IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN BARRAL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 64135

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether the district court committed structural error when it neglected to administer an oath to the prospective jurors but properly swore the empaneled jury before trial.
2. Whether the district court improperly commented on witness testimony when it ruled on the State's objection to the defense's misstatement of prior testimony.
3. Whether the district court improperly disparaged the defense when the court performed its duty to control the courtroom.
4. Whether the district court properly limited Barral's cross-examination of the victim because the evidence Barral sought to introduce was irrelevant.
5. Whether the State committed prosecutorial misconduct sufficient to warrant a new trial based on its characterization of specific testimony.
6. Whether the district court properly denied Barral's motion for acquittal because the State presented sufficient evidence such that any rational trier of fact could have found Barral guilty.

7. Whether the district court properly denied Barral's motion for a new trial because the evidence was not conflicting.
8. Whether Barral was denied a fair trial based on cumulative error when Barral has failed to demonstrate sufficient errors to cumulate.

STATEMENT OF THE CASE

On November 29, 2010, the State filed an Information charging Appellant Dustin James Barral with two counts of Sexual Assault with a Minor under Fourteen Years of Age (Felony – NRS 200.364, 200.366). 1 Appellant's Appendix (AA) 14-15. Specifically, the Information alleged that Barral digitally penetrated J.C., a minor under fourteen years old, in both her genital and anal openings on or between July 10 and July 12 of 2010. 1 AA 14-15. On May 31, 2013, after a four-day trial, the jury found Barral guilty of both counts charged in the Information. 4 AA 810-11.

Barral filed a Motion for Acquittal or in the Alternative a New trial on June 7, 2013. 1 AA 47-59. The State filed an Opposition on June 20, 2013, to which Barral filed a Reply on June 28, 2013. 1 AA 60-80. On July 8, 2013, the district court heard arguments of counsel and denied Barral's Motion. 4 AA 816-21. A written Order was filed on July 19, 2013. 1 AA 83-84.

On September 18, 2013, the district court sentenced Barral to imprisonment for two concurrent terms of life in prison with a minimum parole eligibility four hundred twenty (420) months. 1 AA 85-86. The Judgment of Conviction was filed

on September 23, 2013. 1 AA 85-86. Barral's instant appeal followed. 1 AA 87-90.

STATEMENT OF THE FACTS

"He hand like digging in all my privates. He digged all the way from there. . . . He was um, he was sinking – he was sinking inside of my privates. . . ." Those are the words of then four-year-old J.C. describing what her uncle, Appellant Dustin Barral, did to her. State's Exhibit 2.[1]

On Saturday, July 10, 2010, J.C. stayed the night at the home of her Aunt and Uncle (Barral's house) because J.C.'s mother had been admitted to the hospital. 2 AA 438-39.[2] That night, J.C. went to bed on a futon in the same bedroom as her six-month-old cousin who slept in a crib next to the futon. 2 AA 416; St. Ex. 2. At one point during the night, J.C. was trying to fall asleep when Barral came into the room, sat next to J.C. on the futon, and, as J.C. described, dug in her privates and in her butt. 2 AA 417, 428; St. Ex. 2. After Barral dug in J.C.'s privates and butt with his fingers, J.C. saw him walk to the bathroom across the hallway and wash his hands.

[1] State's Exhibit 2 is a CD/DVD containing an audio/video recording of Las Vegas Metropolitan Police Department Detective Timothy Hatchett's interview of J.C. on July 15, 2010, which was admitted during the third day of trial. 3 AA 710-11. The district court clerk transmitted State's Exhibit 2 to this Court on April 15, 2014, pursuant to this Court's Order of April 2, 2014.

[2] The State refers to the four-year old victim as J.C. and, other than Barral, the State refers to J.C.'s family members by their relationship to J.C. rather than by name in an effort to protect the victim's privacy.

2 AA 418-19; St. Ex. 2. Barral then returned to the bedroom and woke up his wife to tell her that he had "accidentally sat" on J.C. because "he forgot she was there." 3 AA 567.

On Sunday morning, Barral and J.C.'s aunt were in their room with J.C. and her aunt relayed Barral's story to J.C. with something along the lines of, "Wasn't it funny that Uncle Dustin accidentally sat on you last night; do you remember that?" 3 AA 568. She explained that J.C.'s response was to look at her as though J.C. had no idea what she was talking about. 3 AA 568. The story of Uncle Dustin accidentally sitting on J.C. was repeated at church that Sunday in front of J.C.'s grandmother, and again J.C.'s reaction was confusion and like she did not know what had happened. 2-3 AA 443-44, 571. After church, J.C's grandmother, aunt, and great aunt too took J.C. and her two-year-old sister to the hospital to visit J.C.'s mother. 2 AA 445. J.C. stayed at the Barrals' house again on Sunday night, but this time J.C. slept on the floor with two of her cousins in a different room. 3 AA 573.

As per their usual routine, J.C. and her sister stayed overnight on Monday at their father's house. 3 AA 573-74. J.C. finally returned home (J.C.'s mother and her two girls were living with the maternal grandparents at that time) late in the day on Tuesday. 2 AA 351. Upon arriving at home, there was a family dinner with J.C. her sister, her mother, her aunt (Barral's wife), her two cousins, and her grandparents. 2 AA 351. After dinner, J.C.'s aunt left with her two boys and J.C.'s

mother took her two daughters upstairs for a bath. 2 AA 351. When they got upstairs, J.C. told her mother that she needed to talk to her, so they went into her mother's bedroom, sat down on the bed, and J.C. told her mom that Uncle Dustin had touched and dug into her privates. 2 AA 352, 420; St. Ex. 2. J.C.'s mother knew that this horrific event had to be reported, so she asked J.C. one simple follow-up question, "Are you telling the truth?" and J.C. said "yes." 2 AA 352-53.

Shocked by what J.C. had just said, J.C.'s mother went downstairs to her parents, leaving J.C. and her sister upstairs. 2 AA 353. J.C.'s mother told them what J.C. had just said, and while J.C.'s mother tried to collect herself, J.C.'s grandmother went upstairs to take care of the girls. 2 AA 354. J.C. then revealed to her grandmother that Uncle Dustin had dug in her privates. 2 AA 420, 449; St. Ex. 2. J.C.'s grandmother did not ask any follow-up questions. 2 AA 449-50. Meanwhile, J.C.'s grandfather called J.C.'s aunt and told her to come right back to the house. 2 AA 354. When she got back to the house, her parents told her what Barral had done to J.C. 2 AA 451. Needing to hear for herself, J.C.'s aunt sat J.C. down on her lap and, in the presence of J.C.'s mother and grandparents, J.C. told her that Uncle Dustin had touched her and hurt her. 2 AA 356, 452.

Later that night, J.C.'s mother called 3-1-1 and was provided contact information in order to follow up with a detective on the following day. 2 AA 356-57. Accordingly, on Wednesday, J.C.'s mother spoke with Detective (Sergeant at

the time of trial) Timothy Hatchett, and at his direction, she took J.C. to Sunrise Pediatric Hospital for a SCAN exam. 2 AA 357. The SCAN exam yielded one non-specific finding that J.C. had vaginitis. 2 AA 385. The following day, she took J.C. to the Southern Nevada Children's Assessment Center (CAC) where Detective Hatchett conducted an audio/video-recorded forensic interview of J.C. 2-3 AA 359, 692-94; St. Ex. 2.

J.C. gave Detective Hatchett an extremely detailed and descriptive disclosure that Barral dug in her privates and butt with his fingers. St. Ex. 2. J.C. described when it happened, including that she was sleeping in the room with the baby. St. Ex. 2. J.C. used descriptive, age-appropriate language to describe how Barral reached under her pajamas and panties and described Barral's fingers turning into her privates. St. Ex. 2. J.C. used the words "digged" and "dug" repeatedly throughout the interview to describe what Barral did to her with his fingers in her privates and butt. St. Ex. 2. J.C. complained that the digging hurt bad and caused pain that lasted for a while. St. Ex. 2. J.C. reported that she could see Barral in the room and reported that he was only wearing shorts that night. St. Ex. 2. J.C. also explained that, after digging in her privates and butt, she could see Barral go in the bathroom down the hallway and wash his hands before returning to his bedroom. St. Ex. 2. Detective Hatchett testified that, when he asked J.C. to describe what digging was and to try and describe it on the anatomical chart,

> [J.C.] actually began to making [sic] mannerisms to her vaginal area and indicated that he went underneath her clothing and used her fingers to describe him placing them in side [sic] of her vaginal area. And she used the work – she basically said, you know, was digging and also sinking. . . .

3 AA 709.[3] Detective Hatchett subsequently arrested Barral for sexual assault. 3 AA 716.

SUMMARY OF THE ARGUMENT

Appellant Dustin Barral was properly convicted of two counts of sexual assault with a minor under fourteen years of age because he digitally penetrated his four-year-old niece's vagina and anus. Barral fails to demonstrate any errors warranting relief and thus his conviction should be affirmed.

First, the district court did not commit structural error when it neglected to swear in the venire at the beginning of jury selection. Notably, Barral failed to preserve this issue for appeal and thus this Court should decline review. Notwithstanding, the alleged error does not fall into the limited class of structural errors. The empaneled jury was properly sworn at the start of the trial, and Barral does not allege, let alone demonstrate, that any of the empaneled jurors were biased or otherwise failed to properly perform their duties as jurors. Therefore, Barral fails

[3] The anatomical chart used during Detective Hatchett's interview of J.C. was admitted as State's Exhibit 3 at trial. 3 AA 712. At the beginning of the interview, Detective Hatchett used the chart in the context of taking a bath to ask J.C. to identify human anatomy to learn the language J.C. uses to describe body parts. 3 AA 696.

to demonstrate that the error affected the very framework of the trail and his claim should be denied.

Second, the district court did not improperly comment on J.C.'s testimony regarding her "practice" for trial. Earlier testimony demonstrated that, for J.C., "practice" only meant telling adults what happened and receiving reassurances in dealing with her nervousness about testifying in court and in front of the man who assaulted her. No one coached or otherwise told J.C. what to say. The court's comments were nothing more than an appropriate ruling on the State's objection to the defense's attempt to mislead the jury as to what J.C. had testified. Moreover, even if the court's comments somehow rose to the level of plain error, Barral failed to demonstrate that the error cause actual prejudice to his substantial rights and thus his claim warrants no relief.

Third, Barral failed to object to alleged judicial misconduct and thus this Court should decline to review that issue. Nevertheless, the district court did not improperly disparage the defense as Barral contends. The court reasonably maintained control of its courtroom and required the parties to be respectful and act with professionalism throughout the trial. Further, even if any of the court's statements with which Barral takes issue were improper, Barral failed to demonstrate that the error was plain and affected his substantial rights. Therefore, Barral's claim is without merit.

Fourth, the district court appropriately limited Barral's cross-examination of the victim because the evidence Barral sought to introduce was irrelevant. Most of the instances of alleged prior sexual contact occurred after the crimes in this case and thus could not have influenced J.C.'s testimony, testimony that was consistent with a recorded interview she gave to Detective Hatchett shortly after the crimes occurred. Moreover, none of the prior instances of alleged sexual contact Barral sought to introduce were actual sexual contact, certainly not in comparison to intercourse, fellatio, and genital fondling. Thus, the district court did not abuse its discretion when it precluded Barral from questioning J.C. in that regard.

Fifth, the state did not commit prosecutorial misconduct by misstating evidence. When Detective Hatchett inadvertently testified regarding matters the court had ruled inadmissible, and even then misstated the facts in the victim's recorded statement, the State simply attempted to redirect the focus from the inadmissible and misleading testimony and move on. The court properly overruled Barral's objection and the State proceeded as directed by the court. Further, during its rebuttal argument, the State did not misstate whether the baby monitor could have been turned down using the unit located in the baby's room, but rather argued simply that Barral could have manipulated the volume. Thus, the State did not misstate testimony. Notwithstanding, even if the State improperly questioned Detective

Hatchett or misstated the location of the baby monitor's volume control, any such error was harmless beyond a reasonable doubt and thus is not a basis for a new trial.

Sixth, the district court properly denied Barral's motion for acquittal. The State presented sufficient evidence such that, if believed, any rational trier of fact would have found Barral guilty on both counts. The victim's testimony, prior statements to family members, and recorded interview with police all consistently demonstrate that Barral digitally penetrated J.C.'s vagina and anus. Thus, the State presented sufficient evidence to sustain the verdict and the district court correctly so ruled.

Seventh, the district court did not abuse its discretion when it denied Barral's motion for a new trial based on allegedly conflicting evidence. Barral failed to demonstrate any significant conflict in the evidence that undermined the jury's findings. Therefore, the district court acted well within its discretion when resolved any alleged conflicts in the evidence in the same manner as the jury and denied Barral's motion.

Lastly, Barral was not denied a fair trial based on alleged cumulative error. Notably, Barral failed to preserve for review several of the errors he alleges, and as he failed to demonstrate any error in the proceedings, there is nothing to cumulate. The State presented substantial evidence of Barral's guilt, and although his crimes were grave, the quality and character of the alleged errors does not warrant reversal.

Indeed, even assuming arguendo that Barral demonstrate some error occurred, such error, even if cumulated, was harmless beyond a reasonable doubt.

The jury properly convicted Barral of two counts of sexual assault for digitally penetrating his four-year-old niece. This Court should affirm.

ARGUMENT

I

THE DISTRICT COURT DID NOT COMMIT STRUCTURAL ERROR IN NEGLECTING TO ADMINISTER AN OATH TO PROSEPECTIVE JURORS.

Burral is not entitled to a new trial merely because the district court neglected to swear in the prospective jurors prior to voir dire. The actual jury panel was properly sworn at the start of trial, 2 AA 337, and Barral does not even allege, let alone demonstrate, that any members of the jury panel were biased or otherwise unqualified to perform their duty as jurors. There is simply no indication that Barral was denied a fair trial because the venire was not properly sworn and thus Barral's claim warrants no relief.

A. Barral Waived this Issue when he Failed to Timely Object.

Barral waived the issue of the district court's failure to administer the oath to prospective jurors when he failed to properly object. The failure to object at trial precludes appellate review of the matter unless it rises to the level of plain error. Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (citing Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005)); see Green v. State, 119 Nev.

542, 545, 80 P.3d 93, 95 (2003) (stating failure to object to jury instruction generally precludes appellate review); see also NRS 178.602. Thus, "[w]hile this Court may, at times, review questions of constitutional dimension even in the absence of a proper objection, it will not do so unless the record is developed sufficiently both to demonstrate that fundamental rights are, in fact, implicated and to provide an adequate basis for review." Wilkins v. State, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980).

Importantly, an objection at trial must be contemporaneous with the alleged error to properly preserve the issue for appeal. Maxey v. State, 94 Nev. 255, 256, 578 P.2d 751, 752 (1978). In Maxey, for example, appellant argued that the district court erred when it gave an allegedly improper jury instruction regarding circumstantial evidence during voir dire. Id., 578 P.2d at 752. This Court, however, ruled that appellant waived the alleged error because trial counsel failed to object to the instruction until after the jury was sworn and both sides had concluded opening statements. Id., 578 P.2d at 752. "Where, as here, appellant has knowledge of the misconduct, he must assert his right to a mistrial *immediately* or be deemed to have waived any alleged error." Id., 578 P.2d at 752 (emphasis added).

Here, Barral waived the issue of the district court's decision not to swear in the venire prior to voir dire when he failed to properly object. On the first day of trial, the court conducted general voir dire of the entire venire and then began to

question individual jurors, allowing each party to voir dire the individual jurors after the court. 1 AA 110-33. After the parties had each questioned one potential juror who was subsequently excused, Barral requested to approach the bench. 1 AA 133. At the bench conference, Barral did not object, but rather noted to the court that he could not remember if the venire had been sworn. 1 AA 133. The court responded that it does not administer the oath until the jury panel has been selected. 1 AA 134. Barral did not inform the court that NRS 16.030(5) requires the court to administer an oath to the venire, nor did Barral ever state that he objected to the manner in which the court was proceeding. 1 AA 133-35.[4] In fact, after the court provided its explanation for its procedure, Barral simply stated, "Okay." 1 AA 134. Barral never used the word "object" or implied that he objected, and instead stated that he merely wanted to bring it to the court's attention "[f]or what it's worth. . . ." 1 AA 134. Barral never requested a new venire or challenged the seated panel. Moreover, even if Barral's conduct could be construed as a proper objection, it was untimely because Barral did not object at the beginning of jury selection, and instead waited until jury selection had move all the way to individual voir dire before noting the issue. Therefore, Barral waived this issue when he failed to contemporaneously object and this Court should decline review.

[4] NRS 175.021 states that "[t]rial juries for criminal actions are formed in the same manner as trial juries in civil actions." Thus, NRS 16.030, which governs jury formation in civil trials, applies to jury formation in criminal trials.

B. The District Court did not Commit Structural Error when it did not Administer an Oath to the Prospective Jurors.

Notwithstanding that Barral failed to preserve the issue for appeal, Barral makes no attempt to demonstrate that the error alleged amounts to plain error that affected Barral's substantial rights. Instead, Barral argues that the district court's failure to swear in the jury venire pursuant to NRS 16.030(5) amounts to structural error that automatically warrants a new trial. As explained below, no structural error occurred and Barral fails to provide any authority to demonstrate the contrary.

The United States Supreme Court has explained that most constitutional errors can be harmless. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833 (1999) (internal quotations removed). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" Id., 119 S.Ct. at 1833 (quoting Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101 (1986)). "Structural errors" are only those errors that "affect the very framework in which the trial proceeds." Cortinas v. State, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008) (citing Neder, 527 U.S. at 8, 119 S.Ct. at 1833) (internal quotations omitted). Further, "since most constitutional errors can be harmless, structural errors arise in only a very limited class of cases." Id., 195 P.3d at 322 (internal quotations omitted).

Jurisprudence regarding instructional error is informative as to the magnitude of error required to rise to the level of structural error. For example, this Court held

that an error is merely subject to harmless-error review unless it "[v]itiates all the jury's findings and produces consequences that are necessarily unquantifiable and indeterminate." Id., 195 P.3d at 322 (internal quotations omitted). Indeed, the United States Supreme Court has only once found structural error in the jury instruction context. Id. at 1025, 195 P.3d at 323. In that case, Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080 (1993), the trial court gave the jury a reasonable doubt instruction that was essentially the same instruction the Court expressly held was unconstitutional in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1998). Further demonstrating the "limited class of cases" to which structural error applies, even omission of an element of the charge in a jury instruction is subject only to harmless-error review. Neder, 527 U.S. at 15, 119 S.Ct. at 1837.

Although this Court has not addressed the issue raised here, the California Supreme Court held that a trial court's failure to administer an oath of truthfulness to all prospective jurors at commencement of jury selection does not require reversal. People v. Carter, 36 Cal.4th 1114, 1175, 117 P.3d 476, 517 (Cal. 2005), cert denied, 547 U.S. 1099, 126 S.Ct. 1881 (2006). There, just as Barral claims here, the defendant contended that the trial court's error in not administering the oath of truthfulness pursuant to California Code to two of the three groups of potential jurors was a "structural defect" that per se warranted reversal. Carter reasoned that,

> . . . although empaneling one or more jurors who are actually biased against the defense would constitute

> structural error, here *the trial court's error in failing to swear some of the prospective jurors has not been shown to have resulted in the inclusion of any biased jurors on the panel, and defendant's claim of structural error fails for that reason*.

Id. at 1176, 117 P.3d at 518 (emphasis added). That Court noted that there can be other indicia besides the oath that indicate the jurors understood the importance of truthfulness during voir dire, such as the admonition on a jury questionnaire completed before voir dire. Id. at 1176, 117 P.3d at 518.

Barral attempts to distinguish Carter by overemphasizing that Court's reliance on the jury questionnaire that admonished potential jurors to be truthful. While Carter indeed considered the questionnaire, it ultimately relied on the fact that the empaneled jurors were properly sworn and the defendant made no showing that he was prejudiced by the empaneled jury:

> [T]he jury ultimately was instructed as to its duty to follow the trial court's instructions and was presumed to have performed its official duty, and defendant has failed to establish that he was prejudiced by the trial court's failure to administer the required oath at the outset of questioning some of the prospective jurors.

Id. at 1176-77, 117 P.3d at 518. Like the defendant in Carter, Barral has made no attempt to show that any empaneled jurors were biased or otherwise caused him prejudice and instead provides the bare allegation that "there was no guarantee that potential jurors felt obligated to give accurate and truthful responses." At no point did Barral object to the process, the panel, or any of the individual empaneled jurors.

Moreover, serving a similar purpose as the questionnaire in Carter, throughout the entire voir dire process, the court, the defense, and the State all emphasized the importance of telling the truth, the seriousness of the matter, and the importance of having jurors that can be fair to both sides. See, e.g., 2-3 AA 114, 125, 130, 293. In fact, the defense thoroughly explained to the potential jurors at the outset of voir dire the importance of honesty and that they needed to express their real feelings as opposed to what they thought the court or the parties wanted to hear. 2 AA 130. There is simply no reason to doubt that the potential jurors did not understand their duty to answer truthfully, and as the impaneled jurors were sworn before trial began, there is simply no reason to doubt that the jurors followed the courts instructions and appropriately performed their duties as unbiased jurors.

Barral also attempts a flawed analogy between the issue here and a Batson violation when he cites Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031 (2008), to claim structural error. In Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S.Ct. 1712 (1986), the United States Supreme Court explained that a defendant has the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria and that the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire strictly on account of race. Accordingly, Batson established the protocol by which courts must address a defendant's claim that a peremptory strike was impermissibly

race-based. Id. at 96-98, 10 S.Ct. at 1723-24. Thus, a trial court's error in rejecting a defendant's Batson challenge would necessarily mean that the empaneled jury was constitutionally infirm, i.e. a juror who would have otherwise been on the panel was removed for unconstitutional reasons.

Barral offers no explanation for how the failure to swear the venire prior to jury selection necessarily creates a constitutional error that undermines the framework of the trial as does a Batson violation. Instead, Barral offers nothing more than the mere coincidence that a Batson violation and the oath to the venire both occur during the jury selection process. Notably, the error in Batson was of constitutional magnitude in that it relied largely on the Equal Protection Clause, whereas here, the error of which Barral complains only violated a state statute, NRS 16.030(5). Interestingly, the Federal Rules of Criminal Procedure have no counterpart to NRS 16.030(5), and Barral fails to identify any authority indicating that an unsworn venire violates the Nevada or United States Constitution.

Equally unavailing, Barral claims that rulings in Alabama and Michigan are persuasive in finding structural error. First, Barral focuses on the Alabama Supreme Court's classification of juror oath problems as either "defective oath situations" or "no-oath situations" and claims the situation here qualifies as a no-oath situation. Notably, Barral misrepresents Fortner v. State, 825 So.2d 876 (Ala. Crim. App. 2002) as though it were an opinion from Alabama's Supreme Court – it is not.

Moreover, despite Barral's attempt to use Alabama's classifications to his benefit, the Alabama Supreme Court actually ruled that a situation where the petit jury was properly sworn, although the venire was not, is only a "defective oath situation" that, while potentially reversible, is a waivable error. Ex parte Benford, 935 So.2d 421, 430 (Ala. 2006). Thus, the logical inference is that, if an error is waivable, it is not a structural error requiring automatic reversal. Second, Barral cites a Michigan case, People v. Allen, 299 Mich. App. 205, 829 N.W.2d 319 (Mich. Ct. App. 2013), but that case only considered the circumstance where the petit jury was not sworn before or during the trial and thus is irrelevant to factual circumstances presented here. Notably, again, Barral misrepresents an intermediate court ruling as though it came from that State's high court.

The district court's failure to administer an oath to the venire pursuant to NRS 16.030(5) is not structural error because the error did not undermine the very framework of Barral's trial. Moreover, Barral fails to demonstrate beyond mere speculation that the district court's error prejudiced Barral's substantial rights in any manner. Indeed, considering the empaneled jury was properly sworn, that the court and the parties all repeatedly stressed the importance of truthfulness to the potential jurors throughout voir dire, and that Barral makes no claim that the empaneled jurors did not live up to their oath, the district court's error was not prejudicial and was harmless beyond a reasonable doubt. Therefore, Barral is not entitled to a new trial.

II
THE DISTRICT COURT DID NOT COMMENT ON HOW THE JURY SHOULD INTERPRET WITNESS TESTIMONY.

The district court did not impermissibly comment on how the jury should interpret evidence. Barral waived this issue for appeal by failing to properly object, and notwithstanding, Barral fails to demonstrate that the district court's statement amounts to plain error affecting his substantial rights.[5]

NRS 178.602 grants this Court discretion to review an inadequately preserved issue, but only if the error was "plain and affected the defendant's substantial rights." Green, 119 Nev. at 545, 80 P.3d at 95 (internal citations omitted). The defendant bears the burden to show the error caused "actual prejudice or a miscarriage of justice." Id., 80 P.3d at 95 (internal citations omitted).

Although judges may not comment on the probability or improbability of the truth or credibility of the evidence, judges indeed may state the testimony and declare the law. Nev. Const. art. VI, § 12; NRS 3.230. Thus, judges may not charge the jury as to facts but indeed may permissibly state the evidence. Shannon v. State, 105 Nev. 782, 788, 783 P.2d 942, 946 (1989). As an example, in Barrett v. State, 105 Nev. 356, 360-61, 776 P.2d 538, 541 (1989), this Court ruled that the district court did not impermissibly comment on a witness' testimony during a defense

[5] Barral concedes that he did not properly preserve the issue because the only standard of review Barral identifies in his argument is the plain error standard. Appellant's Opening Brief at 12.

objection. There, a defense witness testified regarding an incident during which the defendant, in an apparent emotional frenzy, repeatedly exclaimed, "I wish I wouldn't of did it." Id. at 360, 776 P.2d at 541. Then, on cross-examination, the prosecution asked if the witness knew what the defendant wished she had not done, prompting a defense objection. Id. at 360, 776 P.2d at 541. Before the court could rule, however, the witness blurted out, "I think she was talking about the murder." Id. at 361, 776 P.2d at 541. The court then stated, "The objection is sustained. But I don't know if we're going to be able to erase the obvious conclusion that is unsupported by any facts of what this witness has volunteered." This Court aptly ruled that the court was not charging the jury and thus neither Article 6, § 12 nor NRS 3.230 applied. Id. at 361, 776 P.2d at 541. Moreover, this Court explained that even if error, such a statement was not prejudicial and was thereby harmless. Id. at 360, 776 P.2d at 541 (citing Gordon v. Hurtado, 91 Nev. 641, 541 P.2d 533 (1975)).

In contrast, this Court described the district court's comments on testimony as "obvious" error in Gordon, 91 Nev. at 645, 541 P.2d at 535. There, the district court flagrantly commented on the credibility of the witness and the weight of that testimony as evidence:

> 'The court is substantially impressed in this case not only by the qualification of this witness and the validity to formulate opinions enunciated by him, but also by the fact there was virtually no direct testimony whatsoever to assist or aid or direct or guide the jury with regard to circumstances surrounding the accident in concluding that

> in this case the testimony in the line of accident construction is particularly appropriate and particularly probative and, therefore, more than justified on the basis of the record before the court at this time. . . .'

Id. at 644-45, 541 P.2d at 535. In ruling that the error was not harmless, this Court noted that not only did the court err in commenting on both the quantity and quality of the direct evidence, but the court's comments concerned testimony that was not even admissible in the first place. Id. at 645, 541 P.2d at 535.

Here, the district court's comments do not remotely rise to nature of the comments in Gordon and, in fact, were nothing more than an explanation for the court's ruling on the State's objection. Context, notably omitted from Barral's argument, is particularly important. During Barral's cross-examination of J.C., the following exchange occurred:

> Q: And do you remember meeting with Betsy [J.C.'s therapist] and telling Betsy that you wanted to practice what you were going to say in court when you get here?
>
> A: Yes.
>
> Q: Okay. So you've been practicing a lot to prepare for today. Is that right?
>
> A: Not a lot.
>
> Q: How did you go about practicing?
>
> A: I told Ms. Betsy what happened.

2 AA 422-23. J.C. was seven years old at the time of trial, and the record indicates that "practice" for J.C. likely only meant telling adults what had happened to her so that she would not be too nervous to explain what happened in court, not that she was in any way coached or told what to say. In fact, subsequent testimony from J.C.'s mother and grandmother confirmed that J.C. was never told what to say, but rather that the adults tried to help J.C., a seven-year-old girl, prepare to deal with the magnitude and seriousness of a court proceeding and J.C.'s inevitable nervousness if facing the man who assaulted her. 2-3 AA 488-90, 643-47.

J.C.'s mother was called as a witness prior to J.C. at trial, and the issue of J.C.'s "practice" was not addressed at that time. Thus, in light of J.C.'s testimony, the State recalled J.C.'s mother and asked whether she ever coached J.C. or told her what to say. 3 AA 643-47. J.C.'s mother explained that she did not, although she helped J.C. deal with her nervousness and fear of testifying in front of Barral. 3 AA 643-47. Then, during cross-examination, the defense asked J.C.'s mother, "Are you aware that [J.C.] testified that she practiced with you in the days and weeks leading up to testifying in court?" 3 AA 647. The State promptly objected on grounds that the question misstated J.C.'s testimony. J.C. had testified that her mother had only helped her "practice" two times, 2 AA 423, and as explained above, further questioning elicited that J.C. did not likely mean the word practice in the sense adults might construe it in the context of a court proceeding, but rather in the sense that

adults had helped her deal with the anxiety of testifying. In ruling on the State's objection, the district court appropriately explained that practice, as the defense was using it its question, was not necessarily an accurate representation of J.C.'s testimony because, especially considering J.C. was a seven-year-old child, it seemed that she was using practice to refer simply to preparing to deal with court. 3 AA 647. The district court's remarks had nothing to do with J.C.'s credibility as a witness, as Barral purports, but rather were directly focused on ensuring that her prior testimony was not misrepresented during questioning of another witness, an entirely appropriate response from the court considering its duty to ensure a fair proceeding in which the jury is not misled. Therefore, the district court's statement was not error, plain or otherwise.

Even assuming arguendo that the court's statement was improper, Barral fails to demonstrate that he was prejudiced thereby and thus his claim warrants no relief. The court's statement did not reveal impartiality in front of the jury or somehow vouch for J.C.'s credibility as Barral contends. Rather, even if the court's attempt to prevent the defense from parsing a seven-year-old child's words to mislead the jury was improper, it was a marginal breach of the jury's duty to interpret and weigh testimony. As explained above, J.C.'s mother and grandmother both testified that they did not coach J.C. or otherwise script her testimony, and J.C.'s own testimony demonstrated that the "practice" to which she was referring was nothing more than

telling adults what happened to her and talking about how to handle coming to court and testifying in front of the man who assaulted her. Thus, absent the district court's statement, there is no reason to conclude the jury would have disregarded all other evidence in the case and reached a different verdict. Importantly, J.C.'s testimony at trial was consistent with her interview with Detective Hatchett that occurred only a few days after staying at Barral's house, an interview that was played for the jury, which demonstrates that J.C. was not told what to say at trial and supports the jury's findings. Therefore, Barral fails to demonstrate that the error he alleges resulted in actual prejudice to his substantial rights or a miscarriage of justice and his claim should be denied.

III
THE DISTRICT COURT DID NOT IMPERMISSIBLY DISPARAGE THE DEFENSE IN FRONT OF THE JURY.

Barral failed to preserve for this Court's review the issue of whether the district court erred by "expressing impatience" with the defense during trial. "Judicial misconduct must be preserved for appellate review; failure to object or assign misconduct will generally preclude review by this court." Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998). Barral alleges the district court improperly disparaged the defense via a few particular comments over the span of the four-day trial, yet Barral failed to lodge a single objection on such grounds.

Accordingly, Barral failed to properly preserve the issue and this Court should decline review.

This Court has held that it may review an inadequately preserved claim of alleged judicial disparagement under the plain error doctrine in certain circumstances. Id. at 622, 960 P.2d at 338. In Oade, for example, defense counsel objected to the first instance of perceived judicial disparagement and moved for a mistrial, and the court then admonished counsel that it would not be "provoked into a mistrial." Id., 960 P.2d at 338. This Court reasoned that counsel may, after lodging the initial objection, reasonably fear that further objections would antagonize the judge and potentially lead to prejudice against the client. Id., 960 P.2d at 338. The sheer volume of alleged instances of disparagement (eighteen instances in Oade) can magnify that risk and justify counsel's decision to discontinue objecting. Id., 960 P.2d at 338. Thus, this Court understandably concluded that it would apply plain error review under those circumstances. Id., 960 P.2d at 338.

Here, however, Barral failed to lodge a single objection on grounds of judicial misconduct or disparagement of the defense. In failing to bring his concerns of alleged disparagement to the court's attention, Barral never gave the court the opportunity to address his concerns, thereby compounding the alleged error. Thus, unlike in Oade where counsel justifiably declined to continually object after his motion for mistrial was denied, Barral unreasonably declined to object in the first

instance. Therefore, Barral waived any alleged error and this Court should decline plain-error review.

Notwithstanding, Barral fails to demonstrate that any of the district court's statements rise to the level of plain error that caused actual prejudice to Barral's substantial rights. Indeed, the district court did not improperly disparage the defense, but rather properly controlled its courtroom and reasonably declined to allow the parties to dictate courtroom procedure or dispense with proper courtroom etiquette. Moreover, none of the court's comments with which Barral takes issue reveal bias as he contends.

Barral first claims that the district court disparaged the defense when, after defense counsel requested to approach the bench during voir dire, the court stated as follows: "Okay. We approach a lot. We take – we im – impede on the jury's time but go ahead. Let's try to cut this down." 1 AA 142. Nothing in the court's response was disparaging or demonstrated bias towards the defense. In fact, the court made a similar response to a subsequent request to approach the bench from the State during jury selection: "Approaching takes time from the Jury but do it. This may be the last time." 1 AA 236. Thus, the court merely attempted to avoid wasting time with unnecessary bench conferences, and the court applied the same standard to the State.

Barral next contends that the court disparaged the defense when counsel objected during the State's examination of J.C.'s uncle (not Barral). The record reveals the following:

> Q: Did you encourage [J.C.'s aunt] one way or the other as far as her cooperation with the detective?
>
> A: Yeah. Yeah, of course. I told her, you know, what's your concern about going to see him and hear his questions, you know?
>
> Q: And what did you find out as a result of that?
>
> A: Well she seemed like –
>
> MR. CASTILLO (Defense): Objection, calls for a hearsay response.
>
> THE COURT: Calm down.
> Ask that question again please.
>
> Q: What did you find out as a result of that?
>
> THE COURT: Okay. Restate that question.

3 AA 635. Barral apparently takes issue with "calm down," but from the record it is not even clear to whom that remark was directed. Even if directed at defense counsel, the paper record does not reveal the manner in which defense counsel objected so as to indicate to what the court was reacting. Further, the comment was not disparaging and did not indicate bias because the court sustained the objection when it required the State to rephrase its question. In fact, the State continued to

attempt to elicit the same information from the witness and the court sustained two subsequent defense objections. 3 AA 635-36.

Barral next alleges that the court disparaged the defense twice during the testimony of Dr. Sandra Cetl, the State's expert who testified regarding her review of records from J.C.'s examination at Sunrise Hospital. Barral first complains of when the Court informed defense counsel that the court control's the courtroom and not the attorneys. The court's statement, however, directly followed defense counsel attempting in the middle of the State's direct examination to instruct the court that it was a good time for a recess. Thus, the Court's comment – "And I'll control my courtroom; not you. Thank you." – was entirely temperate and an appropriate way to direct counsel not to attempt to disrupt the other party's examinations in such a manner. Barral's second complaint with the court during Dr. Cetl's testimony stems from the State's objection during cross-examination. After the State objected, defense counsel stated, "Well, I'd object to a speaking objection." 3 AA 683. In the context of the entire trial transcript, defense counsel's remark was nothing more than a sarcastic response to the Court's prior admonitions to not have speaking objections and in no way was a professional, substantive response to the State's objection. Thus, the court appropriately directed defense counsel to be respectful of the court and opposing counsel, well within reason considering the court's duty to control the courtroom and ensure a fair trial to both sides.

Lastly, Barral claims that the court "chastised" defense counsel when he objected to the court "editorializing from the bench," but Barral greatly exaggerates the court's response. No chastising was involved, but rather the court responded appropriately to defense counsel's inappropriate manner of objecting in an effort to keep control in the courtroom and ensure dignified proceedings. 3 AA 683.

The district court, as shown above, did not disparage the defense or reveal bias against defense counsel, and Barral's meritless claim relies on nothing more than a few innocuous statements isolated from the entirety of a four-day trial. Barral makes no attempt beyond mere conclusory allegations to demonstrate that the alleged judicial misconduct caused actual prejudice to his substantial rights in light of the totality of evidence presented at trial. In fact, Barral seemingly concedes that his claim does not alone warrant relief, but rather suggests that the comments only contribute to cumulative error. Appellant's Opening Brief at 18.[6] Notwithstanding that there is no error to cumulate, Barral's claim is nothing like the eighteen alleged instances of judicial misconduct alleged in Oade. In Oade, for comparison, four of the eighteen instances involved the court threatening or actually imposing sanctions and fines on defense counsel in front of the jury. Oade, 114 Nev. at 624, 960 P.2d at 340 (Gibbons, J., concurring). Barral's allegations are not remotely comparable.

[6] The State responds to Barral's cumulative error claim more fully in Section VIII, infra.

Therefore, Barral fails to demonstrate plain error that caused actual prejudice and his claim warrants no relief.

IV
THE DISTRICT COURT PROPERLY LIMITED BARRAL'S CROSS-EXAMINATOPM OF THE VICTIM BECAUSE THE EVIDENCE BARRAL SOUGHT TO INTRODUCE WAS IRRELEVANT.

The district court properly denied Barral's request to question J.C. regarding notes from J.C.'s therapist that allegedly reveal sexual contact because the notes were irrelevant to the purpose for which Barral sought to have them admitted. This Court will not reverse a district court's decision to admit or exclude evidence absent an abuse of discretion. Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). Barral correctly notes that this Court generally reviews Confrontation Clause issues de novo because they ultimately raise a question of law, Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009), but Barral did not argue below that the district court's ruling violated the Confrontation Clause, 1 AA 17-21, and thus he failed to preserve that issue. Moreover, other than citing the applicable standard of review, Barral makes no argument here related to the Confrontation Clause. See NRAP 28(a)(9); see also Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (declining to address issues where appellant failed to comply with his responsibility to provide relevant authority and cogent argument). Therefore, the appropriate analysis here is whether the district court abused its discretion when it made the evidentiary ruling.

This Court ruled in Summitt v. State, 101 Nev. 159, 163-64, 697 P.2d 1374, 1377 (1985), that prior sexual experiences of a child victim may be admissible to demonstrate that the child's prior sexual experiences could explain the source of the child's knowledge of the sexual activity described in testimony at trial, notwithstanding Nevada's rape shield law, NRS 50.090. Prior to admitting such evidence, however, "the trial court must undertake to balance the probative value of the evidence against its prejudicial effect, see NRS 48.035(1), and that the inquiry should particularly focus upon 'potential prejudice to the truthfinding process itself,' i.e., 'whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis.'" Id. at 163, 697 P.2d at 1377 (citation omitted). The factual basis for Summitt was a defense request to admit evidence that the child victim had sexual experiences, including intercourse, fellatio, and fondling of genitalia, two years prior to the crimes at issue so as to show that the victim might only be recounting that earlier experience in her trial testimony. Id. at 160, 697 P.2d at 1375.

Barral's attempt to rely on Summit here is flawed for at least two reasons. First, the alleged sexual experience information Barral sought to use in questioning J.C. almost exclusively referred to incidents that occurred *after* the crimes that were the subject of Barral's trial. 1 AA 20. Thus, those alleged sexual experiences could not have been evidence that J.C.'s trial testimony was based on those incidents –

J.C.'s statement regarding Barral's conduct was captured in her videotaped interview with Detective Hatchett mere days after Barral committed the crimes. Second, what Barral claims were prior incidents of "sexual contact" were not sexual contact at all in comparison to the intercourse, fellatio, and genital fondling described in Summit. Of the allegations Barral cited in his motion that occurred after the crimes in this case, only two involved contact of any sort, one where a girl at school "patted" J.C.'s privates and a second where a boy at school kicked J.C. in the privates. 1 AA 20. The only incident cited that allegedly occurred prior to Barral's crimes is when J.C. told Detective Hatchett that a friend had "touched" her on her privates. 1 AA 20; St. Ex. 2. J.C. in no way described actual sexual contact, such as digging in her privates and butt like Barral. One four-year-old being touched by another four-year-old on the privates is not sexual contact, certainly not the type of sexual contact contemplated in Summit. Therefore, the purported evidence was irrelevant, and because the purported evidence was not comparable to the evidence in Summit in that it mostly post-dated the crimes and did not consist of actual sexual contact, the district court properly denied Barral's request.

V
THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT WHEN IT CHARACTERIZED TESTIMONY.

The district court did not abuse its discretion when it overruled defense objections to two instances of alleged prosecutorial misconduct involving the

characterization of witness testimony. Notwithstanding that no error occurred, the alleged improper statements were not constitutional errors and were harmless beyond a reasonable doubt.

This Court applies a two-step analysis to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). This Court first determines whether the prosecutor's conduct was improper, and second, whether the conduct warrants reversal. Id., 196 P.3d at 476. "A prosecutor's comments should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quoting United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038 (1985)). Moreover, "this Court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Valdez, 124 Nev. at 1188, 196 P.3d at 476.

One of two harmless error standards applies to review of prosecutorial misconduct depending on whether the alleged error is of a "constitutional dimension." Id. at 1188-89, 196 P.3d at 476. When the alleged misconduct is of a constitutional nature, this Court applies the Chapman v. California standard, 386 U.S. 18, 24, 87 S.Ct. 824 (1967), and will not reverse if "the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Id. at 1189, 196 P.3d at 476. Alternatively, when the alleged error is not constitutional,

this Court "will reverse only if the error substantially affects the jury's verdict." Id., 196 P.3d at 476. The nature of the alleged misconduct determines whether the error is or is not constitutional. Id., 196 P.3d at 477. "Whether these distinctions make a significant difference in the ultimate analysis of harmlessness may be the subject of some debate," but there are nonetheless two standards. Id., 196 P.3d at 477.

Barral first alleges prosecutorial misconduct during Detective Hatchett's testimony regarding J.C.'s statements during the videotaped interview. During the early portion of Detective Hatchett's interview of J.C., Detective Hatchett inquired as to whether J.C. allowed anyone to touch her privates, and J.C. stated that her parents were allowed and that a friend of hers, a four-year-old boy, had kissed her on the shoulder and touched her on her privates. 3 AA 532-33. The district court denied Barral's request to introduce evidence related to that touching incident, supra, and thus that information was redacted from the video played for the jury. 3 AA 532. When the State inquired of Detective Hatchett as to J.C.'s statement of who she allowed to touch her privates, i.e. J.C.'s parents, Detective Hatchett inadvertently referenced the incident with the four-year-old boy. 3 AA 697. Not only did Detective Hatchett mistakenly refer to that incident, but Detective Hatchett also misstated what J.C. had told him in that he said the boy kissed her on her privates rather than merely touched her. 1 AA 34-35; 3 AA 697. The State immediately noticed Detective Hatchett's error, both in revealing the incident and in

misrepresenting J.C.'s statement in the interview, and in light of the court's ruling that the evidence was inadmissible, the State attempted to redirect Detective Hatchett in a manner consistent with the court's ruling and with the redacted video admitted as evidence. 3 AA 697. Rather than allow the State to simply move on without drawing attention to the Detective's mistake, and while keenly aware of the court's prior ruling and the precise statements J.C. made during the interview, defense counsel immediately objected on grounds that the State had misrepresented Detective Hatchett's testimony, thus highlighting the error. 3 AA 697.

After a bench conference and a lengthy discussion outside the jury's presence, the Court agreed that the best course was to not further highlight the error and that the State would admonish the Detective and simply continue its examination by re-asking its last question. 3 AA 705-06. Barral contends that, when the examination resumed, the State again misstated the testimony, but that contention is belied by the record because the State did precisely what it said it was going to do – ask the exact same question again. The State's last question before the break was as follows:

> Q: Okay so with the – with regard to the boy at school she said that he had kissed her on her – was it on her shoulder I believe and then she talked about then her parents when you asked if someone had touched her on her private parts, she said her parents had, just her mom and her dad. And –

3 AA 697. The State's first question after the break was as follows:

> Q: Okay. So I think where we left off – and you were saying that at some point you had spoke to Jocelyn that a little boy, four years old, Nico had kissed her on her shoulder. And then in response to if anyone had touched her privates that her – both her mom and her dad had.

3 AA 707. Thus, the record plainly demonstrates that the State precisely followed what had been agreed upon during the break to resolve Detective Hatchett's error. Accordingly, the State's comment was not a mischaracterization of testimony that constituted prosecutorial misconduct.

Remarkably, Barral contends that he was prejudiced by the alleged error because the State's question left the jury misinformed. In reality, however, Detective Hatchett's initial testimony, which incorrectly represented what J.C. said during the interview, is what would have misled the jury. The State's question accurately reflected the facts of the case. Thus, only the defense sought to have the jury hear testimony that was inaccurate. Therefore, notwithstanding that no prosecutorial misconduct occurred, the alleged error did not substantially affect the jury's verdict, and further, the alleged error was harmless beyond a reasonable doubt.

Barral also alleges that the State committed prosecutorial misconduct during its rebuttal argument in relation to statements about a baby monitor located in the room where J.C. was assaulted. During rebuttal, the State argued that Barral could have turned down the volume of the baby monitor so that J.C.'s aunt could not hear any potential noise. 4 AA 803. J.C.'s aunt had testified on redirect examination that

the volume of the monitor could be turned down from that room. 3 AA 608-09. On re-cross, however, she indeed clarified that the volume could have only been turned down from the unit in the parents' room rather than the unit in the room where J.C. was assaulted. 3 AA 613. During rebuttal argument, the State did not specify which specific unit had a volume control as it had in its questions during redirect examination, but rather, in light of the clarification on re-cross, simply argued that "you could manipulate the monitor in Josh's room to turn down the volume." 4 AA 803. Thus, the jury could reasonable infer from the State's argument that Barral could have manipulated the volume of the baby monitor located in Josh's room by turning down the volume in Barral's bedroom. The State never mentioned where the control was during its argument and thus did not misstate the evidence.

Nevertheless, even assuming arguendo that the State's argument was not accurate, there was no prejudice to Barral. Barral promptly objected during the State's argument, and in response, the Court admonished the jury that what the attorneys argue is not evidence and to follow the jury instructions. 4 AA 803. Thus, the Court immediately reminded the jury to rely on its own perception of the actual testimony and other evidence presented, not counsel's argument. Further, despite Barral's attempt to portray the baby monitor as key evidence, Barral placed himself in the room that night when he concocted the story that he accidentally sat on J.C., an event that would have provided an explanation had J.C. made any noise.

Therefore, the alleged error did not substantially affect the jury's verdict, and further, the alleged error was harmless beyond a reasonable doubt.

VI
THE DISTRICT COURT PROPERLY DENIED BARRAL'S MOTION FOR ACQUITTAL BECAUSE THE STATE PRODUCED SUFFICENT EVIDENCE FOR ANY RATIONAL TRIER OF FACT TO FIND BARRAL GUILTY.

The district court properly denied Barral's motion for acquittal because the State produced sufficient evidence for any rational trier of fact to find Barral guilty. NRS 175.381 provides that, after the jury finds a defendant guilty, the district court may set aside the jury's verdict and enter a judgment of acquittal only "if the evidence is insufficient to sustain a conviction." Importantly, the relevant inquiry in reviewing the sufficiency of the evidence is not whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the defendant guilty, 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, 908 P.2d 684, 686-87 (1995) (quotation and citation omitted; emphasis in original).

Understandably, then, 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, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (emphasis removed). The district court is not permitted "to act as a 'thirteenth juror' and reevaluate the evidence and the credibility of the witnesses." Id., 926 P.2d at 279. Rather, it is the jury's role as fact finder "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002). This court has repeatedly held that the testimony of a sexual assault victim need not be corroborated and is alone sufficient to uphold a conviction for a sexual offense. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005).

Here, the State proved beyond a reasonable doubt that Barral used his finger(s) to penetrate J.C.'s vagina and anus and the jury properly so found. Although Barral seemingly contends that there was no evidence that Barral actually penetrated J.C.'s vagina and anus, the facts produced at trial, if believed, were sufficient for any rational trier of fact to find that Barral penetrated J.C.'s vagina and anus and find him guilty on both counts. "Sexual penetration," under NRS 200.364(5), means

"any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another. . . ." J.C. testified that Barral *dug* into her privates while she stayed the night at his house. 2 AA 416-17, 428. More specifically, she was sleeping on a futon in the baby's room when Barral entered, sat down on the futon, placed his hands under her clothes and proceeded to *dig* in her privates. 2 AA 416-17, 428. Barral agrees that the victim's testimony need not be corroborated to support a conviction, yet he implies that J.C.'s testimony was not sufficiently particular when he cites to LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). In LaPierre, however, the issue with particularity stemmed from the victim's inability to identify the number of incidents of sexual contact with particularity and, in fact, five of the counts were based on "mere conjecture." LaPierre, 108 Nev. at 531, 836 P.2d at 58. There was no confusion or lack of specificity in J.C.'s testimony here, but rather J.C. was very precise in describing Barral's digging in her privates and butt and the circumstances under which it occurred.

Pursuant to NRS 51.385, J.C.'s prior recorded statement to Detective Hatchett – given within days of the incident – was played for the jury. 3 AA 710-11; St. Ex. 2. Throughout the recorded interview, J.C. repeatedly describes Uncle Dustin or Levi's Daddy as *digging in her privates and butt* with his fingers. St. Ex. 2. She repeatedly used the words dig, dug, or digging to describe what Barral did. St. Ex.

2. J.C. also describes Barral's fingers going under her clothes and *turning right into her privates*. St. Ex. 2. In the interview, J.C. also uses the words "*sinking in*" to describe what happened to Barral's fingers while he was digging in her privates. St. Ex. 2. J.C. also explains that, after he dug in her privates and butt, she watched Barral walk to the bathroom and wash his hands. St. Ex. 2. Also pursuant to NRS 51.385, the State elicited J.C.'s statements of how Barral had dug in her privates, touched her, and hurt her from J.C.'s mother, grandmother, and aunt, and all such statements were consistent with J.C.'s testimony and recorded interview with Detective Hatchett. 2 AA 352, 356, 420, 449, 452.

Contrary to Barral's claim, there was no absence of evidence that Barral digitally penetrated J.C.'s vagina and anus. The jury reasonably found that the language J.C. used to describe what happened – dug, dig, digged in her privates and butt, fingers sinking into her privates – demonstrated that Barral penetrated J.C.'s vagina and anus. The fact that J.C. used age-appropriate language merely raised a question for the fact-finder to resolve, i.e. that J.C.'s statements described vaginal and anal penetration beyond a reasonable doubt. Therefore, the State produced sufficient evidence for any rational trier of fact to find Barral guilty of two counts of sexual assault on a child under fourteen years of age.

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VII
THE DISTRICT COURT PROPERLY DENIED BARRAL'S MOTION FOR A NEW TRIAL BECAUSE THE EVIDENCE WAS NOT CONFLICTING.

The district court properly denied Barral's motion for a new trial based on allegedly conflicting evidence. "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse." Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (internal quotation omitted).

The "other grounds" provision of NRS 176.515(3) provides that the district court may grant a motion for a new trial when, even though there is sufficient evidence to support the jury's verdict, the court does not believe the defendant was proven guilty beyond a reasonable doubt based on the court's own evaluation of conflicting evidence. State v. Purcell, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994); State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2 (1993). In Purcell, for example, this Court affirmed the district court's grant of a new trial based on conflicting evidence, explaining as follows:

> On cross-examination, the defense brought out inconsistencies in her testimony, put on its own witnesses to testify about her untruthfulness and her motivation to lie about Purcell so that she could go live with her father, and introduced evidence showing a lack of opportunity for Purcell to have committed the crimes at the time and in the manner that she described.

Purcell, 110 Nev. at 1393, 887 P.2d at 278.

Here, the district court did not abuse its discretion when it agreed with the jury's verdict and rejected Barral's claim that the evidence was conflicting. Unlike in Purcell where the defense introduced evidence to show the victim's untruthfulness and had a specific motivation to lie about the defendant, there was no evidence whatsoever at Barral's trial to indicate then four-year-old J.C. was being untruthful or had any motivation to lie about what had occurred. J.C.'s disclosures to her family members, her statements to Detective Hatchett, and her testimony at trial were all consistent in describing that Barral dug in her privates and butt and the circumstances surrounding that event. Further, whereas there was evidence that Purcell lacked an opportunity to commit the crimes, Barral directly placed himself on the futon with J.C. that night when he concocted an incredible story about accidentally sitting on J.C. Inasmuch as Barral purports that his story creates a conflict, the district court was well within its discretion to resolve that purported conflict by dispensing with Barral's version of events, as did the jury.

Barral contends that the baby monitor evidence conflicted with J.C.'s testimony and statements, but Barral overestimates the significance of the baby monitor and creates a conflict where none exists. Even assuming arguendo that the baby monitor was turned on with the volume up when the events occurred, there was no evidence that any noise or talking in the baby's room would have been sufficient to alert J.C.'s aunt, or even if she heard some noise that she would have paid it any

mind since Barral had already gotten up to purportedly check on the baby. Further, with J.C.'s aunt asleep, Barral could have easily turned down the volume on the baby monitor before he left his bedroom so that she would not have been able to hear any potential commotion. In short, testimony regarding the baby monitor was insignificant and was in no way evidence that Barral did not dig into J.C.'s privates and butt. Therefore, the district court properly determined that it did not disagree with the jury's verdict based on Barral's mere speculation that the baby monitor caused a conflict in the evidence presented at trial.

As fact finder, the jury appropriately weighed the evidence and assigned credibility to witnesses, and the jury ultimately concluded that Barral was guilty beyond a reasonable doubt. The district court, after its own review of the evidence, acted well within its discretion to agree with the jury's verdict and deny Barral's motion for a new trial.

VIII
BARRAL WAS NOT DENIED A FAIR TRIAL BASED ON CUMULATIVE ERROR.

Barral was not denied a fair trial due to alleged cumulative error. This 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, 992 P.2d 845, 854-55 (2000). Importantly, a defendant "is not entitled to a perfect trial, but only a

fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)).

The issue of guilt in this case was not close. As explained in detail above, there was more than sufficient evidence to sustain the verdict, including consistent, detailed descriptions from J.C. of how Barral dug into her privates and butt. Regarding the quality and character of the error, Barral failed to demonstrate any error warranting relief and thus there is nothing to cumulate. In fact, Barral waived several of the errors he alleges when he failed to properly preserve the issues for appeal. Even assuming arguendo that Barral demonstrated some degree of error in the proceedings, none of the errors Barral alleged were of such a character as to have impacted the jury's verdict. Thus the cumulative effect of any such error(s) was harmless beyond a reasonable doubt, particularly in light of the substantial evidence presented at trial. Barral's crimes of two counts of sexual assault on a minor under fourteen years of age are indeed grave, see Valdez, 124 Nev. at 1198, 196 P.3d at 482 (stating crimes of first degree murder and attempt murder are very grave crimes), but the gravity of Barral's crimes does not alone outweigh the factors of whether the issue of guilt is close and the quantity and quality of errors, both of which weigh heavily in favor of the State. Therefore, Barral's claim of cumulative error has no merit and his conviction should be affirmed.

/ / /

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 16th day of June, 2014.

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 11,478 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 16th day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 16th day of June, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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