that

> because "Townsend stopped [fondling the child's breasts] before proceeding further," separate acts of lewdness occurred.
>
> However, in *Crowley v. State,* the defendant rubbed the victim's penis through the victim's pants, put his hand inside the victim's underwear and touched the victim's penis, and pulled down the victim's pants and performed fellatio on the victim. This court reversed Crowley's conviction for lewdness, explaining that unlike *Wright* and *Townsend,* Crowley never interrupted his actions. "By touching and rubbing the male victim's penis, Crowley sought to arouse the victim and create willingness to engage in sexual conduct. Crowley's actions were not separate and distinct; they were a part of the same episode."https://1.next.westlaw.com/Document/Ief28f02e2b7011da974abd26ac2a6030/View/FullText.html?originationContext=kcCitingReferences&transitionType=Document&contextData=(sc.Search)&docSource=89799a07f09447229819bfadf971f894&rank=2&rulebookMode=false -co_footnote_B042422007344396 In *Ebeling v. State,* this court reversed Ebeling's conviction for lewdness after determining that the touching of Ebeling's penis on the victim's buttocks was incidental to the sexual assault by anal penetration.

Gaxiola v. State, 121 Nev. 638, 651 (2005).

Here, V.M.'s testimony showed that Brass's lewd acts charged as Counts 1 and 5 were not incidental to the sexual assaults charged. Taking each challenged count in turn, Brass was charged with Counts 1 and 2 for acts that occurred on or between May 4, 2015, and February 1, 2017. 1AA161. Brass was charged with Count 1 for causing V.M. to sit on his lap and/or on top of him while V.M. and/or Brass was naked, and/or by undressing and/or kissing and/or touching the buttocks and genital area of V.M. Id. Brass was charged with Count 2 for having vaginal intercourse with V.M. Id.

At trial, V.M. testified that Brass instructed to her to undress, then took off his clothes before telling V.M. to sit on his lap. 5AA1171-72. Brass had to move and manipulate V.M. in order to put his penis inside her vagina. 5AA1172. This movement constituted sufficient interruption of Brass's actions. Indeed, Brass specifically commanded V.M. to undress and sit on his lap; whereas the sexual assault charged as Count 2, pertained to Brass's own affirmative actions of putting his penis inside V.M.'s genital opening. 1AA161.The State argued during closing argument that the mere command for V.M. to undress constituted a lewd act that did not require physical contact. 7AA1541.

While these two acts may have occurred in the same sexual encounter, they were not incidental to one another. Instead, after Brass told V.M. to undress, he then issued a separate command for him to sit on top of her. 5AA1171. Brass then had to re-position V.M. in order to put his penis inside her vagina. 5AA1172. Therefore, there was sufficient evidence that the acts charged as Count 1 were not incidental to the act charged as Count 2.

Similarly, Brass was charged with Counts 5 and 22 for acts that occurred on or between May 4, 2015, and February 1, 2017. 1AA162. Brass was charged with Count 5 for causing V.M. to sit on his lap and/or on top of him while V.M. and/or Brass naked, and/or by undressing and/or kissing and/or touching the buttocks and genital area of V.M. Id. Brass was then charged with Count 22 for putting his penis

into V.M.'s anal opening. 1AA166. At trial V.M. testified that Brass instructed V.M. to do two separate things: take off her clothes and sit on his lap. 6AA1223. Brass then put his penis inside V.M.'s anus. Id. That these acts occurred during the same sexual encounter does not mean that the lewd acts were incidental to the sexual assaults. Indeed, the lewdness charged as Count 5 pertained to the verbal commands issued by Brass to V.M. The sexual assault charged as Count 22, on the other hand, pertained to Brass's own affirmative actions of putting his penis inside V.M.'s anus. Accordingly, the lewd act charged as Count 5 was not incidental to the sexual assault charged as Count 22, and there was sufficient evidence of Count 5.

B. There was sufficient evidence of Counts 12 and 19 – Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution.

Brass argues that based on the plain language of NRS 199.350(1), the State had the burden to prove that Brass specifically dissuaded his victims from contacting a member of law enforcement. AOB42. Because there was no testimony presented that Brass told V.M. or A.W. not to call the police, there was insufficient evidence of Counts 12 and 19. Brass's claim fails.

Pursuant to NRS 199.305(1):

> 1. 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;

(b) Commencing a criminal prosecution or a proceeding for the revocation of a parole or probation, or seeking or assisting in such a prosecution or proceeding; or

(c) Causing the arrest of a person in connection with a crime,

or who hinders or delays such a victim, agent or witness in an effort to carry out any of those actions is guilty of a category D felony and shall be punished as provided in NRS 193.130.

Here, as an initial matter, according to the plain language of NRS 199.305, the State did not have to prove that Brass specifically told A.W. or V.M. not to call the police because Brass's commands to both victims not to tell their mothers or not to tell anyone sufficiently acted to dissuade them from commencing prosecution or causing "the arrest of a person in connection with a crime." NRS 199.305(1)(c).

Brass was charged with two counts of Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution. 1AA164-65. Specifically, Brass was charged with Count 12 for "willfully, unlawfully, and feloniously, by intimidation or threats, prevent or dissuade, or hinder or delay V.M. from reporting a crime to a peace officer by threatening to hurt V.M. and/or V.M.'s brother if V.M. told" On or between May 4, 2015, and February 1, 2017. 1AA164. Similarly, Brass was charged with Count 19 for "willfully, unlawfully, and feloniously, by intimidation or threats, prevent or dissuade, or hinder or delay A.W.

from reporting a crime to a peace officer by telling A.W. not to tell anyone else or he would harm and/or kill A.W." on or between November 1, 2016, and February 1, 2017. 1AA165. At trial, the State presented sufficient evidence of both counts.

Specifically, at trial, V.M. testified that Brass told her not to tell anyone about what he was doing to her or else something bad would happen. 5AA1173. Similarly, at trial, A.W. testified that after Brass sexually assaulted her and V.M. in the hotel, Brass told them "that he would kill [them] because … he knows [their] family and he knows where [they] live" and he would hurt their families if they ever told what happened. 4AA960. While Brass did not specifically tell V.M. or A.W. not to call the police, common sense dictates that the term "anyone" would include peace officers and Brass has not provided any case law establishing that threats made to prevent a victim from reporting a crime must specifically include the terms or references to law enforcement. Accordingly, the jury reasonably concluded that there was overwhelming evidence that Brass was guilty of Counts 12 and 19.

Moreover, despite Brass's claims to the contrary, this threat not only satisfied NRS 199.305, but it actually dissuaded V.M. and A.W. from reporting Brass's crimes to anyone. V.M. testified that despite Brass sexually assaulting her on multiple occasions, she never told her mother or the police because she was indeed afraid that Brass would make good on his threats to hurt her family. 5AA1185. Even when Kimberly asked V.M. whether Brass was assaulting her, V.M.'s first instinct

was to deny it because she was so afraid of Brass. 6AA1216-17. V.M. only disclosed to Kimberly what Brass had been doing after Kimberly spent days reassuring her that everything would be ok. 6AA1217.

Similarly, A.W. testified that she believed Brass's threats to do harm and was so afraid of him that she indeed did not tell her mother what Brass did to her. 4AA961. A.W. also testified that she was so afraid of Brass that when he texted her to meet him weeks later, she met him so he would not hurt her family. 5AA966. A.W. further testified that even after Brass sexually assaulted her a second time, she did not tell her mother or police for fear of what Brass would do to her family. 5AA971-72. Even when A.W. was questioned by police, she was hesitant to disclose Brass's abuse. 5AA974. Accordingly, the record is clear that Brass's threats dissuaded A.W. from reporting his abuse. Therefore, there was overwhelming evidence that Brass was guilty of Counts 12 and 19.

III. THE JURY WAS PROPERLY INSTRUCTED LEWDNESS WITH A CHILD AND DISSUADING A WITNESS

Brass argues that in the event this Court concludes there was sufficient evidence of Counts 1, 5, 12, and 19, Brass is nevertheless entitled to a new trial because the jury was not properly instructed regarding these counts. AOB44. First, Brass argues that regarding his charges for lewdness and sexual assault, the jury should have been instructed that they could not convict him of both lewdness and sexual assault unless there was specific interruption between the lewdness and

sexual assault. AOB45. Second, Brass argues that the jury should have been instructed that preventing or dissuading was a specific intent crime. AOB46. Brass's claim fails.

As an initial matter, Appellant did not object these instructions and has therefore waived his opportunity for appellate review for all but plain error.2 Guy, 108 Nev. at 780.

When properly objected to, district courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748 (2003). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120 (2001). However, this Court reviews de novo "whether a particular instruction . . . comprises a correct statement of the law." Cortinas v. State, 124 Nev. 1013, 1019 (2008). District courts have "broad discretion" to settle jury instructions. Id. at 1019, 195. A district court may refuse to give a jury instruction substantially covered by another. Davis v. State, 130 Nev. 136, 145 (2014). Further, instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would

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2 Brass alleges that trial counsel was ineffective for failing to object to the jury instructions provided or request different ones. AOB45-47. However, as claims of ineffective assistance of counsel must first be pursued in post-conviction habeas proceedings, the State has addressed that claim *infra* XI.

undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155-56 (2000) overruled on other grounds, Rosas v. State, 122 Nev. 1258 (2006).

A. The jury was properly instructed regarding lewdness and sexual assault.

Brass argues that Jury Instruction 18 was improper. Jury 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 action of sexual assault/lewdness." AOB45 (citing 1AA200). Brass believes this instruction was improper because it included lewdness and therefore allowed the jury to convict Brass of lewd acts that were incidental to the sexual assaults. AOB45.

Brass fails to include the rest of Jury Instruction 18:

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

1AA200.

Accordingly, Brass's claim that Jury Instruction 18 allowed the jury to convict him of lewdness that was incidental to the sexual assaults is belied by the record. The jury was specifically instructed that before Brass could be found guilty of sexual assault and lewdness arising from the same sexual encounter, the jury had to conclude that there was an interruption between those acts. The State's closing argument also made clear that Brass "can be found guilty for each interruption of a different sexual act of sexual assault or lewdness." 7AA1529. Finally, as explained *supra* II.A, this instruction was consistent with this Court's holding in Wright, 106 Nev. at 650. Given the overwhelming evidence that Brass was guilty of both lewdness and sexual assaults arising from the same sexual encounter, any claim that this jury instruction was improper fails.

B. The jury was properly instructed regarding dissuading a witness.

Brass argues that NRS 199.305 requires proof of specific intent to dissuade. AOB46. Without that proof, Brass believes that NRS 199.305 "would criminalize conduct based solely on the effect it had on other and would be unconstitutionally indeterminate." AOB46. Brass likens NRS 199.305 to this Court's jurisprudence regarding the crime of pandering which requires specific intent. AOB47. Appellant's argument fails.

At trial, the district court issued Jury Instruction 24 regarding Counts 12 and 19:

> 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;
>
> (b) Commencing a criminal prosecution or a proceeding for the revocation of a parole or probation, or seeking or assisting in such a prosecution or proceeding; or
>
> (c) Causing the arrest of a person in connection with a crime,
>
> or who hinders or delays such a victim, agent or witness in an effort to carry out any of those actions is guilty of a category D felony and shall be punished as provided in NRS 193.130.

1AA206.

Jury Instruction 24 is the exact language contained in NRS 199.305, which makes clear that dissuading a witness from reporting a crime or commencing prosecution does not require a defendant to specifically intend that his threat be successful. While Brass believes this crime is the equivalent of pandering, Brass has failed to provide a single case—from either Nevada or any other jurisdiction—supporting his claim. This failure is fatal. This Court need not consider issues that are not cogently argued. Maresca v. State, 103 Nev. 669, 673 (1987).

Regardless, Brass has failed to establish that this Court should apply its interpretation of NRS 201.300—which criminalizes pandering—to the language of

NRS 199.305(1). While this Court in Ford v. State, 127 Nev. 608 (2011), held that the crime of pandering was a specific intent crime, the court's analysis is inapplicable to NRS 199.305. Ford explained that pursuant to not only the plain language of the pandering statute, but also because of the legislative history of the statute, pandering was a specific intent crime. Id. at 613-14. "NRS 201.300(1), reads as follows: 'A person who: (a) Induces, persuades, encourages, inveigles, entices or *compels* a person to become a prostitute *or to continue to engage in prostitution* ... is guilty of pandering.'" Id. at 613 (emphasis in original).

Notably, these "bad mind" words included in NRS 201.300(1) are absent from NRS 199.305. Instead, NRS 199.305 states that a person is guilty of dissuading a witness from reporting a crime when they intimidate or threaten another person, to prevent or dissuade a victim of a crime. The plain language of the statute is clear that the crime is committed when the threat is issued, and it does not require any conclusion that the defendant specifically issued the threat to prevent a victim from reporting a crime. Further, Brass has not identified what other purpose he could have had when threatening to harm the minor victims if they reported his crimes. Accordingly, Brass's claim fails.

IV. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY REGARDING BAD ACT EVIDENCE

Brass argues that the State admitted numerous uncharged bad acts to the jury through A.W.'s and V.M.'s interview statements and videos. AOB50. Brass argues

this evidence was inadmissible, and the district court should have issued a Tavares instruction prior to this evidence's admission. AOB49-51. Because the district court did not issue this instruction, Brass believes he is entitled to reversal. AOB52. Brass's claim fails.

Brass never objected to the admission of A.W.'s or V.M.'s statements regarding Brass's behavior or to the admission of their forensic interviews.3 Therefore, review of this issue is waived absent plain error. Guy, 108 Nev.at 780. "Reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." Martinorellan, 131 Nev. at 49.

For the admission of uncharged bad acts, "the prosecutor has the burden of requesting admission of the evidence and establishing at a hearing outside the jury's presence that: (1) the incident 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." Tavares v. State, 117 Nev. 725, 731 (2001) (internal quotation marks omitted). If a hearing is not held, this court will not reverse if the record sufficiently establishes the admissibility of

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3 Brass alleges that trial counsel was ineffective for failing to object to A.W.'s testimony or the admission of A.W.'s and V.M.'s forensic interviews. AOB51. However, as claims of ineffective assistance of counsel must first be pursued in post-conviction habeas proceedings, the State has addressed that claim *infra* XI.

the evidence or if the result of the trial would not have been different had the evidence not been admitted. Ledbetter v. State, 122 Nev. 252, 259 (2006). Additionally, the prosecutor has the duty to request the jury be instructed on the limited use of the evidence; should the prosecutor neglect its duty, the district court has a *sua sponte* duty to raise the issue. Tavares, 117 Nev. at 731.

The failure to give a limiting instruction on the use of uncharged bad act evidence is a nonconstitutional error and will only result in reversal if the error "had substantial and injurious effect or influence in determining the jury's verdict." Id. at 732.

However, evidence of an uncharged crime is admissible when it is so closely related to the crime charged that a witness cannot describe the crime without referring to the other act. NRS 48.035(3). This long-standing principle of *res gestae* provides that the State is entitled to present, and the jury is entitled to hear, "the complete story of the crime." Allen v. State, 92. Nev. 318, 549 P.2d 1402 (1976). This Court explained in Dutton v. State, 94 Nev. 461, 464, 581 P.2d 856, 858 (1978), that "the State is entitled to present a full and accurate account of the circumstances of the commission of the crime" even if doing so requires introducing evidence implicating a defendant in an uncharged act.

When the doctrine of *res gestae* is invoked, a hearing on the admissibility of the evidence at issue pursuant to Petrocelli v. State, 101 Nev. 46 (1985), is not

required because "the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts. If the court determines that testimony relevant to the charged crime cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts." State v. Shade, 111 Nev. 887, 894 (1995). Indeed, *res gestae* evidence cannot be excluded solely because of its prejudicial nature. Id. at 894, fn.1. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed unless manifestly wrong. Wesley v. State, 112 Nev. 503, 512 (1996).

Here, Brass first takes issue with A.W.'s testimony that Brass put something in her water and did something to her while she slept. AOB48. Brass avers that A.W. should not have been permitted to testify to this and that the State inappropriately argued this unproved act during closing arguments. AOB49. At trial, A.W. testified that her first memory of Brass was when she was at V.M.'s home and Brass brought her water. 4AA948. A.W. explained that after she drank the water, she fell asleep, and when she woke up her pants were unbuttoned and her side hurt. 4AA948. A.W. did not testify that she believed that Brass drugged her drink or put anything in her water, thereby belying any claim that A.W. testified that Brass put "something" in her water. Additionally, A.W. did not testify that Brass did anything inappropriate to her, and the State did not argue that Brass did so. Instead, during closing arguments, the State referenced A.W.'s forensic interview and preliminary hearing

testimony to establish that her trial testimony was consistent and believable. 7AA1551; 7AA1578-79. In fact, the PowerPoint slide referenced by Brass shows that any reference to this incident only established that A.W.'s recollection of events had been consistent from her forensic interview to her preliminary hearing testimony, to her trial testimony. 9AA1942. Accordingly, any claim that A.W. testified or that the State argued that Brass drugged A.W. and assaulted her is belied by the record.

Moreover, A.W.'s trial testimony regarding this incident was admissible *res gestae* because it pertained to her interaction with Brass, and A.W. needed to talk about the incident at issue for the State to present a full and accurate account of the circumstances of Brass's crimes. Shade, 111 Nev. at, 894.

Brass next takes issue with the admission of A.W.'s and V.M.'s forensic interviews and videos because he believed those statements included references to other uncharged criminal acts. AOB50. Brass specifically takes issue with A.W.'s statements that Brass drugged Kim, threatened to kill Kim, punched R.M., stalked A.W., drove her around while intoxicated, and tapped her phone. AOB50. Moreover, Brass complains that the admission of V.M.'s forensic interview corroborated A.W.'s claim in her forensic statement that Brass tried to kill them in their sleep. AOB51.

However, neither A.W. nor V.M. ever testified to any of these facts and the State never referenced these specific facts in their closing argument. Regardless, all of A.W.'s statements during her forensic interview were relevant *res gestae* because all statements were made within the context of her descriptions of when she remembered Brass sexually assaulting her, describing how Brass was able to have access to sexually assault her or V.M., or explaining why she was afraid of Brass. Next, V.M.'s statement allegedly corroborating A.W.'s claim that Brass tried to kill them is belied by the record. V.M.'s forensic interview shows that she never said Brass tried to kill her mother by turning on the gas and setting the house on fire. 8AA1700-01. Instead, V.M.'s statement was made when describing Brass's threats to her and was an anecdote that her mother said Brass left the gas on at their house. It was not a comment that Brass tried to kill anyone. Id. As these comments were relevant to Brass dissuading's V.M. to report his crimes, any claim that they should not have been provided to the jury fails. Accordingly, Brass's claim that admission of these interviews amounts to error fails.

Finally, despite Brass's claim that the State relied heavily on A.W.'s and V.M.'s forensic interviews during closing argument, the record shows that any argument referencing A.W.'s and V.M.'s statements made in their forensic interviews was not to prove the truth of those statements, but to establish that A.W.'s

and V.M.'s testimony was believable because it remained consistent from their forensic interviews, their preliminary hearing testimony, and their trial testimony. Specifically, the State directed the jury's attention to the credibility and believability instruction and to the different factors jurors can consider when assessing a witnesses credibility, and directed jurors to look at V.M.'s demeanor during her interview and explained how it was clear that V.M. was uncomfortable and did not want to talk about what Brass did to her. 7AA1534-36; 7AA1556; 7AA1575. The State referenced V.M.'s interview a second time to talk about how detailed her description of the rapes were. 7AA1536. The State then referenced V.M.'s interview again to establish that her story had indeed remained consistent. 7AA1539-48.

The State similarly referenced A.W.'s forensic interview for the same reasons: to assess her credibility and believability. 7AA1537-38. The State specifically drew the jurors' attention to A.W.'s demeanor during the interview compared to her demeanor at trial, as well as her memory regarding the specific details of Brass's assault: what she heard, saw, smelled, and felt. Id.; 7AA1556; 7AA1579. The State further argued that A.W.'s statements between her forensic interview, at preliminary hearing, and at trial had all been consistent. 7AA1549-53; 7AA1579. Even Brass used A.W.'s and V.M.'s forensic interviews during closing argument, arguing that their testimonies were not consistent, in support of his theory of defense. 7AA1559-70.

None of those arguments made any reference to uncharged acts or argued that Brass was guilty because of those uncharged bad acts. Any reference to the forensic interviews was solely for the purpose of establishing V.M.'s and A.W.'s credibility. While the State may have referenced these interviews 26 times during both closing and rebuttal arguments, the State also referenced A.W.'s and V.M.'s consistency, believability, credibility and motive to lie 51 times. At trial, whether these victims were being truthful was critical, and as such any reference or argument as to why they should be believed was appropriate.

Finally, the district court did not err in not issuing a limiting instruction prior to the admission of A.W.'s and V.M.'s forensic interviews. As explained, the interviews focused on and detailed the sexual abuse Brass was on trial for. While A.W. and V.M. may have made comments in those interviews about Brass's behaviors they were all made in the context of his abuse and behavior. Moreover, the district court cannot be faulted for failing to comb through the transcripts of V.M.'s and A.W.'s statements to ensure they did not contain information about uncharged crimes. At trial, the State offered to redact certain parts of A.W.'s and V.M.'s interviews, but Brass specifically chose not to have those statements redacted. 4AA902. Given that neither A.W. nor V.M. specifically testified to these other uncharged acts, there was no error for failing to issue a Tavares instruction.

Moreover, Brass used V.M.'s and A.W.'s forensic interviews and preliminary hearing testimony during cross examination and closing argument to insinuate that their trial testimony was inconsistent, incredible, and should not be believed. 5AA999-1002; 6AA1231-33; 7AA1563; 7AA1565-67. Indeed, Brass's entire cross examination of V.M. and A.W. was noting each inconsistency between their forensic interviews and trial testimonies. 5AA999-1002; 6AA1231-33. During closing argument, Brass even went as far as outright accusing all victims of lying:

> **When you look at these inconsistencies, when you look at the evidence that is not there, when you look at the fact that all three children either have lied,** or in once case has been suspected by her mother of lying, when her mother would say to the 911 people that she was bipolar, is that the doubt? What kind of doubt is that? Is that some sort of theoretical doubt? Or is that a doubt based on a reason? Is that a doubt where you're looking at the facts, looking at the reason why that is a doubt? And I would submit to you that that is a doubt based on reason. And a doubt based on reason is a reasonable doubt.

7AA1569 (emphasis added).

To the extent this Court concludes otherwise, Brass's claim nevertheless fails because there was overwhelming evidence of Brass's guilt. A.W. and V.M. consistently testified to the repeated sexual abuse they endured at Brass's hands, and the jury reasonably concluded that they were to be believed. Accordingly, Brass's claim fails.

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V. THE JURY WAS NOT EXPOSED TO PROSECUTOR NOTES AND VICTIM IMPACT TESTIMONY

Brass argues that the State introduced a copy of A.W.'s forensic interview that contained notations made by the prosecutor which improperly drew the jury's attention to highly inflammatory statements that described Brass as a stalker and predator. AOB53 (citing 8AA1778; 8AA1786; 8AA1795). Brass believes these notations "arguably influenced the jury during deliberations." AOB54. Brass further argues that A.W.'s statements made during her forensic interview that A.W. wanted Brass to get the death penalty and get killed; and V.M.'s statements made in her forensic interview that she wanted Brass to get in trouble were improperly admitted and infected the trial with unfairness. AOB54-55. Brass further acknowledges that because trial counsel did not object to the admission of these statements, he has waived appellate review of the issue. AOB55. Nevertheless, Brass claims that there was no possible strategic reason not to object to the admission of A.W.'s or V.M.'s forensic interviews. Id.

As an initial matter, Brass did not object to the admission of A.W.'s forensic interview.4 6AA1312. As such, it is waived. Guy, 108 Nev. at 780. As such, the issue may only be reviewed for plain error. Maestas, 128 Nev. at 146, 275 P.3d at

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4 Brass alleges that counsel was ineffective for failing to object to admitting the forensic interviews containing prosecutor notes. AOB55. However, given that all claims of ineffective assistance of counsel must first be pursued in a post-conviction habeas petition, the State has addressed that claim *infra* XI.

89. "Reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." Martinorellan, 131 Nev. at 49.

Generally, whether a new trial is warranted because the jury was improperly exposed to attorney notes or communications is reviewed for abuse of discretion. U.S. v. Cooper, 868 F.2d 1505, 1522 (6th Cir. 1989). The court must consider that communication's potential impact on a juror's ability to remain impartial. U.S. v. Walker, 1 F.3d 423, 429 (6th Cir. 1993). Specifically, the U.S. Supreme Court has explained that the trial court should "determine the circumstances, the impact thereof upon the juror and whether or not it was prejudicial." Remmer v. United States, 347 U.S. 227, 229-30 (1954).

Brass complains that an underline and markings on A.W.'s forensic interview constituted a third-party attempt to influence the jury. AOB53. Brass specifically points this Court to an underline under the words "he already tried to kill Kim" (8AA1778), a marking near A.W.'s description of Brass as a predator (8AA1786), and a marking by A.W.'s statement about a prior uncharged incident (8AA1795).

None of the cases Brass cites to support his claim are either binding or relevant. Brass cites to U.S. v. Walker, where the court determined that a mistrial was warranted because the jury received highlighted transcripts from a deposition but fails to inform this Court that those transcripts the jury received had already been

deemed inadmissible evidence. 1 F.3d 423, 429 (6th Cir. 1993). The same cannot be said for A.W.'s or V.M.'s forensic interviews. Brass next cites to State v. Sawyer, 263 Wis. 218 (Wis. Sup. Ct. 1953). There, a new trial was granted because "the special prosecutor's written notes substantially stating his concluding argument to the jury were inadvertently taken into the jury room." Id. at 225. However, unlike Sawyer, the markings Brass challenges here contain no statements or conclusions of the State. Sawyer is therefore inapplicable. Finally, Brass relies on United States v. Wood, where the court granted a new trial when the jury received prosecutor notes during deliberations. 958 F.2d 963 (10th Cir. 1992). Those notes were made during witness examinations and included four dates and events that were significant to the government's case, including a statement regarding what the State believed was "the 'critical time period in this case.'" Id. at 965 & 967. Here, unlike Wood, none of the markings challenged by Brass included notes or opinions reached by the State.

Accordingly, all relied upon cases by Brass are distinguishable from what happened here. If anything, those cases establish that what should matter to this Court's analysis is whether the jury was exposed to statements that they should not have been. Pursuant to NRS 51.045(1), a "statement" is defined as "an oral or written assertion." None of the challenged markings constitutes a statement because they do not claim anything.

Taking each challenged marking in turn, Brass cannot show that any marking unduly influenced the jury's ability to remain impartial. While the State may have underlined a statement, that underline does not include any of the State's own thoughts or feelings regarding Brass and any claim that this underline was the final straw that determined the jury's verdict is risible. Regarding the second and third challenged marking, they are nothing more than a stray line that can in no way be interpreted as an attempt to draw the jury's attention to that specific portion of the transcript. 8AA1786. Indeed, Brass has failed to argue, much less establish, that the State intentionally made markings to draw the jury's attention to any statement in the forensic interviews. Even if these markings had done so, Brass does not demonstrate that these marks prejudiced the verdict, both because they were not statements made by the prosecutor or opinions conveyed regarding the case and because Brass fails to establish that the jury even noticed the markings, much less attached any significance to them.

Finally, Brass claims that A.W.'s and V.M.'s statements in their forensic interviews regarding what they thought should happen to Brass should not have been admitted. As explained *supra* IV., A.W.'s and V.M.'s was properly admitted and therefore this claim must also fail. Further, because neither A.W. or V.M. testified at trial to what they thought the appropriate punishment should be, and as the jury did not sentence Brass, any claim that these statements prejudiced the verdict fails.

Further, given the overwhelming evidence of Brass's guilt, any error was harmless. Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Nonconstitutional trial errors are reviewed for harmlessness based on whether the error had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). On the other hand, the test for constitutional errors are "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n.14 (2001) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967)). Here, there was overwhelming evidence of Brass's guilt. Both A.W. and V.M. consistently testified to specific facts and details regarding Brass's abuse including specifics on what he did, how each victim was positioned, where they were, and how it felt. Accordingly, Brass's claim fails.

VI. "GOOGLE MAPS" DATA WAS PROPERLY ADMITTED

Brass argues that the district court improperly admitted Kim's testimony that she looked on her daughter's phone and saw "Google map" data and 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. AOB56. Brass explains that Kim's testimony regarding what she saw on Google maps was inadmissible hearsay. AOB56-57. Brass further claims that

Kim's testimony regarding what Google maps said violated the best evidence rule because it was based on a writing that was not introduced at trial. AOB57. Brass's argument fails.

Brass did not object to Kimberly's testimony regarding the location data she discovered on V.M.'s phone.5 6AA1312. As such, it is waived or, if reviewed at all, reviewed for plain error. Guy, 108 Nev. at 780; Maestas, 128 Nev. at 146, 275 P.3d at 89.

Hearsay is a statement offered to prove the truth of the matter asserted. NRS 51.035. A "statement" is an oral or written assertion, or nonverbal conduct of a person, if it is intended as an assertion. NRS 51.045. This court has further explained that data retrieved from a machine is not a "statement" that could be considered hearsay. State v. Barr, WL 5634157, 471 P.3d 754, *2 n.5 (unpublished) (September 18, 2020) (citing NRS 51.045; see also Commonwealth v. Thissell, 928 N.E.2d 932, 937 n.13 (Mass. 2010) (explaining that, "[b]ecause computer-generated records, by definition, do not contain a statement from a person, they do not necessarily implicate hearsay concerns")).

Additionally, pursuant to NRS 52.255:

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5 Brass alleges that counsel was ineffective for failing to object to Kimberly's testimony. AOB57. However, given that all claims of ineffective assistance of counsel must first be pursued in a post-conviction habeas petition, the State has addressed that claim *infra* XI.

> Except as otherwise provided in NRS 52.247, the original is not required, and other evidence of the contents of a writing, recording or photograph is admissible, if:
>
> 1. All originals are lost or have been destroyed, unless the loss or destruction resulted from the fraudulent act of the proponent;
> 2. No original can be obtained by any available judicial process or procedure;
> 3. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
> 4. The writing, recording or photograph is not closely related to a controlling issue.

NRS 52.255 is better known as the "best evidence rule." This Court has held that this rule applies to admitting copies of writings and not to whether writings must be admitted before a witness may testify to the writing's contents. Tomlinson v. State, 110 Nev. 757 (1994).

Here, at trial Kimberly testified that she learned A.W. was likely also a victim of Brass's abuse when she looked through V.M.'s phone and saw an email chain between V.M. and A.W. looking for abortion clinics and location data showing that the girls had been at Brass's brother's house. 6AA1312. First, Kimberly's testimony about the location data she saw was not hearsay as it was a direct observation of computer-generated data, and therefore properly admitted. Moreover, the testimony was offered to explain how she came to suspect that A.W. was also a victim of Brass's abuse and was not offered to establish that Brass in fact sexually assaulted either A.W. or V.M. at his home. Id.

Second, Kimberly's statements about what location data she saw on V.M.'s phone did not violate the best evidence rule. In fact, the best evidence rule was not even implicated because the State did not move to admit any copy of the data Kimberly testified to. Tomlinson, 110 Nev. at 759. While Brass relies on Stephans v. State, 127 Nev. 712 to claim the opposite, Stephans is inapposite. Stephans held that because the value of items stolen is material to a prosecution for grand larceny, witness testimony to the price tags of specific items implicated the best evidence rule. Id. at 718-19. Unlike Stephans, Kimberly's testimony in the instant case regarding the location data she saw on V.M.'s phone was not material to any element of any of Brass's underlying charges. Therefore, the best evidence rule was not at issue here.

Finally, while the State argued during rebuttal argument that Brass could have taken V.M. and A.W. to his brother's apartment to sexually assault them, that argument does not constitute evidence and did not so infect the trial with unfairness that reversal is warranted. Moreover, that argument was not a reference to Kimberly's statement regarding the location data she saw. 7AA1552. Instead, it was a proper argument that what V.M. believed was a hotel could have been Brass's brother's apartment because her description of what the hotel looked like matched the description of said apartment. Id. This was not an argument that Kimberly's

statement regarding the location data should be relied on as true. Accordingly, Brass's argument fails.

VII. BRASS WAS CONVICTED BY AN IMPARTIAL JURY

Brass argues that four biased jurors: Juror Nos. 334, 484, 492, and 369; were seated even though there was evidence that they could not be impartial. AOB57. According to Brass, all four jurors should have been removed for cause and argues that trial counsel was ineffective for failing to ask Juror Nos. 334, 484, 492 follow up questions after the district court denied counsel's request to remove him for cause; and for failing to challenge juror No. 369. Brass's claim fails.

Before Brass may challenge an empaneled juror on appeal, they must first raise that claim at the trial court. Sayedzada v. State, 134 Nev. 283, 285, 419 P.3d 184, 188 (2018). Failure to do so waives their ability to raise the issue on appeal if the defendant knew about the facts below and did not object. Id. at 288, 419 P.3d at 190. While Brass initially asked to remove Jurors #484 and #492, he did not renew that request after the District Court questioned them further, and he never moved to strike Jurors #334 and #369.6 As such, Brass's claim is waived and should not be considered absent plain error. Guy, 108 Nev. at 780.

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6 Brass alleges that counsel was ineffective for failing to renew his requests to remove these jurors. AOB59. However, given that all claims of ineffective assistance of counsel must first be pursued in a post-conviction habeas petition, the State has addressed that claim *infra* XI.

District courts have "broad discretion" in deciding whether to remove prospective jurors for cause. Weber v. State, 121 Nev. 554, 580 (2005). A juror should be removed for cause if their views "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Johnson v. State, 122 Nev. 1344, 1354 (2006). The critical concern of voir dire is to discover whether a juror "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Adams v. Texas, 448 U.S. 38, 45 (1980); Khoury v. Seastrand, 132 Nev. 520, 530 (2016). A prospective juror may be challenged for cause if they have "formed or expressed an unqualified opinion or belief as to the merits of the action, or the main question involved therein." NRS 16.050(1)(f). However, a prospective juror who has expressed a preconceived bias should not be removed for cause if the record as a whole demonstrates that he could "lay aside his impression or opinion and render a verdict based on the evidence presented in court." Blake v. State, 121 Nev. 779, 795 (2005).

NRS 175.036 provides that "(1) either side may challenge an individual juror…for any cause…which would prevent the juror from adjudicating the facts fairly" and "(2) challenges for cause shall be tried by the court." The plain language of the statute does give parties the right to *directly* question a juror during a for-cause challenge.

Here, taking each challenged juror in turn, all impaneled jurors made clear during vior dire that they could remain impartial and unbiased. First, Juror #334, Armstead, informed the court during initial questions that he was sexually assaulted as a child but believe he could be unbiased. 3AA501. When the district court probed further, Armstead confirmed that nothing about that experience would impact his ability to be fair and impartial in this case. 5AA576. Armstead further confirmed that there was nothing about the nature of the case that would make it difficult for him to sit as a juror, that he could base his verdict solely on the evidence presented at trial and wait to form an opinion until after all evidence had been presented, and that he could be fair and impartial to both sides. 3AA576-77.

When the State asked Armstead additional questions about his childhood, Armstead continued to make clear that he could be fair and impartial to both sides, and that he would be able to separate what happened to him from the evidence presented in this case. 4AA781. Armstead further elaborated that when it comes to determining a witness's credibility, he would not presume that everybody talks about traumatic experiences or describes traumatic experiences the same way he does, and that different reactions do not make a witnesses testimony any less credible. 4AA781-82. Armstead was properly empaneled as a juror and Brass has not pointed to any specific fact or statement indicating that Armstead was not impartial.

Second, Juror #484, Nehme, informed the district court during initial questioning that his mother-in-law had been raped 25 years prior and that he was not sure whether that would influence his ability to remain fair and impartial. 3AA536. As a result of Nehme's answers, Brass moved to strike him from the panel. 3AA558. The State objected to Nehme's removal, and the district court declined to remove Nehme at that time. 3AA559. The district court then asked Nehme follow up questions and Nehme explained that his mother-in-law's rape occurred in a different country and that he could "try to be fair." 3AA588-89.

Nehme further confirmed that there was nothing about the nature of the case that would make it difficult for him to sit as a juror, that he could base his verdict solely on the evidence presented at trial and wait to form an opinion until after all evidence had been presented, and that he could be fair and impartial to both sides. 3AA590. Brass renewed his request to remove Nehme from the jury panel and the district court allowed follow-up examination. 3AA694.

When questioned further by the State, Nehme acknowledged that people could perceive the same event differently and that those different perceptions did not mean the underlying event did not occur. 4AA774. When Brass asked Nehme follow-up questions, Nehme explained that it was reasonable for people to recall details of events differently. 4AA857. Brass did not subsequently renew his motion to strike. Brass reasonably inquired into whether Nehme could remain impartial and when it

became clear that he could be, Nehme was properly empaneled as a juror. Brass has not pointed to any fact or statement indicating that Nehme was not impartial.

Third, Juror #369, Garcia, informed the court during preliminary questions that he had been hit by a drunk driver and that he believed that the perpetrator was not appropriately punished. 3AA603-04. Garcia also informed the court that his mother was the victim of domestic violence. 3AA604-05. Nevertheless, Garcia confirmed that nothing about those experiences would impact his ability to remain fair and impartial in this case. 3AA604-05. Garcia also informed the court that his father sold drugs when Garcia was a child and Garcia felt like he did not do the right thing because of his age. 3AA605. Garcia then told the court that he could try to be fair and impartial in the instant case. 3AA605-06. Additionally, Garcia confirmed that while he became emotional when he heard what the charges were, he could be impartial, believed he could base his verdict on the evidence presented, and be fair and impartial to both sides. 3AA606.

Upon further questioning by the State, Garcia stated that when listening to multiple witnesses testify about the same event, his determination as to each witness's credibility would depend on whether the witness's stories were consistent. 4AA767-68. Garcia acknowledged that two people could perceive the same event differently. 4AA769. Garcia further affirmed that he would not consider punishment when determining Brass's guilt. 4AA783. When Brass asked Garcia follow-up

questions, Garcia explained that it was reasonable for people to remember the same event differently, that adrenaline can impact a person's recollection of events, and that he understood that none of the witnesses were entitled to a presumption that their testimony was truthful. 4AA847-54. Garcia was properly empaneled as a juror and Brass has not pointed to any fact or statement indicating that Armstead was not impartial.

Fourth, Juror #492, Tanner, informed the district court that while he found the nature of the charges troubling, he believed he could base his verdict solely on the evidence presented at trial and wait to form an opinion until after hearing all of that evidence. 3AA641. When Brass moved to remove Nehme from the jury panel, the district court allowed follow-up examination because everyone would find the nature of these charges troubling and that was not enough to strike Tanner from the venire. 3AA694-65.

When the State questioned Tanner further, he explained that depending on a witness's testimony, he would prefer to have that testimony corroborated by additional witnesses. 4AA760-61. Tanner elaborated and explained that this would depend on whether he believed the witness was truthful and that sometimes it was difficult to determine if a person was lying. 4AA762-64. When Brass questioned Tanner further, Tanner confirmed that two witnesses who told different versions of

the same event differently would possibly cast doubt upon their credibility. 4AA845-47.

Based on Garcia's representations, it is clear that he could remain impartial and unbiased. Moreover, the record supports that it was reasonable for Brass not to move to strike Tanner given his belief that contradictory stories about the same event could result in reasonable doubt. While this would not impact Tanner's impartiality, it was nevertheless reasonable for Brass to want him on the jury panel.

Accordingly, Brass's claim that he was denied his right to an impartial jury fails as it is belied by the record. Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made."). All four challenged jurors stated that they would base their verdict on the evidence presented and that they would remain fair and impartial during trial.

VIII. BRASS WAS AFFORDED HIS RIGHT TO A PUBLIC TRIAL

Brass argues that his right to a public trial was violated when the district court excluded two family members of Brass during A.W.'s trial testimony. AOB60. Brass argues that the district court did so without considering any reasonable alternatives and committed structural error for failing to make adequate findings to justify the partial closure. AOB61. Brass's argument fails.

This Court has concluded that the Sixth Amendment of the U.S. Constitution guarantees the accused a right to a public trial. Faezell v. State, 11 Nev. 1446, 1448 (1995). However, this right "is not absolute and must give way in some cases to other interests essential to the fair administration of justice." U.S. v. Sherlock, 962 F.2d 1349, 1356 (9th Cir. 1992) (citing Waller v. Georgia, 467 U.S. 39, 45 (1984)). Indeed, "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court of California, Riverside County,464 U.S. 501, 502 (1984). Moreover, "the right to a public trial 'has always been interpreted as being subject to the trial judge's power to keep order in the courtroom. Were this not so a public trial might mean no trial at all at the option of the defendant and his sympathizers." U.S. v. Hernandez, 608 F.2d 741, 747 (9th Cir. 1979).

There are two types of courtroom closures—total or partial. Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992). A full closure occurs when *all* persons except witnesses, court personnel, and the parties are excluded for the entire proceeding. Id. A partial closure, on the other hand, occurs when a specific group of people are excluded for only a portion of the hearing. Id. Accordingly, whether a courtroom closure is total or partial turns on who is excluded, and not the length of the closure. U.S. v. Thompson, 713 F.3d 388, 395 (8th Cir. 2013). The standard of

review for a defendant's claim of a Sixth Amendment violation of his right to a public trial is de novo. U.S. v. Ivester, 316 F.3d 955, 958 (9th Cir. 2003).

In Waller v. Georgia, the U.S. Supreme Court announced a four-part test to apply before a judge may close a courtroom, *over the objections of the accused*: 1) the party seeking to close the courtroom must advance an overriding interest likely to be prejudiced; 2) the closure must be no broader than necessary to protect that interest; 3) the trial court must consider reasonable alternatives; and 4) the court must make findings adequate to support that closure. 467 U.S. 39, 48 (1984). In 1995, this Court adopted this test. Feazell, 111 Nev. at 1448. Importantly, when a party objects to a partial closure, courts need only advance a "substantial reason," not an overriding interest, when closing a courtroom over a party's objection. Feazell, 111 Nev. at 1488 (citing, Woods, 977 F.2d at 76). Notably, these procedural requirements apply when judges close their courtrooms *over a defendant's objection*. Courts have generally refused to expand Waller to include cases in which the defendant did not object. See, e.g., Downs v. Lape, 657 F.3d 97, 108 (2d Cir. 2011).

As Waller requires a party to object before a court is then required to state the reasons for the closure on the record, Brass has waived the issue of whether the court violated Waller for all but plain error. 7 Guy, 108 Nev. at 780.

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7 Brass alleges that counsel was ineffective for failing to renew his requests to remove these jurors. However, given that all claims of ineffective assistance of

"Where only a partial closure is involved, a court must look to the particular circumstances to see if the defendant still received the safeguards of the public trial guarantee." U.S. v. Sherlock, 962 F.2d 1349, 1352 (9th Cir. 1992) (internal citation omitted). In Sherlock, the Ninth Circuit provided several examples of substantial reasons for partial closures including, protecting a witness from harassment and physical harm, maintaining dignity in a rape trial—particularly for child witnesses—or limiting the fear of testifying in public; avoiding disorder; and maintaining order in the courtroom. 962 F.2d at 1352.

Here, the district court properly closed the courtroom to the public during A.W.'s, V.M.'s, and R.M.'s trial testimony. On the first day of trial, the State moved to close the courtroom during the minor victims' testimony because the witnesses felt intimidated by Brass's family during their preliminary hearing. 4AA897. Brass did not object to the closure and the district court subsequently granted the State's request. 4AA898-99. The district court did not err in doing so.

All three victims were testifying to sensitive and traumatic sexual traumas—a subject the Ninth Circuit has already deemed as a substantial reason to close a courtroom. Sherlock, 962 F.2d at 1352. Further, the record is clear that even with the courtroom closed to the public, the minor victims were terrified. A.W. got on the

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counsel must first be pursued in a post-conviction habeas petition, the State has addressed that claim *infra* XI.

witness stand in tears. 4AA929. V.M. was so soft-spoken, she had to be reminded multiple times to speak up. 5AA1158. While Brass faults the district court for not first considering alternatives or making specific findings on the record, the court would have been required to do so only if Brass objected when the State requested to close the courtroom. As he did not, the court cannot be faulted for allegedly failing to consider reasonable alternatives prior to partially closing the courtroom. Accordingly, Brass was not denied his right to a public trial.

Should this Court conclude that the district court impermissibly closed the courtroom—a point the State does not concede—Brass is not entitled to reversal. In Weaver, the U.S. Supreme Court established a two-part test to determine whether structural error applies in courtroom closure cases: 1) when the effect of the error is difficult to assess; and 2) to protect against unjust convictions that may result when the public or press are denied access to a courtroom. Weaver, 137 S.Ct. at 1910. If neither of those factors are met, the court should assess the error under harmless error.

Here, Brass has not explained how closing the courtroom to the public during the minor victims' testimony prejudiced him or how it resulted in an unjust conviction. Accordingly, any claim of prejudice is a bare and naked assertion suitable only for summary denial.

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IX. DR. CETL'S TESTIMONY WAS PROPER

Brass argues that Dr. Cetl, the State's expert witness regarding the sexual assault exams, was improper for three reasons. First, Brass believes that Dr. Cetl should not have been permitted to testify through audiovisual means. Id. Second, Brass argues that Dr. Cetl should not have been permitted to testify to the testimonial statements made in the SNCAC paperwork that she did not author. AOB63. Third, Brass claims that the court should not have allowed the SNCAC paperwork to be admitted at trial. AOB63. Brass acknowledges that trial counsel did not object to the manner or substance of Dr. Cetl's testimony, or the admission of the SNCAC paperwork, and that appellate review is therefore subject to plain error. AOB63-64. Nevertheless, Brass argues that these errors violated his Confrontation Clause rights and that reversal is therefore required. AOB64.

As an initial matter, Brass did not object to Dr. Cetl's audio visual testimony, her testimony regarding the SNCAC paperwork, or to the admission of that SNCAC paperwork. Consequently, Brass has waived appellate review of his claims for all but plain error.8 Maestas, 128 Nev. at 146.

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8 Brass alleges that trial counsel was ineffective for failing to object Dr. Cetl's testimony. AOB63-64. However, as claims of ineffective assistance of counsel must first be pursued in post-conviction habeas proceedings, the State has addressed that claim *infra* XI.

Additionally, Brass's claim is ripe for summary dismissal. While Brass claims that Dr. Cetl should not have be permitted to testify audio visually or to testimonial statements contained in the SNCAC report she did not offer, Brass has failed to point either this Court or the State to any specific testimonial statement Dr. Cetl testified to or any testimonial statement contained in the SNCAC report admitted to the jury. This Court need not consider issues that are not cogently argued. Maresca v. State, 103 Nev. 669, 673 (1987); NRAP 28(a)(10)(A) requires appellants to support their arguments with citations to relevant parts of the record. Any unsupported arguments are summarily rejected on appeal. Thomas v. State, 120 Nev. 37 (2004). If an appellant fails to do so, the Court need not examine the merits of an argument and may instead dismiss it outright. On this basis alone, the State submits that this Court should dismiss Brass's argument. To the extent this Court chooses to consider the merits of Brass's claim, it still fails.

This Court reviews a district court's evidentiary rulings under an abuse of discretion standard. Mclellan v. State, 124 Nev. 263, 266 (2008). However, whether a defendant's Confrontation Clause rights were violated are "question [s] of law that must be reviewed de novo." Chavez v. State, 125 Nev. 328, 339 (2009). The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. Const. amends. VI; See Pointer v.

Texas, 380 U.S. 400 (1965). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990).

The right to confrontation requires that the witness be placed under oath, the defendant given the opportunity for cross examination, and the factfinder be provided the opportunity to observe the witness's demeanor. Id. at 845-46. See Delaware v. Fensterer, 474 U.S. 15, 22 (1985)("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities through cross examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony); Ohio v. Roberts, 448 U.S. 56, 69 (1980) (quoting California v. Green, 399 U.S. 149, 166 (1970)(oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands.")).

In Maryland v. Craig, 497 U.S. 836, 850 (1990), the United States Supreme Court ruled that the right to confront may be satisfied absent a physical, face-to-face confrontation where the testimony's reliability is otherwise assured and where it is necessary to further an important public policy. Maryland's statutory procedure allowed for child witnesses to testify via one-way closed-circuit television. Id. at 851. While the child witness could not see a defendant during trial, the child witness

had to testify under oath, a defendant had the opportunity to contemporaneously cross examine the witness, and a judge, jury, and defendant were able to see the witness and his or her demeanor while testifying. Id. The United State Supreme Court held that "the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." Id.

In Rivera v. State, 381 S.W.3d 710, 711 (Tex. 2012), Rivera argued that his federal and state rights of confrontation were denied by allowing an active-duty soldier to testify by live video conference. At trial, the crime scene analyst, who found fingerprints on the victim's vehicle, testified using live video conferencing because he was on active duty in Iraq. Id. The Court of Appeals in Texas found that the procedures used did not violate Rivera's rights under the Confrontation Clause. Id. at 713. The Court specifically pointed out that the procedure used allowed the witness to participate in the trial by live video conference while in full view of those participating in the courtroom. Id. "[T]he preference for having witnesses testify in the courtroom must give way to the practical considerations involving [the witness's] military obligation that made his physical presence impractical." Id.

Regarding a witness's physical presence in the courtroom, this Court has established a rule which permits the use of audiovisual testimony at trial in criminal

proceedings. Supreme Court Rules Part IX-A(B). Rule 2 within that Part is entitled, "Policy favoring simultaneous audiovisual transmission equipment appearances," and states:

> The intent of this rule is to promote uniformity in the practices and procedures relating to simultaneous audiovisual transmission appearances. To improve access to the courts and reduce litigation costs, courts shall permit parties, to the extent feasible, to appear by simultaneous audiovisual transmission equipment at appropriate proceedings pursuant to these rules.

(Emphasis added.)

Rule 4 of the same Part provides further guidance on when the use of audiovisual equipment is appropriate:

> 1. Except as set forth in Rule 3 and Rule 4(2), a party or witness may request to appear by simultaneous audiovisual transmission equipment in all other criminal proceedings or hearings where personal appearance is required. Parties may stipulate to appearance by simultaneous audiovisual transmission equipment, but the stipulation must be approved by the court.
> 2. Except as provided in NRS 50.330, the personal appearance of a party or a party's witness is required at trial unless:
>
> (a) The parties stipulate to allow the party or the party's witness to appear by simultaneous audiovisual transmission equipment, the defendant expressly consents to the use of simultaneous audiovisual transmission equipment, and the court approves the stipulation; or
>
> (b) The court makes an individualized determination, based on clear and convincing evidence, that the use of simultaneous audiovisual transmission equipment for a particular witness is necessary and that all of the other elements of the right of confrontation are preserved.9

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9 Supreme Court Rule Part IX-A(B)(4) was subsequently amended, those changes went into effect February 25, 2019. However, because the State's Motion was

Thus, where applicable, Nevada Courts must allow witnesses to testify via audiovisual transmission equipment.

Additionally, the Confrontation Clause is "generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination[.]" Delaware v. Fensterer, 474 U.S. 15, 22 (1985). The United States Supreme Court has held that the Confrontation Clause does not apply to out-of-court statements that are nontestimonial. Crawford v. Washington, 541 U.S. 36 (2004). Testimonial statements are inadmissible unless (1) the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine them. Crawford v. Washington, 541 U.S. 36, 53–54 (2004).

To determine whether statements made to police are testimonial, this Court applies the test developed in Davis v. Washington, 547 U.S. 813, 822 (2006). Harkins v. State, 122 Nev. 974, 983 (2006). In Davis, the U.S. Supreme Court explained that statements made to the police during an ongoing emergency are nontestimonial; whereas statements are testimonial when made for the primary purpose of investigating a past event which may be relevant to criminal prosecution. Davis, 547 U.S. at 822.

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litigated on October 30, 2018, and the instant offenses were committed between 2015 and 2015, the old version of Supreme Court Rule Part IX-A(B)(4) applies. State v. Quinn, 117 Nev. 709, 712 (2001).

Here, the district court correctly granted the State's Motion to Allow Dr. Sandra Cetl to Appear by Simultaneous Audiovisual Transmission Equipment, and Dr. Cetl's testimony and admission of the SNCAC was proper. The State filed a Motion to Allow Dr. Cetl to Appear by Simultaneous Audiovisual Transmission Equipment on October 18, 2018—over a year prior to trial. 1AA94-103. In that Motion, the State made clear that Dr. Cetl was unavailable to testify in person because she "recently relocated to another State." 1AA102. On the date set for argument on the State's Motion, Brass made no objection, and the Motion was granted. 2AA356. While Brass now faults the court for granting the State's Motion without first determining whether Dr. Cetl's "lack of presence [was] 'necessary to further an important state interest,'" Brass's own stipulation to allow Dr. Cetl to testify audio visually negates any claim that the court was required to conclude that Dr. Cetl's absence was absolutely necessary. Accordingly, the district court did not err in granting the State's Motion to Allow Dr. Cetl to Appear by Simultaneous Audiovisual Transmission Equipment.

Even on appeal, Brass has failed to establish why it was necessary for Dr. Cetl to testify in person. Brass has not articulated a single question Brass could not ask during cross examination that he was prevented from asking as a result of Dr. Cetl's audio visual testimony, nor has he alleged that the other elements of confrontation were missing from her testimony. Therefore, Brass's claim is nothing more than a

bare and naked assertion suitable only for summary denial. "Bare" and "naked" allegations are not sufficient to support appellate relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502 (1984).

Second, Dr. Cetl's expert testimony regarding V.M.'s and R.M.'s SNCAC reports was proper. As an initial matter, while Brass claims that Dr. Cetl was not present during V.M.'s and R.M.'s medical exam, Dr. Cetl's trial testimony belies this claim. 5AA1119. While Peirce authored the reports, Dr. Cetl specifically testified that she was present for both V.M.'s and R.M.'s exams and reviewed all of the pictures taken and conclusions reached during the exam. Id. Accordingly, the record is clear that Dr. Cetl had the personal knowledge needed to testify to V.M.'s and R.M.'s SNCAC report.

Further, none of Dr. Cetl's testimony regarding the substance of those reports was hearsay, let alone testimonial hearsay.

NRS 50.275, governing "Testimony by experts," permits expert witness testimony in the following circumstances:

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

NRS 50.275 (emphasis added).

NRS 50.285 further states as follows:

1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Based on the statutory language above, even if Dr. Cetl was not present during R.M.'s and V.M.'s medical exam, her testimony regarding the reports was nevertheless proper because she used those reports to reach her conclusions. Moreover, none of her statements were testimonial. Dr. Cetl is not law enforcement, and she did not testify to any out of court statements from V.M., R.M., or Peirce. Dr. Cetl was present while both children were medically evaluated for signs of sexual trauma. Additionally, Dr. Cetl never testified to statements Pierce made during the course of her evaluations. Brass has not identified any out of court statements made to either Dr. Cetl or Pierce that Dr. Cetl testified to or that were admitted through the SNCAC reports. Accordingly, any claim that Dr. Cetl testified to inadmissible testimonial hearsay fails.

Third, for the same reasons articulated above, the district court properly admitted V.M.'s and R.M.'s SNCAC reports. That those reports noted that abuse was probable does not make the SNCAC reports or conclusions contained within them testimonial hearsay. V.M. and R.M. were medically evaluated to address the ongoing emergency of determining whether these minor children had been sexually abused. Any statement made by either victim would have been admissible hearsay

as a statement made for purposes of medical diagnosis or treatment. NRS 51.115 ("Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof are not inadmissible under the hearsay rule insofar as they were reasonably pertinent to diagnosis or treatment.").

Accordingly, Brass's claim that his right to confront witnesses was violated fails. The method and substance of Dr. Cetl's testimony was proper.

X. THERE WAS NO PROSECUTORIAL MISCONDUCT

Brass argues that the State engaged in prosecutorial misconduct by arguing that Brass tailored his testimony and fabricated evidence during closing arguments, asked Brass if the witnesses were lying to the evidence presented, speculated regarding unproved and uncharged bad acts, and improperly vouched for A.W. and V.M.'s credibility during closing arguments. AOB64-68.

As an initial matter, like the rest of Brass's claims, he did not object to these arguments below and has therefore waived review of this argument for all but plain error.10 Maestas, 128 Nev. at 146. When resolving claims of prosecutorial

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10 Brass alleges that trial counsel was ineffective for failing to object to prosecutorial misconduct. AOB64-65. However, as claims of ineffective assistance of counsel must first be pursued in post-conviction habeas proceedings, the State has addressed that claim *infra* XI.

misconduct, this Court undertakes a two-step analysis: 1) determining whether the comments were improper; and 2) deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188 (2008). This Court views the statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189 (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. at 1189.

"[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented." Id., (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992)). Further, the State may respond to defense theories and

arguments. Williams v. State, 113 Nev. 1008, 1018-19 (1997). This includes commenting on a defendant's failure to substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116 Nev. 752, 762 (2000) (citing State v. Green, 81 Nev. 173, 176 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.")).

The Nevada Supreme Court has noted that "statements by a prosecutor, in argument, . . . made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392 (1993) (quoting, Collins v. State, 87 Nev. 436, 439 (1971)). Ultimately, the State is permitted to offer commentary on the evidence that is supported by the record. Rose v. State, 123 Nev. 194, 209 (2007).

To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process and must consider such statements in context, as a criminal conviction is not to be lightly overturned. Thomas v. State, 120 Nev. 37, 47 (2004). When evidence of guilt is overwhelming, even a constitutional error can be insignificant. Haywood v. State, 107 Nev. 285, 288 (1991); State v. Carroll, 109 Nev. 975, 977 (1993).

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A. The State did not make a generic tailoring argument.

In Portuondo v. Agard, the United States Supreme Court defined two categories of accusations—specific and generic—and held that a defendant's rights are not violated when the State makes a generic argument that their presence in the courtroom afforded them the opportunity to change their testimony to comport with other witness statements. 529 U.S. 61, 71-72 (2000). In doing so, the court explained that comments that a defendant would have a motive to alter is testimony, was "a consideration the jury was to have in mind when assessing the defendant's credibility, which, in turn, assisted it in determining the guilt of the defendant." Id. Indeed, the court specifically held:

> In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

Id. at 73.

While this Court in Woodstone v. State, indicated that it was hesitant to adopt Portundo's holding, it did so only as it pertained to Woodstone's accusation that the State asked him whether he changed his testimony based on other witness testimony. WL 959244, 435 P.3d 657, *1 (February 22, 2019) (unpub.). Moreover, the

Woodstone court declined to consider whether it would depart from Portundo's majority opinion because Woodstone did not object to the State's questions. Given the lack of objection to the State's argument here, this Court should do so as well. Moreover, Woodstone made clear that it took issue with the State asking the defendant if he was lying. That is not what Brass claims now.

Instead, Brass takes issue with two arguments made by the State. First, during closing argument, when arguing that A.W.'s and V.M.'s testimony was credible, the State argued that even Brass could not explain why A.W. or V.M. would have a motive to lie. 7AA1539. This argument was in no way a claim that Brass tailored his testimony based on what the victim's testified to.

Second, during rebuttal argument, the State argued that all the questions regarding determining whether a witness had a motive to lie applied to Brass's trial testimony as well. 7AA1573-74. Brass believes this was not only an argument that he tailored his testimony, but also an argument that he fabricated evidence. Neither claim has merit.

During cross examination, the State never accused Brass of fabricating evidence. Instead, when the State asked Brass if Kimberly ever accused him of sexually abusing V.M. while they dated, Brass offered that information, and the State did not follow up on it:

> Q And after your relationship did Kim ever accuse you of any allegations of sexual assault; is that fair to say?

A That's correct. Actually, Kimberly said that her aunt moved in the next month, which was September 2016, and she says that also her aunt stayed with her maybe two weeks to a month and she kicked her out because of those accusations, which would have been before November of 2016 where the supposed allegations come from. So in essence Venice accused, or accused Trinity of these things before the events in November of 2016 supposedly ever occurred.

Q So, Mr. Brass, going back to my question, which asked for a yes or no and Mr. Posin can follow up with you on redirect, Kim never accused you of any types of allegations against her?

A No.

7AA1488-89.

During rebuttal, the State then explained that Brass's testimony was the only testimony that was not consistent between A.W. and V.M. and argued that this could be explained because Brass had a motive to lie. Id. The State further explained that this would explain why his testimony regarding when Kimberly told him that V.M. said her cousin abused her was not consistent with any other witnesses'. Id. This argument was not an allegation that Brass fabricated any evidence, instead it was an argument that Brass's testimony was not credible. Moreover, this argument was supported by specific evidence because V.M. and Kimberly consistently testified that V.M. did not accuse her cousin of being her abuser until after Kimberly suspected Brass of harming her daughter, months after Brass claimed he first learned that V.M. stated her cousin hurt her. 6AA1216; 6AA1308; 7AA1488-89. Accordingly, any claim that the State engaged in misconduct by alleging that Brass tailored his trial testimony fails.

B. The State did not ask Brass whether other witnesses lied.

This Court has held that prosecutors may not ask a defendant whether other witnesses have lied unless the defendant directly challenged those witnesses' truthfulness during direct examination. Daniel v. State, 119 Nev. 519, 519 (2003). The rule does not prohibit the prosecutor from asking a defendant whether the testimony of other witnesses is inconsistent with that of the defendants. Id. Accordingly, prosecutors may question a defendant about whether their version of events are inconsistent with the testimony of other witnesses. "Violations of the rule are subject to harmless-error review under NRS 178.598.52" Id. at 519. Pursuant to this harmless-error analysis, the question for the court is whether the prosecutor acted with any wrongful intent that resulted in prejudice. Gaxiola, 121 Nev. at 654.

Here, the record belies Brass's claim that the State asked him whether V.M. and A.W. were lying. Instead, the record shows that during Brass's trial testimony, the State impeached him with his own statement to police wherein he told law enforcement he could not think of a reason why the girls would lie. 7AA1493. This was not a question as to whether V.M. or A.W. were truthful during trial.

Regarding Brass's claim that the State asked Brass whether V.M. and Kimberly were lying regarding V.M. first identifying her cousin as her abuser, it should be noted that prior to the State asking Brass any questions regarding this fact,

during Brass's cross examination of V.M., he accused her of being a liar regarding this claim:

> A Yes.
> Q But that was a lie, wasn't it?
> A Yes.
> Q Or was it?
> A It was a lie.
> Q You were willing to lie about somebody touching you and hurting you.
> A Yes.

6AA1231.

Given that Brass called V.M. and Kimberly's truthfulness into question, the State was entitled to follow-up with that claim during Brass's trial testimony. Additionally, on re-direct examination, Brass testified that Kimberly told him V.M. disclosed to her that her cousin was abusing her months prior to when both Kimberly and V.M. testified that V.M. claimed that it was her cousin and not Brass who abused her. 7AA1495-96. Based on Brass's cross examination of V.M. and his trial testimony, the State properly clarified that Brass's testimony was inconsistent with V.M.'s and Kimberly's. 7AA1496.

Accordingly, Brass has failed to establish any error. Moreover, Brass cannot establish that he was prejudiced by these questions because, contrary to Brass's claim, the State did not argue during closing argument that Brass accused any of the victims of lying. Instead, when the State argued that none of the victims had a motive

to lie, the State bolstered that argument with Brass's own admission to police that he could not think of a reason why these victims would lie. 7AA1538.

Finally, given the overwhelming evidence of Brass's guilt, any error was harmless. Daniel, 119 Nev. at 519. Both V.M.'s and A.W.'s testimony about Brass's crimes remained consistent and believable. Given this consistency, the prosecutor did not act with any wrongful intent when clarifying with Brass that neither V.M. or A.W. had any motive to lie and that his testimony was the only inconsistent version of events presented to the jury. As such, these comments or questions can hardly be deemed to have prejudiced Brass. Accordingly, while the State does not concede any error, any error would have been harmless.

C. The State did not speculate about unproved and uncharged bad acts.

The State may respond to defense theories and arguments. Williams, 113 Nev. at 1018-19. "[S]tatements by a prosecutor, in argument, . . . made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker, 109 Nev. at 392.

Here, during rebuttal argument, the State made the following argument:

> Ask yourselves, they had -- this is the -- a quote from the Defense closing: A lot of time to get their stories straight and to grow together. Really? Is that really what happened? Wouldn't they know the hotel? Again, wouldn't RaRa and Venice come in here and say the exact same thing?
>
> We ask that you use your common sense. The whole -- I mean, he worked at Sprint, and Mr. Posin tried to make it into the same phone company, but I'm pretty sure **1:04:18 [sic] Mr. Brause [sic] was

> clear on that, that it was two different phone companies, and he received training from two different phone companies, both Sprint and Apple. If anybody could do what Arianna's saying that he did, it's probably him.
>
> And also, why would the kids say that if he didn't really do it if they know that they're not going to be able to find it on their phone? Arianna asked multiple times during her forensic interview, look through my phone. Look through it. Didn't you guys find it in there? Why would they say that if they're lying and they're concocting this story to get the Defendant in trouble? For what reason? There's none. There's just none that has been given to you, nothing that you have heard in this courtroom would be a reason for them to make this up.

7AA1574-75.

Brass now claims this argument improperly commented on an unproved claim that Brass hacked into the victim's phone. AOB67. This argument was a proper response to Brass's closing argument:

> What about Arianna talking about he was blowing up my phone. He was blowing up my phone. And now, well, he somehow remotely erased all that information. It's just not there. Use your commonsense. Does that happen? Can that happen? Can that happen with somebody who actually works for a phone company? In this case, Apple. It had been Sprint, but now it's Apple. Maybe he has some super secret information about how to do that. But guess what? He was, essentially, in a position of a telemarketer. This is not a man who has advanced degrees. This is not a man who has advanced training.

7AA1566-67.

Accordingly, while A.W. may not have testified that she believed that Brass hacked into her phone, the State's comment during rebuttal that Brass had the ability to erase information was a proper response to Brass's claim that A.W. should not be believed because there was no cell phone evidence corroborating her claims.

D. The State did not engage in improper vouching.

"The prosecution may not vouch for a witness. See Browning v. State, 120 Nev. 347, 359, (2004). "Such vouching occurs when the prosecution places 'the prestige of the government behind the witness' by providing 'personal assurances of [the] witness's veracity.'" Id, (quoting United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992) (internal quotation marks omitted)).

Here, Brass contends that the following statements made during the State's rebuttal argument constituted improper vouching:

> The whole willing to lie in the forensic interview with Venice, I urge you to look through that interview. If you want to re-watch it and play every single minute of it with you, look through the transcript. She is asked at the end -- I believe Elizabeth's exact words, "Is there anything else you want to tell me about?" After being in there for three to four hours, she says no. She doesn't lie. She doesn't say nothing never happened with Arianna. She's not specifically asked that question. She says, "No, I don't want to talk about anything else," which wasn't a lie.

7AA1575.

> They have nothing to gain. They were subpoenaed to come to court. They were sworn to tell the truth, and that's exactly what they did. They didn't have a choice in the matter. The only person that had a choice was the Defendant when he chose these victims, when he chose to do what he did to them. That's the only person that had the choice.

7AA1577.

Neither statement constitutes improper vouching. Instead, the State's first argument regarding V.M.'s truthfulness during her forensic interview was not a

personal assurance that the State believed V.M. Instead, it was an argument that V.M. did not lie in her interview because she answered the interviewer's question about whether she wanted to tell the interview anything else honestly. Similarly, the second argument regarding the fact that V.M. and A.W. testified truthfully at trial was not a personal assurance that either victim was honest. Instead, it was an argument that neither one had anything to gain from testifying and that their testimony should therefore be believed. Moreover, given the overwhelming evidence of Brass's guilt, any alleged error was harmless. Accordingly, Brass's claim fails.

XI. TRIAL COUNSEL WAS NOT INEFFECTIVE

Brass argues that for all of the above reasons, this Court should deem that trial counsel was ineffective. AOB69-70. According to Brass, taken together, these claims establish deficient performance and there is no need for an evidentiary hearing. AOB70. Brass's claim fails.

This Court has held that "claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings." Franklin v. State, 110 Nev. 750, 752 (1994) (d*isapproved on other grounds by* Thomas v. State, 115 Nev. 148 (1999)). In order for this Court to review claims of ineffective assistance of counsel on direct appeal it must be clear from the trial record that counsel was ineffective *per se*. Mazzan v. State, 100 Nev. 74, 79-80 (1984). Accordingly, unless

a claim of ineffective assistance of counsel can be decided without an evidentiary hearing, the issue should not be considered in a direct appeal from a judgment of conviction but, should be raised first in front of the district court in a petition for post-conviction relief so that an evidentiary record regarding counsel's performance at trial can be created. Pellegrini v. State, 117 Nev. 860, 883 (2001); see also Feazell v. State, 111 Nev. 1446, 1449 (1995); Gibbons v. State, 97 Nev. 520, 523 (1981); Wallach v. State, 106 Nev. 470, 474 n.1 (1990).

Here, for every objection trial counsel failed to make, Brass now accuses counsel of deficient performance. AOB69. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or raise futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

As articulated above, none of Brass's claim have merit so it follows that any claim of ineffective assistance of counsel would likewise fail. Specifically, as explained *supra* I, the district court properly denied Brass's eleventh-hour motion to substitute counsel and to the extent Brass wishes to challenge Posin's unchallengeable strategic decisions, an evidentiary hearing would first be required to allow Posin the opportunity to explain the method behind his trial strategy of focusing on attacking the credibility and truthfulness of each victim. Next, as explained *supra* VII, any claim that counsel allowed biased jurors to sit on the jury is belied by the record. As explained *supra* VIII, the State's request for a partial

courtroom closure during the minor victims' testimony was proper and Brass has failed to establish how counsel's objection would have altered the court's decision.

As explained *supra* IV and V, the district court properly admitted the victims' forensic interviews and counsel reasonably used them in his trial strategy to argue that the victim's stories were not believable. As articulated *supra* IX, the district court did not err in allowing Dr. Cetl's trial testimony or the admission of V.M.'s and R.M.'s SCANC report because it did not contain testimonial hearsay, meaning any objection would have been futile. As articulated *supra* VI, Kimberly's testimony regarding the Google map data was proper meaning any objection would have been futile. As articulated *supra* III, all jury instructions were proper meaning any objection would have been futile. Finally, as explained *sura* X, because the State did not engage in misconduct any objection necessarily would have failed. Accordingly, not only is this claim inappropriately raised on direct appeal, but it must also fail as the basis for the claims are meritless.

XII. THERE WAS NO CUMULATIVE ERROR

Brass argues that the cumulative effect of all of the errors detailed above entitle him to reversal. AOB71. Brass's claim fails. The Nevada Supreme Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17 (2000). Appellant

must present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533 (1975) (citing Michigan v. Tucker, 417 U.S. 433 (1974)).

Appellant has failed to demonstrate the cumulative error warrants reversal. The issue of guilt was not close and all of the alleged errors are either meritless or belied by the record.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court AFFIRM Brass's Judgment of Conviction.

Dated this 4th day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 24,147 words.
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 4th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 4th day of June, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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