IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD ALEXANDER JENKINS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 83465

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction following a jury trial in April of 2021 where Appellant Richard Alexander Jenkins (hereinafter, "Jenkins") was convicted of four counts of Lewdness with a Child under 16, category B felonies. Appellant's Appendix, hereinafter AA, Volume VIII 1810-1812. The district court sentenced Jenkins to consecutive time for the offenses, which resulted in an aggregate term of sixteen (16) to forty (40) years in prison. VIII AA 1810-1812. This appeal follows.

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II. ROUTING STATEMENT

Because this is a direct appeal from a judgment of conviction for Category B felonies, this appeal is presumptively assigned to the Nevada Supreme Court. NRAP 17(b)(2)(A). While Respondent agrees this matter is assigned to the Nevada Supreme Court pursuant to NRAP 17(b)(2)(A), this appeal does not present issues of first impression, as this Court has already decided on issues presented herein.

III. ISSUES PRESENTED

A. Whether the evidence presented at trial, when viewed in the light most favorable to the prosecution, was sufficient to support the jury's verdict?

B. Where NRS 50.350 contemplates the admission of grooming testimony when relevant, whether the district court plainly erred by allowing such testimony in a case where Jenkins used his position as a trusted father figure and coach to abuse a 14 year old child?

C. Whether the district court abused its discretion by admitting evidence of Jenkins' other acts involving G.W., a 14 year old child?

IV. STATEMENT OF FACTS[1]

Between July 1, 2018, and September 25, 2018, Jenkins developed a relationship with "Kory Collins"[2]. "Kory Collins" was given this name as a

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[1] This Statement of Facts will generally address Jenkins' offenses. Additional facts necessary for the discrete issues raised in this appeal will be included in the related argument section below.

[2] "Kory Collins" is a pseudonym used in the Information of the instant matter, pursuant to NRS 200.3772. At the request of counsel for Jenkins,

pseudonym by law enforcement in the instant matter, and has the initials of G.W. G.W. was born on September 16, 2004. VI AA 1270, VII AA 1502. During the summer of 2018, G.W. was a thirteen turning fourteen-year-old volleyball player and friend of Jenkins' daughter Alyssa Jenkins. VI AA 1273. G.W. grew close to Jenkins when her stepfather Wayne passed away June 9, 2018. *Id.*, 1273. G.W. and Jenkins would spend mostly every day together during the summer of 2018. *Id.* Most of their time would be spent at the Douglas County Recreation Center or Jenkins' home. *Id.*

While at the Recreation Center, Jenkins and G.W. would go to secluded areas. *Id.*, 1275. G.W. and Jenkins would go to the equipment room, underneath the staircase, and an area known as the squishy room. *Id.* While in the equipment room Jenkins would hug G.W. for a long time, kiss her on the neck or either cheek, and rub his hand down G.W.'s back and touch her butt. *Id.*, 1283. While in the squishy room and underneath the staircase the same conduct would occur. *Id.*, 1283, 1306, 1324. When asked if Jenkins would ever touch G.W. under her clothing at the Recreation Center, she responded "[h]e would sometimes." *Id.*, 1326. Jenkins instructed G.W. to leave the equipment room before him. *Id.*,

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parties referred to "Kory Collins" throughout trial as G.W., as such and due to Appellant's use of G.W. in the Opening Brief, the Respondent will refer to the victim in the instant matter as G.W.

1283, 1314. The three locations at the Douglas County Recreation Center were chosen because there were no video surveillance views. *Id.*, 1285.

There are cameras within the Douglas County Recreation Center. Surveillance footage was captured of contact between G.W. and Jenkins, and admitted at trial as exhibits 20, 21, 27, 28, and 29.[3]

When G.W. would go to Jenkins' home she would spend the night to visit with Jenkins and his daughter, Alyssa Jenkins. *Id.*, 1276. They would watch movies when G.W. would come over to visit. *Id.*, 1277. When watching movies, Alyssa, Jenkins, and G.W. would be present, watching the movies on the couch. *Id.* G.W. described Jenkins as sitting in the middle of the couch and her and Alyssa on separate sides of Jenkins. *Id.*[4] Both G.W. and Alyssa would also described Jenkins as laying in the same manner with them in bed. *Id.*; VIII AA 1619-1620. While on the couch Jenkins would have his arm around G.W., and Jenkins would slowly move his hands down

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[3] The State is contemporaneously moving to transmit Exhibits 20, 21, 27, 28, and 29.

[4] The appendix submitted by Appellant is missing page 655 of testimony by G.W. It is the appellant's responsibility to ensure that the record on appeal contains the material to which exception is taken. "If such material is not contained in the record on appeal, the missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary." *Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991), rev'd on other grounds, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992).

to the bottom of her back, and put his hands on her buttocks and on the front of her body. *Id.*, 1279. During an encounter on the couch, Jenkins asked G.W. if she was uncomfortable as he touched her. *Id.* This would occur both inside and outside G.W.'s pants. *Id.*, 1281. Jenkins would also put his hands down the front of G.W.'s pants while at Jenkins' house. *Id.* Specifically G.W. testified that Jenkins "put his hands down inside of my pants," and he would get to the top of touching G.W.'s vagina. *Id.*

G.W. had grown to trust and appreciate Jenkins. He had taken her to lunch at Burger King, on river rafting trips, and a trip to race RC cars. *Id.*, 1274, 1280. G.W. described her contact with Jenkins to also include Jenkins kissing her neck, the two of them holding hands, laying on his lap, leaning on his shoulder, and hugging for long periods of time. *Id.*, 1281-1282. G.W. testified that she engaged in this conduct with Jenkins because she felt obligated, and didn't want him to feel bad. *Id.*, 1282. G.W. also described an incident where Jenkins forcefully moved her hips, by grabbing her by the hips and moving her around during a practice. G.W. indicated Jenkins would do this when G.W. made a mistake during volleyball practice. G.W. testified that she decided to come forward with the information about what happened to her because "I didn't want anything else to happen to any other girls." *Id.*, 1287.

During the investigation into the instant matter Douglas County Sheriff's Office Investigator Nadine Chrzanowski interviewed individuals who had observed the relationship between G.W. and Jenkins during the summer of 2018. VII AA 1501. Those who observed contact between G.W. and Jenkins testified in trial. First, Tamera Woodbridge, G.W.'s mother, described incidents between Jenkins and G.W. that caused concern. Tamera described an incident where Jenkins dropped G.W. off after a volleyball function and the hug between Jenkins and G.W. appeared to last for too long and was too close. VI AA 1241. Tamera discussed this with Jenkins and G.W. and they indicated they would not hug each other in such a fashion. *Id.* 1242. Next, the principal from Carson Valley Middle School contacted Tamera after interactions between Jenkins and G.W., which were witnessed at school. The principal expressed concern about the intimate appearance of their interaction. *Id.* 1242. Tamera spoke with Jenkins and G.W. and suggested they not have any physical contact with each other to avoid this issue. *Id.*

Ashley Gosney, a former volleyball player and patron of the Douglas County Recreation Center, made a report to the Douglas County Recreation Center regarding contact she observed between Jenkins and G.W. IV AA 944. This report lead to law enforcement being contacted in this matter.

Ashley reported she was playing volleyball at the Recreation Center and noticed a particular closeness between Jenkins and G.W. *Id.* 942-945. Ashley observed Jenkins and G.W. touching one another, holding pinkies, and embracing. *Id.* 943. After the practice, Ashley observed Jenkins and G.W. by themselves and observed Jenkins hug G.W. for a long time and then kiss G.W. or whisper in her ear. *Id.* 945.

Nicholas Lonnegren, observed contact between Jenkins and G.W. at the Douglas County Recreation Center on several occasions. *Id.* 974. Nicholas described the contact as touchy feely, not like a coach would interact with a player. *Id.* 977. Nicholas also described observing Jenkins and G.W. enter the equipment room at the Recreation Center together, alone, and remain inside the room for long periods of time. *Id.* 979. Nicholas described the contact between G.W. and Jenkins as a lot more huggy, where Jenkins would touch G.W.'s shoulder, and would touch her back for an extended period of time. *Id.* 977. Nicholas described observing G.W. and Jenkins in the squishy room or area with padded floor, and observed G.W. laying on Jenkins' thigh. *Id.* 977. Nicholas described the areas of the gym where he observed G.W. and Jenkins, and also described how parents would not congregate where G.W. and Jenkins were located. *Id.* 997.

Kaylyn Keith played volleyball for Jenkins. V AA 1226. Kaylyn described an incident between G.W. and Jenkins that she recalled, because she reported the incident to her coaches Marie Foster and Suzie Townsell. *Id.* 1227. According to Kaylyn, during open gym she observed Jenkins close to G.W. and he appeared to be coaching G.W. exclusively. *Id.* 1228. The group was working on serving and Kaylyn heard Jenkins tell G.W. she needed to move her hips more when she served. *Id.* 1227. Then, while standing behind G.W., Jenkins grabbed G.W.'s hips and moved G.W.'s hips around. *Id.*

Bella Guarazzi was another volleyball player and observed the relationship between Jenkins and G.W. VII AA 1476. Bella described having observed Jenkins pay particular attention to G.W. *Id.* 1478. According to Bella, Jenkins and G.W. were really touchy with each other and they would always mess with each other's hands and hug and get really close. *Id.* 1478-1479. Bella indicated Jenkins would put his face very close to G.W.'s face to talk to her. *Id.* 1479.

Erica Janicki, the mother of Bella, indicated she was in Katie's Restaurant located inside the Carson Valley Inn, in Douglas County, Nevada. *Id.* 1463. While there, Erica observed Jenkins and G.W. at a booth with Jenkins' daughter Alyssa. Erica observed Jenkins and G.W. interact

"like a couple" in a dating relationship. Erica described G.W. as almost in Jenkins' lap, sitting very close to each other, with G.W. leaning against Jenkins and putting her head on his shoulder. *Id.* 1465. According to Erica, Alyssa was not interacting with Defendant this way, and Alyssa sat farther over in the booth. Erica took a photo of Jenkins and G.W. interacting in this way. *Id.* Erica indicated she later observed Jenkins and G.W. again at a scrimmage at Silver State High School in Carson City. *Id.* 1466. There Erica observed Jenkins constantly around G.W., even when she was on the sidelines, even though Jenkins was not coaching G.W.'s team. Erica described this interaction between Jenkins and G.W. as a flirtatious interaction, where G.W. seemed isolated from other teammates and completely focused on Jenkins. *Id.* 1467.

V.S. described herself as G.W.'s good friend, teammate, and schoolmate. V.S. stated Jenkins and G.W. were always together, even during times when Alyssa was not present. VI AA 1359. According to V.S., Jenkins and G.W. would call and text on a regular basis and on one occasion V.S. spent the night with G.W. and G.W. was on the phone with Jenkins. *Id.* 1359-1360. During this call, V.S. heard Jenkins because she was sitting close to G.W. V.S. heard Jenkins asking who was around, if G.W.'s mother was home, where G.W. was, if G.W.'s bedroom door was

open or closed, and if anyone was listening to the conversation. *Id.* 1360. On another occasion when V.S. spent the night with G.W., V.S. and G.W. went for a walk. *Id.* 1361-1362. During the walk, they ended up at Woodette's restaurant in Douglas County, Nevada. Jenkins happened to be at Woodette's. At this time, V.S. knew Jenkins and G.W. were not supposed to be together. According to V.S., while at Woodette's Jenkins and G.W. hugged one another in a "big bear hug" that lasted for a long time. *Id.*

V. SUMMARY OF ARGUMENT

Sufficient evidence was presented to the jury to sustain a conviction on all four counts against Jenkins. Jenkins' claims that the evidence was not sufficient with respect to his conviction lack merit. This Court should not accept Jenkins' invitation to reweigh evidence and view it in a light most favorable to him. Under the proper standard, this Court should uphold Jenkins' convictions.

Grooming evidence was admitted consistent with NRS 50.350 and this Court's prior opinions. Jenkins has not shown that the district court abused its discretion by allowing the testimony of Dr. Blake Carmichael or that a miscarriage of justice occurred when evidence of grooming was admitted to help the jury understand how Jenkins was able to use his

position of trust, as the victim's "father figure," and coach to desensitize her to his touch and ultimately abuse her.

G.W. testified that Jenkins became like a father figure to her, became close to her, and subjected her to sexual abuse. Testimony from other witnesses corroborated her testimony. Testimony from an expert witness established that "grooming" can include conduct such as dates, exciting activities and graduated touching, and Jenkins' prior acts with G.W. were consistent with the experts' testimony. Those acts were admissible other acts, because they were relevant as to motive, intent, plan and the relationship between Jenkins and G.W.

VI. ARGUMENT

A. The Jury's Verdict Was Well-Supported.

1. Standard of Review

When reviewing a sufficiency of the evidence challenge the Court should "review the evidence in the light most favorable to the prosecution and determine whether *any* rational juror could have found the elements of the crime beyond a reasonable doubt." *Watson v. State*, 130 Nev. 764, 781, 335 P.3d 157, 169 (2014) (citations omitted) (emphasis added). "In doing so, we do not reweigh the evidence or determine credibility as those functions belong to the jury." *Id.* (citation omitted).

Pursuant to NRS 201.230, the elements of Lewdness With a Child Under 16 Years of Age are as follows:

a) The defendant willfully, unlawfully, and lewdly,
b) Commits any lewd or lascivious act, other than the acts constituting the crime of sexual assault,
c) Upon or with the body or any part or member thereof,
d) Of a child under the age of 16 years, and
e) With the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child.

2. Discussion

Jenkins' sufficiency of the evidence argument asks this Court to ignore the applicable standard of review by reweighing the evidence and resolve his perceived conflicting testimony in his favor. This Court should decline Jenkins' invitation to do so.

All four counts alleged that Jenkins committed a lewd and lascivious act upon the body of G.W., when she was under 16 years old, in that Jenkins did place his hand or hands down the front of the pants or shorts, and underneath the underwear of G.W. and did touch and/or rub her pubic area, and/or did touch and/or rub his hand or hands on her buttocks, with

the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child at four distinct location. I AA 63. The prosecutor argued that this event occurred when Jenkins was located at his home, and at the Douglas County Recreation Center, in the "squishy room," underneath the stairwell, and in the equipment closet. I AA 63, VII AA 1780[5].

Jenkins argues that the intent element of NRS 201.230 cannot be proven alone, unless such touching is skin to skin. NRS 201.230 does not require skin-to-skin contact. Rather, it requires a lewd or lascivious act upon or with the body. Regardless, during trial, G.W. specifically stated on multiple instances that Jenkins actually put his hands down her pants. VI AA 1279, 1326; *see* NRS 193.200; *see also Sharma v. State*, 118 Nev. 648 (2002) (Intent may be proved by circumstantial evidence. It rarely can be established by other means. The prosecution is not required to present direct evidence of a defendant's state of mind as it existed during the

[5] The appendix submitted by Appellant is missing page 1160-1223 of closing arguments and the verdict. It is the appellant's responsibility to ensure that the record on appeal contains the material to which exception is taken. "If such material is not contained in the record on appeal, the missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary." *Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991), *rev'd on other grounds*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992).

commission of a crime.). G.W. described the areas where Jenkins would touch her as her private parts. *Id.*, 727. Jenkins points to the distinction of whether the touching was proven to be under the clothes to mean a reasonable juror could not conclude that Jenkins touched G.W. with the proscribed intent. Although there was ample testimony that Jenkins touched G.W. under her clothing, Jenkins asks this court to consider this as not having the requisite intent. OB, pg. 17. This argument is inconsistent with Nevada law because it would require this Court to reweigh the evidence and view it in a light most favorable to Jenkins. *Watson*, 130 Nev. at 781, 335 P.3d at 169 (the evidence is reviewed in the light most favorable to the State, not the defendant); *Gaxiola v. State*, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005) ("The jury determines the weight and credibility to give conflicting testimony."). There was substantial evidence as to Jenkins' intent, as seen in his continued relationship with her even after told to stop, his asking if she was uncomfortable, him telling her to exit the equipment room separate from him, him looking around as seen in surveillance footage from above the arcade in Exhibit 20 admitted at trial, etc.

As this Court has recognized, child sexual assault victims may "have difficulty recalling exact instances when the abuse occurs repeatedly over a period of time." *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007).

When pressed during cross-examination, G.W. stated exactly that phenomenon. VI AA 717. It was also evident that G.W. was nervous while testifying because two breaks had to be taken during her testimony. *See Id.* at 649, 670, 689. Through defense cross-examination, it was made clear that G.W. has testified that Jenkins placed his hands down her pants in all four locations.

A reasonable juror could have concluded that Jenkins abused G.W. with the requisite intent at all four locations after considering the exhibits offered and G.W.'s disclosure to law enforcement and her sworn testimony in court. Moreover, the jurors could have resolved the question of intent in favor of the State because she explained that Jenkins had asked her if she was uncomfortable, Jenkins was described as rubbing up and down her buttocks, and testimony showed Jenkins was told on numerous occasions to correct his conduct with G.W., yet he persisted. G.W. also testified that Jenkins repeatedly did this to her when they were alone together, which is consistent with her previous testimony. A reasonable juror could have found the elements of lewdness with a child beyond a reasonable doubt for all four counts, especially after viewing the evidence discussed above in the light most favorable to the prosecution. The evidence related to all four

counts was sufficient, and this Court should affirm the judgment of conviction.

Jenkins asks this Court to adopt a new standard with regard to the intent required in NRS 201.230. There is no question in Nevada that a touching over the clothing may still amount to a violation of NRS 201.230. Nevada has accepted the standard adopted by California, as Jenkins suggests Nevada may. OB 17; *State v. Catanio*, 120 Nev. 1030 (2004). "An act committed 'with' the minor's body indicates that the minor's body is the object of attention, and that language does not require a physical touching by the accused." *Catanio*, 120 Nev. at 1033-1034. In *Catanio,* this Court considered all published Nevada opinions at the time.[6] There was no

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[6] *See, e.g., Crowley v. State,* 120 Nev. 30, 31–32, 83 P.3d 282, 284 (2004) (defendant rubbed male victim's penis outside of clothing and performed fellatio on victim, and fondled female victim's breasts and vagina); *Ramirez v. State,* 114 Nev. 550, 553, 958 P.2d 724, 726 (1998) (defendant touched victim on her genitals); *Scott E., a Minor v. State,* 113 Nev. 234, 236, 931 P.2d 1370, 1371 (1997) (defendant allegedly touched victim's vaginal area and had victim touch his exposed penis); *Griego v. State,* 111 Nev. 444, 448, 893 P.2d 995, 998 (1995) (defendant fondled child victim), *abrogated on other grounds by Koerschner v. State,* 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000); *Carroll v. State,* 111 Nev. 371, 372, 892 P.2d 586, 587 (1995) (defendant fondled victim's legs, thighs and vaginal area); *State v. Purcell,* 110 Nev. 1389, 1391, 887 P.2d 276, 277 (1994) (defendant allegedly fondled victim's breasts and buttocks); *Taylor v. State,* 109 Nev. 849, 850, 858 P.2d 843, 844 (1993) (defendant touched victim between her legs as she sat on his lap); *Keeney v. State,* 109 Nev. 220, 223, 850 P.2d 311, 313 (1993)

decision made by the Court that lewdness does not include touching above the clothing. This Court "agree[d] with California's interpretation of what must be proven to establish the elements of the crime of lewdness."

(defendant touched victim's " 'private spot' " with his tongue), *overruled on other grounds by Koerschner,* 116 Nev. at 1116, 13 P.3d at 455; *Sterling v. State,* 108 Nev. 391, 393, 834 P.2d 400, 401 (1992) (defendant engaged in sexual acts with victim); *Walstrom v. State,* 104 Nev. 51, 52, 752 P.2d 225, 226 (1988) (slides revealed defendant engaged in lewd acts with child), *overruled in part on other grounds by Hubbard v. State,* 112 Nev. 946, 948, 920 P.2d 991, 993 (1996); *Passama v. State,* 103 Nev. 212, 216, 735 P.2d 321, 324 (1987) (defendant confessed through coercion to touching victims' vaginas); *Sheriff v. Frank,* 103 Nev. 160, 162, 734 P.2d 1241, 1242 (1987) (defendant allegedly touched victim's chest and genitals); *Meador v. State,* 101 Nev. 765, 767, 711 P.2d 852, 853–54 (1985) (defendant pulled girls' nightshirts up to photograph them); *Sheriff v. Miley,* 99 Nev. 377, 379–80, 663 P.2d 343, 344 (1983) (defendant attacked and possibly sexually penetrated victim); *Meyer v. State,* 95 Nev. 885, 886, 603 P.2d 1066, 1066 (1979) (defendant allegedly forced child to perform fellatio), *overruled by Little v. Warden,* 117 Nev. 845, 851, 34 P.3d 540, 544 (2001); *Maes v. Sheriff,* 94 Nev. 715, 716, 582 P.2d 793, 794 (1978) (defendant forced victim to fondle defendant's genitals and licked victim's penis and groin); *Findley v. State,* 94 Nev. 212, 214, 577 P.2d 867, 867 (1978) (defendant placed hand on victim's genitals), *overruled by Braunstein v. State,* 118 Nev. 68, 75, 40 P.3d 413, 418 (2002); *Green v. State,* 94 Nev. 176, 177–78, 576 P.2d 1123, 1124 (1978) (defendant rolled victim's shirt up); *Summers v. Sheriff,* 90 Nev. 180, 181, 521 P.2d 1228, 1228 (1974) (defendant allegedly pulled victim's bottoms down, photographed her and masturbated in front of her); *Sheriff v. Dearing,* 89 Nev. 255, 255, 510 P.2d 874, 874 (1973) (defendant allegedly performed cunnilingus on victim); *Martin v. Sheriff,* 88 Nev. 303, 305, 496 P.2d 754, 755 (1972) (defendant allegedly inserted penis into victim); *Farrell v. State,* 83 Nev. 1, 2, 421 P.2d 948, 948 (1967) (defendant allegedly touched victim inside her panties).

Catanio, 120 Nev. at 1036. As stated by Jenkins, a lewd touching can occur through a victim's clothing, and does not depend on contact with bare skin or "private parts" of either the defendant or the victim. OB 17; *People v. Martinez*, 11 Cal. 4th 434, 903 P.2d 1037 (1995). The jury's verdict was amply supported.

B. The district court did not plainly err by allowing expert testimony regarding "grooming."

1. Additional Facts

Prior to the initial trial date of August, 2020, the State noticed John S. Pacult, LCSW, as an expert who would testify regarding the grooming; victim dynamics, including but not limited to conduct before, during and after abuse; and offender dynamics, including behavior types and conduct. I AA 42. However, the trial was continued to April, 2021, and Mr. Pacult was not available for the new trial date. Subsequently, prior to the April, 2021 trial date, the State noticed Dr. Blake Carmichael, Ph. D, as an expert who would testify regarding the "the dynamics of child sexual abuse victims, including but not limited to conduct of the child before, during and after the abuse; and offender dynamics, including behavior types and conduct," and "disclosure of child sexual abuse by the child, including but not limited to timing of delayed disclosure, and how disclosure is made;" and the impacts of child abuse on children, including but not limited to

physical, social and emotional responses that a child may have." II AA 416. A pretrial evidentiary hearing occurred on April 15, 2021, where the Court considered Jenkins' motion to exclude Dr. Carmichael as an expert. III AA 571.

As part of that hearing, the State offered testimony from Dr. Carmichael regarding grooming behavior and victim disclosure. *Id.* at 578-521. Dr. Carmichael described the grooming process in steps, which includes where the sexual predator engages in a series of behaviors to gain the child's trust or confidence. The grooming process also commonly involves behaviors that lower inhibitions in terms of engaging in sexual behavior. *Id.* Jenkins objected to the testimony of Dr. Carmichael as an expert witness, claiming that testimony of Dr. Carmichael was not relevant or reliable under the *Hallmark*[7] analysis. II AA 432. On April 19, 2021, the district court issued an order regarding Jenkins' motion to preclude testimony of Dr. Carmichael. The district court cautiously considered the rubric laid out in NRS 50.275, *Hallmark v. Eldridge*, 124 Nev. 492 (2008), and *Higgs v. State*, 126 Nev. 1 (2010). Of note, the district court mentioned it had already held admissible prior acts associated with grooming

[7] *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008).

behavior. The district court found Dr. Carmichael's testimony admissible. III AA 621.

During trial, the State offered testimony from Dr. Carmichael consistent with its notice of expert witness. At the time of trial, Dr. Carmichael had been a psychologist for 20 years. VI AA 1436. The majority of his time is spent working with patients, both individually for therapy, working with families, but he also performs assessments, and evaluations, and makes recommendations for treatment, and he has trained other professionals in his areas of expertise. *Id.* at 1437. He has also taken classes regarding child sexual abuse throughout his 20 years of practice. *Id.* at 1439.

Dr. Carmichael testified about his familiarity with the concept of "grooming," which he described as "grooming in a sexual relationship is kind of a couple different levels. One, establishing contact. And then ongoing contact. And then trust with that individual. And once that's established, then integrating sexual contact in to the existing relationship that is there." "Gaining access, ongoing access, and then sexual access to the child where other people are not aware of that, so that it can maintain that secrecy or others not knowing about it. *Id.* at 1440-1441. Dr. Carmichael testified regarding the types of behavior constituting

"grooming" and described the conduct as regular activities to start, ways in which closeness can be built. Dr. Carmichael described the contact to become more sexualized, coupled with more enjoyable thing, which then becomes a way the child relates to a person. *Id.* 1441-1442. Dr. Carmichael described how grooming can becomes more coercive and aggressive, "[but]…you don't have to be coercive or aggressive to maintain secrecy or not talk about sexual abuse." *Id.* 1442.

Dr. Carmichael also addressed specific conduct that may correlate to grooming. Specifically, going to get food together and going on trips together, both represent ongoing access and activities that are otherwise typical as part of the relationship. Dr. Carmichael described how "[m]ost child abuse occurs with an ongoing, trusting, often loving relationship. *Id.* 1443. Dr. Carmichael further referenced how it is a misnomer to think that all victims are angry or hate their perpetrators, oftentimes the victims love them and rely on them. *Id.* Dr. Carmichael further described how grooming can relate to physical touch, and how touching can become coupled with something more enjoyable to normalize the touching. *Id.* Dr. Carmichael further described the impact this conduct can have on a child, to include confusing a child due to their enjoyment of being with the person and liking them. *Id.* 1445. A child going through a difficult time may be

impacted by a person being the relationship with the child where they feel valued, special and get attention, despite the fact that they are being abused by the person. *Id.* 1447. Dr. Carmichael did not provide any opinion with regard to Jenkins conduct in this case.

Dr. Carmichael discussed disclosure of sexual abuse from children, and described the differences in disclosure from children being abused sexual. Dr. Carmichael described how most children delay disclosing sexual abuse. *Id.* 1449. Dr. Carmichael further described that "[i]f a child is being sexually abused, even when asked directly about sexual abuse occurring, many kids deny that the abuse has occurred." *Id.* 1450. Dr. Carmichael described how many researchers in that area have shown children to be reluctant to talk about sexual touch. *Id.* Dr. Carmichael described the disclosure process as not being a "one-time gig" for children. *Id.* 1451. Dr. Carmichael did not provide any opinion with regard to G.W.'s disclosure in this case, or whether G.W. was sexually abused.

2. Standard of Review

Generally, a district court's decision to admit expert testimony regarding grooming behavior is reviewed for an abuse of discretion. *See e.g., Perez v. State*, 129 Nev. 850, 853, 313 P.3d 863, 865 (2013). However, Jenkins did not object to the testimony on the ground he raises in this

appeal, so this Court should employ plain error review. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Under such an analysis it is the appellant's burden to demonstrate plain or clear error and show that the error affected his substantial rights. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Put another way, "the burden is on the [appellant] to show actual prejudice or a miscarriage of justice." *Id.* (*quoting Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Regardless, the district court did not abuse its discretion by admitting the expert testimony of Dr. Carmichael.

3. Discussion

Jenkins admits that his argument is contrary to Nevada law. OB p. 23 (relying upon dissent). Jenkins has not demonstrated that the district court plainly erred by allowing Dr. Carmichael's grooming testimony in this case. Jenkins claims that all of his innocent interactions with G.W. in this case were infected with malevolent intent due to the grooming testimony and, therefore, he was denied a fair trial. Jenkins relies heavily on the partial concurring and dissenting opinion in *Perez v. State*, 129 Nev. 850, 867, 313 P.3d 862, 873 (2013). *See* Opening Brief ("OB"), pgs. 28-31. Jenkins' assignment of error is misplaced.

Initially, Dr. Carmichael's testimony was the same type admitted and approved of by the majority in *Perez*. *Compare* VI AA 1436-1460 *with Perez*, 129 Nev. at 859-860, 313 P. 3d at 868-869. As the *Perez* Court explained:

> The term "grooming" describes when an offender prepares a child for victimization by getting close to the child, making friends with the child, becoming perhaps a confidant of the child, and getting the child used to certain kinds of touching, and play activities. It can also include gifts, praises, and rewards, as well as exposure to sexual items and language. This conduct is undertaken to develop an emotional bond between the victim and offender, and may even lead the victim to feel responsible for his or her own abuse. The offender engages in grooming activity to reduce the child's resistance to sexual activity and reduce the possibility that the victim will report the abuse.

Id. at 855, 313 P.3d at 866 (cleaned up).[8]

Like the expert in *Perez*, Dr. Carmichael discussed how grooming occurs, its purpose, and explained how seemingly innocent acts could be grooming behavior. *Compare Id.* at 1440-1441 *with Perez*, 129 Nev. at 859-860, 313 P. 3d at 868-869. Dr. Carmichael did not render an opinion regarding the victim's credibility in this case or express an opinion regarding whether she had been abused. He identified acts that could be consistent with grooming in this case. Thus, contrary to Jenkins' argument, Dr. Carmichael's

[8] "Cleaned up" is used to indicate that internal quotation marks, alterations, and citations have been omitted. *See e.g., Redlin v. United States*, 921 F.3d 850, 860 (9th Cir. 2019).

testimony fell within the bounds set by the Court in *Perez*. *See* 129 Nev. at 859-860, 313 P. 3d at 868-869.

Moreover, in 2015 the Nevada Legislature passed Assembly Bill 49, which included the addition of NRS 50.350 to Nevada's statutory scheme. Jenkins' argument ignores NRS 50.350, even though the statute is squarely on point. The statute provides that, "expert testimony offered by the prosecution or defendant which concerns the behavior of a defendant in preparing a child under the age of 18 years… for sexual abuse by the defendant is admissible for any relevant purpose." NRS 50.350(1). NRS 50.350(1) further provides that such expert testimony may concern, "without limitation":

> (a) The effect on the victim from the defendant creating a physical or emotional relationship with the victim before the sexual abuse; and
> (b) Any behavior of the defendant that was intended to reduce the resistance of the victim to the sexual abuse or reduce the likelihood that the victim would report the sexual abuse.

NRS 50.350(1)(a)-(b).

NRS 50.350 is not ambiguous. The Legislature's intent to allow grooming testimony is evidenced in the broad admissibility language included in the statute.

Here, Jenkins engaged in common grooming behaviors with G.W. He gained access to her as a trusted father figure, who helped her with

volleyball, took her to lunch, took her on trips, took her rafting. Jenkins used seemingly innocent touching, when he encouraged G.W. to watch movies with him and Alyssa, but his behavior later escalated to involve sexual touching. Jenkins also desensitized G.W. to sexual behavior by using volleyball coaching as a means to touch G.W. Dr. Carmichael's testimony regarding grooming behaviors helped explain how Jenkins prepared and desensitized his victim before the abuse occurred. Thus, Dr. Carmichael's testimony was admissible under NRS 50.350 because it was relevant to the State's allegations and theory that "Father Figure" Jenkins used his position of trust to gain access to and ultimately abuse G.W. In other words, Dr. Carmichael's testimony made G.W.'s allegations about Jenkins' ultimate abuse more probable and more understandable than without the testimony. *See* NRS 50.350; NRS 48.015 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence").

Jenkins appears to assume prejudice resulted from the introduction of Dr. Carmichael's testimony, but he does not present cogent argument to explain why. In order for prejudice to be a basis to exclude the evidence, the evidence would have to be unfairly prejudicial, or encourage the jury to

convict on an improper basis. *See Holmes v. State*, 129 Nev. 567, 575, 306 P.3d 415, 420 (2013) (indicating that the substantially outweigh requirement from NRS 48.035 favors admissibility and evidence is only "unfairly prejudicial if it encourages the jury to convict the defendant on an improper basis."). The grooming evidence offered in this case does not present an improper basis for conviction, as going to Burger King, watching movies, playing volleyball, racing RC cars, etc. does not alone amount to criminal conduct. The purpose of the evidence was to explain how seemingly innocuous actions can make a child more susceptible to abuse and why they may keep it a secret. In other words, the grooming testimony was highly probative because it provided context for some of the potentially innocent appearing behavior that occurred in this case and helped the jury understand how Jenkins used his position of trust to abuse his victim. Dr. Carmichael's testimony may have also helped the jurors assess the victim's credibility and understand her delayed disclosure.

Dr. Carmichael's testimony was related to the facts and circumstances of this case and, arguably, required considering NRS 50.350(1)'s direction that grooming testimony "may concern, without limitation" the physical and emotional relationship of the defendant and the victim and "[a]ny behavior of the defendant that was intended to reduce the resistance of the

victim to the sexual abuse…." *Id.* at sub. (a)-(b). Thus, Jenkins has not shown that the district court plainly erred by allowing Dr. Carmichael's grooming testimony or that a miscarriage of justice has resulted in light of the clear legislative guidance to admit such testimony in child sexual abuse cases. The judgment of conviction should be affirmed.

C. The District Court Properly Admitted Testimony Regarding Jenkins' Prior Acts with G.W.

1. Standard of Review

A trial court's evaluation of the probative value and potential prejudice of evidence "will not be reversed unless it is manifestly erroneous." *Lucas v. State*, 96 Nev. 428, 432-433, 610 P.2d 727, 730 (1980); *see also Holms v. State*, 129 Nev. 567, 571-572, 306 P.3d 415, 418 (2013). Put differently, "[a]n abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 121 P.3d 582 (2005) (citation omitted).

2. Discussion

The general rule is that other act evidence is not admissible to establish propensity to commit charged acts. NRS 48.045(2). The exception to the rule is that in a criminal prosecution for a sexual offense, evidence of a "separate sexual offense" may be admissible to establish

propensity to commit a charged offense. NRS 48.045(2); *Franks v. State*, 135 Nev. 1 (2019). Jenkins argues that error occurred with respect to admission of his prior interactions G.W. This argument is repelled by the district court's order, which demonstrates a well-reasoned application of the relevant law to the circumstances of this case.

In this case, the district court order repeatedly identified and applied the factors outlined by the Court in evaluating whether Jenkin's prior acts should be admitted. II AA 444; *citing Big Pond*, 101 Nev. 1 (1985); *Hubbard v. State*, 134 Nev. 450 (2018); *Rosky v. State*, 121 Nev. 184 (2005); *Tavares v. State*, 117 Nev. 725 (2001). As stated by the district court, the presumption against admissibility of other crimes, wrongs or acts may be overcome. Said evidence may be admitted for any relevant nonpropensity purpose. Said evidence is admissible only if the trial court first determines: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity; (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. *See* II AA 444; citing NRS 48.045(2). Pursuant to the above cited authorities, the district court determined that while some of the State's proffered evidence was admissible, other evidence must be excluded. The

district court thendenied the State's request to admit additional evidence involving other individuals. II AA 444. The district court also addressed this evidence being argued as *res gestae* evidence, which made sense, because the conduct between G.W. and Jenkins was integral to the story of the case, but determined this argument was not before the district court as it was argued in the evidentiary hearing. II AA 444, footnote 1.

Jenkins takes issue generally with the district court's admission of his interactions with G.W. He argues that the district court erred in its reliance upon *Big Pond v. State*, 128 Nev. 108 (2012). Jenkins appears to ask the Court to find *Big Pond* and *Randolph v. State*, 136 Nev. 659 (2020) to require that the prior bad acts be prosecutable and find the district court entered into an order without regard to this Court's holdings. This is not Nevada law. Nevada lays out carefully the factors to be considered for other act evidence, a prosecutable offense is not one of those. Jenkins' argument is repelled by the record: specifically, it ignores the careful analysis contained in the district court's 10-page order regarding admission of Jenkins' prior conduct with G.W., preceded by an entire day hearing during which seven hours of testimony and oral argument were presented by the parties. I AA 87-344.

Before beginning its case-specific application of the relevant law, the

district court correctly identified the factors for admission of prior bad acts. II AA 444. The order organized itself by prior bad acts alleged, and proceeded to apply NRS 48.045 (2) and *Tavares v. State*, 117 Nev. 725, to the discreet act of conduct between Jenkins and G.W.: 1) conduct between Jenkins and G.W. during practice observed by B.G.; 2) conduct between Jenkins and G.W. observed by Tamara Woodbridge, G.W.'s mother, and leading to a conversation between Tamara and Jenkins; 3) conduct between Jenkins and G.W. during a practice observed by Ashley Gosney, and leading to a report being made at the Recreation Center; 4) conduct between Jenkins and G.W. during a practice observed by Kaylyn Keith, and leading to a report being made to other coaches; 5) conduct between Jenkins and G.W. during volleyball games and at a restaurant in public, observed by Erica Janicki; 6) conduct between Jenkins and G.W. on the public high school campus observed by Principal Joe Girdner, and leading to a notification of G.W.'s mother; and 7) conduct between Jenkins and G.W. during telephone conversations and in public observed by V.S. and after Jenkins had been told to limit contact with G.W. II AA 446-448.

Jenkins argues that pursuant to *Bigpond* "there must be a need for the uncharged misconduct evidence in order to establish G.W.'s motive to make inconsistent reports." OB, 28. Jenkins further asserts that evidence

was established by the testimony of Marie Foster. *Id.* G.W. testified she did not want to get Jenkins in trouble, she did not want to hurt his feelings, all of which was bolstered by Jenkins' conduct towards G.W. Jenkins would have had the State simply present evidence that G.W. made inconsistent disclosures, and this relationship between the two of them started out of nowhere, with zero explanation or context regarding how Jenkins gained and maintained control over the victim. This would have been confusing for the jury, depriving it of critical and admissible evidence. The Court should reject Jenkins' argument, and find that the district court did not abuse its discretion.

VII. CONCLUSION

Based on the foregoing, the State respectfully submits that the conviction should be affirmed.

DATED: March 22, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it contains a total of 7,781 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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 22, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on March 22, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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