IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS JASON BERNAL, Appellant

v.

STATE OF NEVADA, Respondent

Docket No. 82465

RESPONDENT'S ANSWERING BRIEF

Appeal from a Judgment of Conviction from the

Third Judicial District Court in and for Lyon County, Nevada

District Court Case No. 20-CR-00099

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I. ROUTING STATEMENT

This matter is a direct appeal from a judgment of conviction after a jury verdict involving a Category A Felony. This matter is not presumptively referred to the Court of Appeals pursuant to NRAP 17(b). Nor is this case within the cases that must be retained by the Supreme Court. NRAP 17(a). This matter can be decided by either the Supreme Court or the Court of Appeals.

II. ISSUES PRESENTED FOR REVIEW

The Appellant sufficiently presented the issues.

III. STATEMENT OF THE CASE

The State of Nevada charged Appellant by Information with three counts of sexual assault. Mr. Bernal entered a not guilty plea to the charges. Mr. Bernal filed several motions, including a Motion to Suppress Mr. Bernal's confession to law enforcement. The district court denied the motion to suppress after an evidentiary hearing.

The case proceeded to jury trial. The jury acquitted Mr. Bernal of counts I and II, and found him guilty of Count III, sexual assault of a child, following a four day jury trial. The district court sentenced Mr. Bernal in accordance with the sentence set forth in NRS 200.366, to life in prison with the possibility of parole after twenty-five (25) years. Mr. Bernal filed a timely appeal of his conviction.

IV. STATEMENT OF FACTS

H.S. was sixteen years old (born 7-20-2004) and a junior in high school when she testified at the trial about Mr. Bernal's sexual abuse of her. 3 AA 612. Mr. Bernal was the step father of H.S. 3 AA 622-23. H.S. described how when she was in the ninth grade Mr. Bernal put his fingers in her vagina. 3 AA 642. Mr. Bernal was rubbing her legs and put his fingers in H.S. vagina. *Id*. He did this in H.S. room at the house in Yerington. H.S. confirmed that the unwanted sexual penetration by the defendant occurred between the months of December 2018 and February 2019. 6 AA 655.

Patricia, H.S. mother, testified that H.S. is a smart, fine young lady. 3 AA 703. Patricia married Mr. Bernal and they lived to together with Patricia's children as described by H.S. On July 14, 2019, Mr. Bernal sent a text message to Patricia saying that she need to come home because they had something that he needed to talk about with her. 3 AA 719. The two exchanged more text messages and Mr. Bernal stated on one text, "K. babe, but hurry home please. We need to talk. Love you." 3 AA 721. When Patricia arrived home, Mr. Bernal was standing at the door and he was agitated and upset. 3 AA 722. The two went into their bedroom. Patricia noticed that he had packed his backpack. Mr. Bernal told Patricia that he had done something that he wasn't sure could be fixed and that he had been inappropriately touching her daughter in her private parts for a while now. 3 AA

723. Mr. Bernal told her that he had penetrated her vagina with his fingers and grabbed H.S. Patricia was understandably upset and told Mr. Bernal he had to leave. 3 AA 724. Patricia confirmed with H.S. that what Mr. Bernal told her happened. H.S. confirmed that it happened. 3 AA 725.

Lyon County Sheriff Detective Messmann interviewed Mr. Bernal. During the course of the interview Mr. Bernal told detective Messmann about a dream he had about H.S. where she was an adult and that he dreamed of having sex with H.S. and that H.S. had become pregnant with his child. 4 AA 779. Mr. Bernal also admitted to Detective Messmann that while he was massaging H.S. leg, he had some CBD cream on his hands and he had slipped and he had "entered her." 4 AA 779. He estimated this happened in January or February 2019. 4 AA 780. He stated this happened in H.S. bedroom in the house in Yerington. 4 AA 781. Mr. Bernal told Detective Messmann there was a piece of paper on the floor which caused him to slip and that is when it happened. 4 AA 781. The jury watched the video of Mr. Bernal's admission. 4 AA 782.

Dr. Piasecki testified regarding reporting of child sexual abuse by children, including the reasons adolescents delay reporting or do not report sexual abuse. 4 AA 848-49. She also testified the nondisclosure is common. 4 AA 850. She testified that from her review of the reports in this case the reporting in response to a direct questions is typical in cases where there is a long period of nondisclosure

with the a close family member being the abuser and that the abuser had already reported so it was no longer the victim's responsibility so the victim was no longer personally responsible for anything at would happen as a result. 4 AA 851-52.

Jennifer McCann interviewed H.S. at the Child Advocacy Center in Reno, Nevada. Jennifer is a trained forensic interviewed and at the time of her testimony she had performed 785 forensic interviews at the time she testified in this case. 4 AA 883. H.S. told Ms. McCann that Mr. Bernal had fingered her. 4 AA 889. Ms. McCann used a diagram to have H.S. confirm that Mr. Bernal had fingered her vagina. 4 AA 890.

The defense offered witnesses that were not present during the sexual abuse allegations for which Mr. Bernal was found guilty by the jury. Mr. Bernal testified that he met with Patricia at the house on July 14, 2019, and told her "so evidently I've been molesting HS since I want to say December." 4 AA 947. Mr. Bernal said that Patricia did not take it very well. Mr. Bernal testified that the detective contacted him and he agreed to go to the Silver Springs station for an interview. 4 AA 950. They agreed to schedule it when Mr. Bernal had a day off from work. Mr. Bernal testified that he told Detective Messmann that he slipped on a piece of paper and penetrated HS's vagina. 4 AA 963. Mr. Bernal continued to massage HS legs even after allegations were made that he was molesting HS. 4 AA 965. Mr. Bernal stated during the interview "it's supposedly just the finger and that's

when I laid it all out and then I went ahead and I let it slip in once and I didn't mean to. You want to know what was bugging me for all this time that's what was bugging me." 4 AA 967. Mr. Bernal confirmed that the detectives provided him with apple pastries, chips and water during the interview. 4 AA 965-66. That Detective Messmann told him during the interview at the Silver Springs Sheriff's station that Mr. Bernal could get up and walk out the door at any time. 4 AA 967.

Dr. Davis, and expert in false confessions, testified regarding false confessions on behalf of the defendant. Dr. Davis discussed in detail the research and information regarding false confessions. 4, 5 AA 983-1068. The jury heard many of the issues related to interrogation and interviews and false confessions from this expert. The jury was able to consider this evidence in evaluating Mr. Bernal's confession to law enforcement and his admission to Patricia, his wife. The defense also had Dr. William O'Donahue testify regarding sexual abuse.

The defense offered a theory of the defense instruction which read "Mr. Bernal's theory of the defense is that H.S. falsified the allegations in this case to remove him from her life because he was the primary disciplinarian in the home and law enforcement coerced Mr. Bernal into providing a false confession." 5 AA 1201. The defense did not offer any other theory of the defense instructions and the defense did not request an instruction regarding the voluntariness of the confession.

The court sentenced Mr. Bernal to life in prison with parole after twenty-five years. 5 AA 1229-30. The court considered letters provided on behalf of the defendant and other information at sentencing. 5 AA 1215-1223. Mr. Bernal filed a timely appeal of his conviction.

VI. SUMMARY OF THE ARGUMENT

The conviction is this case should be affirmed. The victim's testimony alone constituted sufficient evidence to support the jury verdict, however, the jury also heard the confession Mr. Bernal made to law enforcement and the admission he made to Patricia, his wife, that he had sexually assaulted H.S. by digitally penetrating her vagina.

The district court properly ruled that the defendant's admission was admissible because it did not amount to custodial interrogation and it was voluntary based on the totality of the circumstances.

The defense offered and the district court gave a theory of the defense instruction which included that Mr. Bernal's confession was false. This aligned with the defense case and the expert testimony presented by the defense. The district court did not need to give an additional instruction on voluntariness of the confession as it would have been confusing in light of the theory of the defense instruction.

The district court properly admitted evidence regarding a dream of a sexual nature involving H.S. because it was relevant and more probative than prejudicial.

Defense counsel had wide latitude in jury voir dire and was permitted to ask as many questions and necessary to evaluate potential jurors for the case. The district court did not violate Mr. Bernal's right to a fair trial by limiting slightly the court's questions during voir dire because of the circumstances surrounding the case, including the COVID pandemic.

The Nevada sentencing structure for sexual assault on a child does not violate the Nevada or United States Constitutions simply because the statute requires the district court to impose a life sentence. The sentence and conviction must be affirmed.

VII. ARGUMENT

A. The State Presented Sufficient Evidence to Sustain the Jury Conviction of Sexual Assault on a Child Under the Age of Sixteen.

STANDARD OF REVIEW

"The standard of review [when analyzing the sufficiency of evidence] in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " Additionally, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility

of witnesses. ” *Nolan v. State*, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006)(citations omitted). It is well established law in Nevada that in a child sexual abuse case, a jury may convict upon the uncorroborated testimony of the victim. *Deeds v. State*, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981).

ARGUMENT

The victim testified regarding the sexual penetration for which the defendant was convicted. 3 AA 655. Mr. Bernal told Patricia, H.S.'s mother, that he sexually assaulted H.S. Mr. Bernal also told Detective Messmann that he sexually assaulted H.S. and provided the timeframe which matches the timeframe contained in the Information. 4 AA 780; AA 2. This evidence is sufficient evidence to support the conviction for Count III. Taking the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the charged sexual assaults beyond a reasonable doubt. Accordingly, Rose's conviction was supported by sufficient evidence. *Rose v. State*, 123 Nev. 194, 203–04, 163 P.3d 408, 414–15 (2007).

This court has often stated that where there is conflicting testimony presented at a criminal trial, it is within the province of the jury to determine the weight and credibility of the testimony. *Wicker v. State*, 95 Nev. 804, 603 P.2d 265 (1979); *Hankins v. State*, 91 Nev. 477, 538 P.2d 167 (1975). When there is substantial evidence to support a verdict in a criminal case, as there is in this case,

the reviewing court will neither disturb the verdict nor set aside the judgment. *Gatlin v. State*, 96 Nev. 303, 608 P.2d 1100 (1980); *Sanders v. State*, 90 Nev. 433, 529 P.2d 206 (1974). *Deeds v. State*, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981).

The victim did provide some particularity in this case. Child victims are often unable to articulate specific times of events and are oftentimes reluctant to report the abuse to anyone until quite some time after the incident. *Cunningham v. State*, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). The victim is not required to specify exact number of incidents. *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). The testimony of the victim in this case is sufficient to support the conviction based on *Cunningham, LaPierre* and *Rose*, since the victim testified with specificity and the time frame, including such information as her teacher and what grade she was in at the time of the sexual assault.

In this case you have not only the victim's testimony regarding the incident, but you also have the defendant's confession to law enforcement and admission to Patricia. The jury heard evidence from the victim, the victim's mother, and several other witnesses. This included expert testimony presented by both the State and Mr. Bernal. The jury could draw reasonably inferences from that evidence to support the jury's guilty verdict with respect to Count III, sexual assault on a child occurring between December 2018 and February 2019. By any measure, sufficient evidence supports the jury's verdict in this case.

Mr. Bernal asks this court to disregard long-standing legal standards and weigh and evaluate the evidence to reach a different conclusion than the jury. The facts and law do not permit that in this case.

B. The District Court Properly Denied the Pretrial Motion to Suppress the Statement Made by Mr. Bernal to the Police, as the Statement was Not Made in Violation of Miranda and the Statement did not Deprive Mr. Bernal of His Fifth Amendment Right to Remain Silent and Sixth Amendment Right to Counsel

STANDARD OF REVIEW

A trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). The proper inquiry requires a two-step analysis. The district court's purely historical factual findings pertaining to the "scene- and action-setting" circumstances surrounding an interrogation is entitled to deference and will be reviewed for clear error. However, the district court's ultimate determination of whether a person was in custody and whether a statement was voluntary will be reviewed de novo. *Id.* On appeal, if substantial evidence supports the district court's finding that the confession was voluntary, then the district court did not err in admitting the confession. *Gonzales v. State*, 131 Nev. 481, 491, 354 P.3d 654, 661 (Nev. App. 2015). Additionally, even if the

admission of a confession is deemed to have been erroneous, reversal is not required if the error was harmless. *Id.*

ARGUMENT

The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning. *State v. Taylor,* 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998). "Custody" for *Miranda* purposes means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel "at liberty to terminate the interrogation and leave." *Rosky v. State,* 121 Nev. at 191, 111 P.3d at 695 (2005).

Several factors pertinent to the objective custody determination: "(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." *Alward v. State,* 112 Nev. 141, 154, 912 P.2d 243, 252 (1996)(overruled on other grounds). Law enforcement interviewed Mr. Bernal at the sheriff's office in Silver Springs. However, Mr. Bernal agreed to meet the officers at that location and voluntarily drove himself to the station.

In *State v. Taylor,* this court provided several objective indicia of arrest: (1) whether the suspect was told that the questioning was voluntary or that he was free

to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning. *Rosky v. State*, 121 Nev. 184, 192–94, 111 P.3d 690, 695–97 (2005). In *Rosky*, the Supreme Court agreed with the district court determination that it was not custodial interrogation since Rosky was not under formal arrest and the officers informed him that his participation was voluntary and he could leave at any time.

The interview of Mr. Bernal commands the same conclusion as in the *Rosky* case. Mr. Bernal was not under formal arrest and Detective Messmann informed him that he was there voluntarily and he could leave at any time. They also allowed bathroom breaks and during that time Mr. Bernal was left alone and he could have left if it was his choice to do so. Similar to the interview in *Roksy*, the video tape of the interview of Mr. Bernal and the testimony of Detective Messmann confirm that there was no use of "strong arm" or coercive tactics.

The district court found, after reviewing the audio and video clips, that officers told Mr. Bernal the interview was voluntary and that he was free to leave; that the defendant was not under formal arrest and was able to freely move around

as evidenced by multiple bathroom breaks; that the atmosphere was conversational and not dominated by police; that no strong arm tactic or deception during questioning was used; and though an arrest was made it was at the end of the interview after the defendant's voluntary confession. 2 AA 346-349.

Mr. Bernal's confession to law enforcement was also voluntary. This Court stated in *Rosky*:

> The voluntariness analysis involves a subjective element as it logically depends on the accused's characteristics. In this context, the prosecution has the burden of proving by a preponderance of the evidence that the statement was voluntary, *i.e.*, that "the defendant's will was [not] overborne." "[A] confession is involuntary if it was coerced by physical intimidation or psychological pressure." Several factors are relevant in deciding whether a suspect's statements are voluntary: " '[t]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.' " A suspect's prior experience with law enforcement is also a relevant consideration.

Rosky v. State, 121 Nev. 184, 192–94, 111 P.3d 690, 695–97 (2005). Applying the foregoing factors to the interview of Mr. Bernal, it is clear that his confession was voluntary. The district court found there was no coercion or strong arm tactics. The district court further found that Mr. Bernal was free to move around and the atmosphere was conversational. 2 AA 347. The officers told Mr. Bernal he was free to leave. In fact, he was allowed to leave. The district judge determined that the language was more conversational in nature, further supporting a finding that it was voluntary.

The testimony of the detective and Mr. Bernal at trial support these findings. Both testified that Detective Messmann told Mr. Bernal he was free to leave. Both testified that he was given breaks. The district court properly ruled that the confession to law enforcement should be admitted as evidence in the case.

C. The District Court did not Error in Failing to Instruct the Jury Regarding the Voluntariness of Mr. Bernal's Statement.

STANDARD OF REVIEW

This court evaluates appellate claims concerning jury instructions using a harmless error standard of review. *Mathews v. State,* 134 Nev. 512, 517, 424 P.3d 634, 639 (2018). The district court's errors pertaining to jury instructions will be harmless only if the appellate court is convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of the case. *Honea v. State*, 136 Nev. 285, 289–90, 466 P.3d 522, 526 (2020)

ARGUMENT

Mr. Bernal claims that the district court should have instructed the jury regarding the determination of the voluntariness of the confession. "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it." *Harris v. State*, 106 Nev. 667, 670, 799 P.2d 1104, 1105–06 (1990)

(internal quotation marks and alteration omitted). When a defendant requests "specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking," the district court must give those instructions. *Id.* at 753, 121 P.3d at 588. But a defendant is not "entitled to instructions that are misleading, inaccurate, or duplicitous." *Honea v. State*, 136 Nev. 285, 289, 466 P.3d 522, 526 (2020).

Mr. Bernal offered a theory of the defense instruction which was given by the district court. The instruction stated "Mr. Bernal's theory of the defense is that Hay lee Smith falsified the allegations in this case to remove him from her life because he was the primary disciplinarian in the home and law enforcement coerced Mr. Bernal into providing a false confession." 5 AA 1201. This instruction covers the issue of voluntariness. The defense provided the jury with expert testimony regarding false confessions and the defense theory was this amount to a false confession. The theory of the defense instruction focused on the falsity and the expert testimony. A separate instruction would likely have been duplicitous and of no value and would have confused the jury. The district court properly instructed based on the requests of trial counsel, which covered the voluntaries issue with the theory of the defense.

Failure to object or to request an instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to

protect a defendant's right to a fair trial. *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996). In this Mr. Bernal's failure to object precludes appellate review of the jury instruction issue. Mr. Bernal offered and received his theory of defense instruction which includes the false confession theory supported by his case and expert witness. The additional instruction would have been confusing and misleading, and would likely be inconsistent with the defense theory. Even if offered, the district court may have precluded it for the reasons set forth in *Honea*, namely, that the instruction would be misleading. Furthermore, Mr. Bernal cannot show that any error was patently prejudicial. The defense had a strong coherent argument which was supported by the theory of defense instruction given. Mr. Bernal's rights were not violated because the voluntariness instruction was not requested or given.

D. The district court properly ruled on the admissibility of Evidence pursuant to NRS 483.045(2) and did not Deprive Mr. Bernal of his due process right to a fair trial under the Fifth Amendment.

STANDARD OF REVIEW

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008).

ARGUMENT

Mr. Bernal object to a statement made by Mr. Bernal that he had a dream that had a baby with H.S. Detective Messmann testified Mr. Bernal told him during the interview that at a certain point he had a dream, or dreams, about HS. In these dreams she was an adult, and that he'd had -- he dreamed of having sex with HS, and that she had become pregnant with his child. 4 AA 773, 779.

This evidence was property admitted by the district court. The district court properly determined that this evidence was admissible finding that the attraction to HS is relevant to Mr. Bernal sexually abusing her. The district court further found that the probative value outweighs its prejudicial effect, that it was not a prior bad act. The district court further concluded this was his own statement and it was a relevant statement made in relation to his intent in relation to this case, specifically his attraction to HS. 4 AA 774.

Appellant contends that the statement by Mr. Bernal was suspect evidence at its finest. The record belies that claim. This was a statement made by Mr. Bernal during an interview. The evidence is relevant to intent, as pointed out by the district judge when ruling on the objection. The evidence is not a prior bad act or uncharged misconduct. It does show a sexual attraction to H.S. which is relevant to establish the charged crimes in the case.

E. The District Court Did Not Violate Mr. Bernal's Nevada and United States Constitutional Rights to Voir Dire the Jury Venire Panel

STANDARD OF REVIEW

Absent a showing that the district court abused its discretion or that the defendant was prejudiced, the reviewing court should not disturb a district court's determination to conduct a collective voir dire of prospective jurors. *Summers v. State*, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986). Both the scope of voir dire (*Cunningham v. State*, 94 Nev. 128, 575 P.2d 936 (1978)) and the method by which voir dire is pursued (*Wilkins v. State*, 96 Nev. 367, 609 P.2d 309 (1980)) are within the discretion of the district court. *Id*. The district court has discretion in deciding a request for individual voir dire. *See Haynes v. State*, 103 Nev. 309, 316, 739 P.2d 497, 501 (1987); *see also Mu'Min v. Virginia*, 500 U.S. 415, 427, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). Absent an abuse of discretion or a showing of prejudice to the defendant, this court will not disturb the district court's decision. *Haynes*, 103 Nev. at 316, 739 P.2d at 501.

ARGUMENT

Mr. Bernal claims that the district court violated his constitutional rights by limiting juror voir dire. In fact, the district court allowed counsel wide latitude in allowing examination of the prospective jurors in addition to individual voir dire as

requested by counsel. Mr. Bernal's claim regarding jury voir dire is belied by the record and contrary to the district court's rulings. Both the State and the defense were allowed to ask as many questions as they wanted to the prospective jurors. If anything, the State was limited when the district court requested that the State focus its questions on bias.

The court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted. NRS 175.031. The purpose of "jury 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.' " *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006). So long as the process allows the court and counsel to determine whether the juror will meet this standard, the process is sufficient.

In this case, the district court conducted a thorough questioning of the prospective jurors. 2 AA 445-513. The district court then permitted counsel wide latitude to individually question jurors and challenge jurors for cause. The district court also questioned certain jurors in private when it involved sensitive issues or the prospective juror or counsel requested that. The district judge followed the law in jury selection and served the purposes of jury selection – to select jurors that

will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Mr. Bernal asserts that the district court "chilled" voir dire because of the COVID pandemic. The record shows that the district did not "chill" voir dire, but altered the voir dire to protect the safety of the venire, parties and court. The district court limited its questioning a little bit, but the district court still went into the critical issues related to the ability of a juror to serve in a case such as this. Neither the State nor the counsel for Mr. Bernal objected to the process or asked for additional time. Mr. Bernal's counsel was allowed to ask as many questions as he wanted during the questioning of the panel. 3 AA 543-544, 558. The district court merely asked that counsel get to the point with the questioning, but in no manner limited the ability to ask questions or cover additional topics. 3 AA 581.

In *Salazar v. State*, defense counsel proceeded to examine eleven more prospective jurors. Judge McDaniel then informed counsel that he had used up his thirty minutes and asked counsel to be seated. The Supreme Court held that the district court abused its discretion in limiting defense counsel's voir dire to thirty minutes, finding that the limitation was completely arbitrary, having no relation to the circumstances of the case, and resulted in defense counsel being deprived of the opportunity to examine eleven of the prospective jurors. *Salazar v. State*, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991). The district judge in the case at bar did

not place any arbitrary time limitation and did not deprive defense counsel of ability to question any jurors. Rather, the district court properly limited its questioning to only the information that was necessary and also directed counsel to focus its questioning to obtain relevant information. The district court never stopped counsel or refused to allow additional questioning.

The district court made reasonable accommodation because of the COVID pandemic that ensured that the jurors and Mr. Bernal were treated fairly and that Mr. Bernal received a fair jury selection process. The district court did not violate Mr. Bernal's constitutional rights in this case with the jury selection process.

F. The Sentencing Scheme Under NRS 200.366(3)(b) is not Cruel and Unusual Punishment Under the 8th and 14th Amendments to the United States Constitution

STANDARD OF REVIEW

"A sentence does not constitute cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978)." *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221–22 (1979). "This court will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by

impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)." *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009).

ARGUMENT

In *Chavez v. State*, Chavez challenged the district court sentence of four consecutive life sentences with the possibility of parole. Id. at 336; 348. The Supreme Court upheld the sentence finding that it was within the penalty allowed by statute and Chavez did not contend the statute was unconstitutional or that the

A punishment is unconstitutionally excessive " 'if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.' " *Pickard v. State*, 94 Nev. 681, 684, 585 P.2d 1342, 1344 (1978) (quoting *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977)). The legislature, within constitutional limits, is empowered to define crimes and determine punishments, and the courts are not to encroach upon that domain lightly. *Schmidt v. State*, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978). The Nevada Legislature has made a reasonable determination that sexual assault is a severe crime that warrants a severe sentence. Mr. Bernal does not provide any authority or argument that negates this authority of the Nevada Legislature.

"Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v. Michigan*, 501 U.S. 957, 994–95, 111 S. Ct. 2680, 2701, 115 L. Ed. 2d 836 (1991). In *Harmelin*, the defendant was sentenced to life without the possibility of parole for possession 672 grams of cocaine. Harmelin contended that his sentence was unconstitutionally cruel and unusual because it was significantly disproportionate to the crime he committed and the sentencing judge as statutorily required to impose it without taking into account the particularized circumstance of the crime and the criminal. The U.S. Supreme Court held that the sentence was not cruel and unusual punishment in violation of the Eight Amendment. *Id*. "The fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Harmelin*, 501 U.S. at 998, 111 S. Ct. at 2703(concurring opinion).

As the United States Supreme Court stated, "sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (plurality opinion). "[T]he victims of sex assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or

sexual assault." *Id.*, at 32–33, 122 S.Ct. 2017. *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, 123 S. Ct. 1160, 1163, 155 L. Ed. 2d 98 (2003).

Mr. Bernal's crime will impact the victims for the remainder of their lives. There can be no argument against the lifelong damage that is done by child abuse, including child sexual assault. The Nevada Legislature has made a reasonable determination of the appropriate punishment for such a heinous crime. Mr. Bernal has not shown that his sentence violates the Nevada or United States Constitution.

The jury convicted Bernal of one count of sexual assault on a child in violation of NRS 200.366. At the time of sentencing, the Court did not consider any impalpable or highly suspect evidence. This Court should not overturn the sentence because the sentence does not violate the Nevada or United States Constitutions.

VIII. CONCLUSION

For the forgoing reasons, the State respectfully requests this honorable Court to affirm the conviction in this case in all respects.

Date: November 8, 2021

/S/

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IX. ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6), and either the page- or type-volume limitations stated in NRAP 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

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)(A)(ii) it is proportionately spaced, has a typeface of 14 points or more, and contains 6753 words and does not exceed 1,300 lines of text.

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.

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X. CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 8, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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