IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK HARRIS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 69093

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(1) because it is a direct appeal from convictions of Category A and B Felonies.

STATEMENT OF THE ISSUES

1. Whether the District Court properly excluded irrelevant testimony during the cross-examination of T.D.
2. Whether the District Court properly allowed the introduction of statements to medical personnel
3. Whether the District Court properly excluded irrelevant testimony regarding minor victim V.D.'s virginity
4. Whether the District Court properly allowed the introduction of statements to police
5. Whether sufficient evidence supports Harris's convictions for the kidnapping charges

6. Whether the District Court properly denied Harris's Motion for New Trial based on alleged misconduct of a juror who posted a photo of his jury badge on Facebook
7. Whether the District Court properly denied Harris's Motion for New Trial based on alleged misconduct of a juror during voir dire
8. Whether the State presented sufficient evidence to sustain Harris's convictions
9. Whether cumulative error warrants relief

STATEMENT OF THE CASE

On July 23, 2013, Defendant Frederick Harris ("Harris") was charged by way of Information with the following: Counts 1, 15-18: Child Abuse, Neglect, or Endangerment (Category B Felony - NRS 200.508); Counts 2-3, 6, 8-11, 13-14, 21-22: Sexual Assault With a Minor Under Fourteen Years of Age (Category A Felony - NRS 200.364, 200.366); Counts 4-5, 7, 12, 20: Lewdness with a Child Under the Age of 14 (Category A Felony - NRS 201.230); Counts 19, 25, 28, 37: First Degree Kidnapping (Category A Felony - NRS 200.310, 200.320); Count 23: Coercion (Sexually Motivated) (Category B Felony - NRS 207.190); Counts 24 and 27: Administration of a Drug to Aid in the Commission of a Crime (Category B Felony - NRS 200.405); Counts 26, 29-35: Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); Counts 36, 39-41: Sexual Assault (Category A Felony - NRS 200.364, 200.366); Count 38: Battery with Intent to Commit Sexual Assault (Category A Felony - NRS 200.400); Count 42: Pandering (Category C Felony - NRS 201.300); Count 44: Living from the

Earnings of a Prostitute (Category D Felony - NRS 201.320); and Count 45: Battery by Strangulation (Category C Felony - NRS 200.481). 1 AA 9-21.

A jury trial commenced on March 25, 2014. 9 AA 999. On April 15, 2014, after hearing 12 days of evidence and after approximately two days of deliberation, the jury found Harris guilty of the following: eleven counts of Sexual Assault With a Minor Under Fourteen Years of Age; five counts of Lewdness With a Child Under the Age of 14; six counts of Sexual Assault With a Minor Under Sixteen Years of Age; four counts of Sexual Assault; four counts of First Degree Kidnapping; one count of Administration of a Drug to Aid in the Commission of a Crime; one count of Coercion (Sexually Motivated); one count of Battery With Intent to Commit Sexual Assault; one count of Child Abuse, Neglect or Endangerment; one count of Pandering; and one count of Living From the Earnings of a Prostitute. The jury found Defendant not guilty of the following: two counts of Sexual Assault With a Minor Under Sixteen Years of Age; one count of Sexual Assault; one count of Administration of a Drug to Aid in the Commission of a Crime; four counts of Child Abuse, Neglect or Endangerment; and one count of Battery by Strangulation. 21 AA 3266-3268

Harris filed a Motion for New Trial on April 28, 2014. 7 AA 816-822. The State filed an Opposition on June 13, 2014. 8 AA 954-967. Harris's Motion was denied on June 30, 2015. 24 AA 3419.

On November 2, 2014, Harris was adjudged guilty of the following: Count 16 - Child Abuse, Neglect, or Endangerment; Counts 2, 3, 6, 8, 9, 10, 11, 13, 14, 21, and 22 - Sexual Assault with a Minor Under Fourteen Years of Age; Counts 4, 5, 7, 12, and 20 - Lewdness with a Child Under the Age of 14; Count 16 – Child Abuse, Neglect or Endangerment; Counts 19, 25, 28, and 37 - First Degree Kidnapping; Count 23 - Coercion (Sexually Motivated); Count 24 - Administration of a Drug to Aid in the Commission of a Crime; Counts 26, 29, 31, 32, 33, 34, and 35 - Sexual Assault with a Minor Under Sixteen Years of Age; Counts 36, 39, 40, and 41 - Sexual Assault; Count 38 - Battery with Intent to Commit Sexual Assault; Count 42 - Pandering; Count 44 - Living from the Earnings of a Prostitute. 7 AA 843-848.

He was sentenced as follows: As to Count 2 – 35 years to life; as to Count 3 – 35 years to life; as to Count 4 – 10 years to life; as to Count 5 – 10 years to life; as to Count 6 – 35 years to life; as to Count 7 – 10 years to life; as to Count 8 – 35 years to life; as to Count 9 – 35 years to life; as to Count 10 – 35 years to life; as to Count 11 – 35 years to life; as to Count 12 – 10 years to life; as to Count 13 – 35 years to life; as to Count 14 – 35 years to life; as to Count 16 – 28 to 72 months, to run concurrent with all other counts; as to Count 19 – 5 years to life; as to Count 20 – 10 years to life; as to Count 21 – 20 years to life; as to Count 22 – 20 years to life, to run consecutive to Count 21; as to Count 23 – 28 to 72 months, to run concurrent with all other counts; as to Count 24 – 24 to 60 months to run concurrent with all

other counts; as to Count 25 – 5 years to life; as to Count 26 – 20 years to life; as to Count 28 – 5 years to life; as to Count 29 – 20 years to life; as to Count 31 – 20 years to life; as to Count 33 – 20 years to life; as to Count 34 – 20 years to life; as to Count 35 – 20 years to life; as to Count 36 – 10 years to life; as to Count 37 – 5 years to life; as to Count 38 – 2 years to life; as to Count 39 – 10 years to life; as to Count 40 – 10 years to life; as to Count 41 – 10 years to life; as to Count 42 – 24 to 60 months, to run concurrent with all other counts; as to Count 44 – 18 to 48 months, to run consecutive to Count 42; with 979 days credit for time served. All life sentences were ordered to run concurrent with one another. Harris's aggregate total sentence is 918 months to life. Harris was further ordered to be placed under Lifetime Supervision and register as a sex offender upon any release from custody. 7 AA 843-848.

On October 27, 2015, Harris filed a Notice of Appeal. 7 AA 849. He filed the instant Appellant's Opening Brief on June 28, 2016. The State herein responds.

STATEMENT OF THE FACTS

Harris physically and sexually assaulted T.D. and several of her children between 2004 and 2012. T.D. and Harris first became acquainted in 2004 in Louisiana and T.D. moved to Las Vegas shortly thereafter. 11 AA 1523; 11 AA 1527-30; 13 AA 1883-84. For several months between 2004 and 2005, T.D. and her five children (V.D., M.D., S.D., Tah. D., and Taq. D.) lived with Harris's girlfriend,

who they came to call "Miss Ann." 15 AA 1884. At some point in 2005, T.D. and her children moved to Utah where they stayed for about two years. 11 AA 1538; 13 AA 1896. When they returned to Las Vegas in July of 2007, T.D. and her eldest child, V.D., moved into Harris's mother's house. 11 AA 1544-47. The other four children went to live with Harris and Miss Ann on Blankenship Street. T.D. and V.D. moved several times over the next year before moving into the Blankenship house. 11 AA 1552-53; 15 AA 1907-08; 13 AA 1914. From 2008 to 2010, Harris, Miss Ann, T.D. and T.D.'s five children lived at Blankenship. 13 AA 1920-21. In 2010, T.D., V.D., M.D., and S.D., moved out of the Blankenship house and into an apartment in Henderson, while Tah. D. and Taq. D. remained at Blankenship with Harris and Miss Ann. 13 AA 1924-25. 13 AA 1925, 11 AA 1566.

Tah. D. and Taq. D. joined their mom and siblings in Henderson for the summer of 2012, before returning to the house on Blankenship. 16 AA 2470. Taq. D. and Tah. D. were removed from Harris and Miss Ann's home in the Fall of 2012 and lived with a foster family for about a year before being reunited with T.D., who they resided with at the time of trial. 17 AA 2584.

T.D. was working as a cocktail waitress in Louisiana where she lived with her five children when she met Harris in 2004. 11 AA 1523. T.D.'s children, who ranged in age from toddlers to twelve years old, were enrolled in school for the first time in 2004. 11 AA 1524-25. Harris, a Las Vegas resident, was visiting Louisiana and met

T.D. at the bar where she worked. 11 AA 1524-25; 13 AA 1882-83. Shortly thereafter, T.D. left Louisiana for Las Vegas, while her children stayed behind. 11 AA 1524-26; 13 AA 1882-83. While neighbors periodically checked on the children, twelve-year-old V.D. was primarily responsible for the care of her younger siblings. 11 AA 1524-26; 13 AA 1882-83. A few days after T.D.'s arrival in Las Vegas, Harris's brother picked up T.D.'s children and moved them from Louisiana to Las Vegas. 11 AA 1527-30; 13 AA 1883-84.

In 2004, when T.D.'s children moved to Las Vegas, Harris's girlfriend, Miss Ann, was living at a house on Trish Lane while Harris lived in a separate apartment. 15 AA 1884. The children and T.D. moved in with Miss Ann, where they lived for about six months. 13 AA 1884-85. During the same period of time, Harris regularly hit V.D. and S.D. with both his hands and a belt. 13 AA 1891-92. Harris also first sexually assaulted V.D. who was approximately twelve during this time, between December 2004 and May 2005, while she was living with Miss Ann and he was living in his own apartment. 13 AA 1886-88.

One morning when V.D.'s siblings were ill, Harris took V.D and her siblings to his apartment, where the children fell asleep. 13 AA 1886-1890. When V.D. woke up, her siblings were no longer in the house and Harris told V.D. that they were at the park. 13 AA 1888. Harris entered the bedroom where V.D. was, took his penis out of his pants and placed her hand on it. 13 AA 1888-1890. He told her that he

would beat her if she told anyone what happened, and proceeded to remove V.D.'s pants. 13 AA 1888-1890. He pushed his fingers into her vagina, and then his penis. 13 AA 1889-1891. He told her again that he would beat her if she told anyone what he had done. 13 AA 1890-1892.

About a week after this assault, V.D. told Miss Ann what Harris had done to her. 13 AA 1893-94. Miss Ann informed Harris's mother, as well as T.D. 11 AA 1536-37. Miss Ann, Harris, and Harris's mother confronted V.D., who they berated for reporting this assault and told her they did not believe her. 11 AA 1537; 13 AA 1893-95. At that time, no one reported the abuse or sexual assault to authorities. 11 AA 1537. Subsequently, T.D. and her five children left Las Vegas and moved to Utah. 11 AA 1538; 13 AA 1896. They lived in Utah for approximately one-and-a-half years, before T.D. returned to Las Vegas alone. 11 AA 1536-42. While T.D. was in Las Vegas, her children were taken into state custody in Utah. 11 AA 1536-42. T.D. returned to Utah and over the course of six months participated in parenting classes and was reunited with her children. 11 AA 1536-42. Shortly after, she abruptly moved back to Las Vegas, this time taking her children with her. 11 AA 1542-44.

When T.D. and her children moved back to Las Vegas in the summer of 2007, Miss Ann and Harris were living together in a house on Blankenship Street. 11 AA 1544-45. T.D.'s four youngest children moved into that house, while T.D. and V.D.

moved into the house of Harris's mother. 11 AA 1544-47. Harris committed another sexual assault on V.D., who was 15 years old, during this time period. 11 AA 1548-52. Leading up to this assault, Harris believed V.D. was a virgin and told her he wanted to "take her virginity" and made her pick a date for it to occur. 13 AA 1902. On August 24, 2007, Harris, T.D., and V.D. sat in Harris's car outside his mother's house, where he taunted V.D., saying he would be taking her virginity later. 13 AA 1902-1907. Harris drove around town with V.D. and T.D. in the car during the day, picking up alcohol which all three consumed. 11 AA 1549; 13 AA 1902-1907. That night, Harris drove the three of them up to the top of a hill where he parked the car. 11 AA 1548-49; 13 AA 1902-1907. Initially, Harris and T.D. sat in the front seat, while V.D. sat in the back. 11 AA 1548-51. Harris moved to the back seat where he began to rub V.D.'s breasts while her mother watched. 11 AA 1550-51; 13 AA 1902-1907. T.D. seemed amused as Harris removed her daughter's pants. 13 AA 1906. He raped V.D. in the backseat of the car by forcing his penis into her vagina and told her he would do the same to her again. 13 AA 1902-1907. Afterwards, Harris drove back to his mother's house where he dropped off V.D. and T.D. 11 AA 1552.

In the next few months, T.D. and V.D. moved out of Harris's mother's house and into a long-term motel efficiency apartment. 11 AA 1552-53; 15 AA 1907-08. T.D.'s four youngest children continued to live with Harris and Miss Ann on Blankenship Drive. While T.D. and V.D. lived in the efficiency, Harris pressured

T.D. to engage in sex work and give the money she earned to him, in addition to the wages she earned through her job at Bally's housekeeping. 11 AA 1552-54. Harris and T.D. engaged in a consensual sexual relationship during this time. 11 AA 1553. Harris also continued to sexually assault V.D., who was then 15, while she and T.D. lived in the efficiency. 13 AA 1908-12. At times, Harris would come to the apartment while T.D. was at work, drink beer, and force V.D. to have sex with him. 13 AA 1911. Other times he would rape V.D. while T.D. was home. 13 AA 1911. On at least two occasions, T.D. engaged in sexual activities with V.D. at Harris's behest. 11 AA 1559-61; 13 AA 1908-13. Specifically, Harris insisted that T.D. insert one end of a sex toy into her vagina while the other end was inserted into V.D.'s vagina. 11 AA 1559-61; 13 AA 1908-13. He also forced T.D. to perform oral sex on V.D. without V.D.'s consent and forced T.D. to hold a vibrator to V.D.'s genitals. 11 AA 1559-61. On another occasion, Harris became enraged with T.D. who had not surrendered enough money to him, and in response he raped her by forcing his penis into her anus. 11 AA 1558.

After about six months, T.D. and V.D. moved from the efficiency apartment to an apartment on Walnut Street, where they lived for about six months. 13 AA 1914. Harris continued to rape V.D., who was 15 years old, at the apartment on Walnut Street. 13 AA 1915-19. In July of 2008, T.D. and V.D. moved into the Blankenship house. 13 AA 1920-21. Harris, Miss Ann, Miss Ann's daughter, T.D.,

and all five of T.D.'s children were living in the house on Blankenship at that point. 13 AA 1922. Harris raped V.D., aged 16, once while she lived at the Blankenship house, in the bathroom connected to his bedroom. 13 AA 1922-24.

Harris was also physically abusive to T.D. and her children. Among other incidents, Harris struck the children with a belt, punched S.D. in the face and stomach, and strangled M.D. 16 AA 2424-31. Harris similarly struck T.D. with a belt on at least one occasion. 16 AA 2433-34. V.D. lived there for about two years before she and T.D. moved to Henderson with two of V.D.'s siblings. 13 AA 1924-25. That left T.D.'s youngest two children (Tah. D. and Taq. D.) with Harris and Miss Ann at the Blankenship house, while T.D., V.D., M.D., and S.D. lived in an apartment called "St. Andrews." 13 AA 1925, 11 AA 1566.

Harris also raped V.D. once while she was living at the St. Andrew's apartment, and approximately 17 years old. 13 AA 1926. In 2010, when V.D., her mom, and siblings were moving into the St. Andrew's apartment, V.D. met Rose Smith, who she came to call Miss Rose. 13 AA 1930. Over the course of several months, V.D. spent time at Miss Rose's house, where she eventually lived for a period of time. 13 AA 1932. Before V.D. moved in with Miss Rose, while she was visiting in December of 2011, V.D. told Miss Rose about the sexual abuse she had experienced. 16 AA 2552-55; 17 AA 2780. Miss Rose took V.D. to a police station in Henderson, where the desk officer called the special victims unit and Detective

Aguiar was dispatched to the station to interview Miss Rose and V.D. 18 AA 2782-84, 2804-05. After interviewing V.D. at the station, Detective Aguiar went to V.D.'s home on Center Street where T.D. and two of V.D.'s siblings lived. 18 AA 2809-2811. Over the course of his interviews, Detective Aguiar learned that V.D. had been physically and sexually assaulted by Harris on multiple occasions and that V.D.'s younger sisters were currently living with Harris. 18 AA 2816-17. Detective Aguiar then proceeded to Harris's home on Blankenship. 18 AA 2816-18. After interviewing everyone in the home, the officers concluded that probable cause did not exist to make an arrest. 18 AA 2863, 2797-99. The officers from Henderson Police Department made contact with CPS who began an investigation as well. 18 AA 2870.

In the summer of 2012, two years after T.D., V.D., S.D., and M.D. moved out of the Blankenship house, and a few months after the police first questioned him, Harris began sexually assaulting Tah. D., who was twelve years old. 16 AA 2436-37. On more than one occasion, Harris sexually assaulted Tah. D. in the bathroom attached to his bedroom by rubbing her breasts and the outside of her vagina with his hand, and putting his penis inside her vagina. 17 AA 2637-2640. At other times, he forced Tah. D. to put her hand on his penis, and put his penis in her mouth and vagina in her bedroom. 17 AA 2644-2646. He also sexually assaulted Tah. D. in the same manner in the garage. 17 AA 2647. On one particular occasion, he woke Tah.

D. and took her from her bedroom to the laundry room where he unbuckled his pants and forced his fingers in her vagina. 16 AA 2460-2466; 17 AA 2634-2636. When Taq. D. began to approach the laundry room, he stopped and told Tah. D. not to tell anyone what he had done. 17 AA 2634-2636. Taq. D. saw Harris through a crack in the laundry room door touching Tah. D.'s leg and asked Tah. D. what happened. 16 AA 2436. Tah. D. subsequently told Taq. D. that Harris had molested her. 17 AA 2650. Together, the two girls told Miss Ann. 16 AA 2466-68. At that time, Miss Ann took both Tah. D. and Taq. D. to a gynecologist for pelvic exams. 16 AA 2467-68; 15 AA 2283-2303. Miss Ann did not report the disclosure to the police and, although Tah. D. and Taq. D. briefly lived with their mother and siblings in Henderson during the summer of 2012, they returned to the Blankenship house in September. 16 AA 2470.

In September of 2012, approximately nine months after the police first reported to the Blankenship house and two or three months after Tah. D. was sexually assaulted, Taq. D. called the CPS hotline to report Harris sexually assaulting Tah. D. 18 AA 2892. CPS and the Las Vegas Metropolitan Police Department were assigned to the case and arranged for Tah. D. and Taq. D. to be interviewed and undergo medical exams at the Children's Assessment Center. 18 AA 2891-92, 2895, 2902-03. Miss Ann was also interviewed at that time. 18 AA 2900. T.D. and her other children were subsequently interviewed. 18 AA 2907-09,

2913. Harris was arrested early in 2013 and by the start of trial in 2014, Tah. D. and Taq. D. had been reunited with their mother and lived in Henderson. 17 AA 2581.

SUMMARY OF THE ARGUMENT

Harris presents a number of procedural and substantive issues in this direct appeal from a judgment of conviction, none of which merit relief.

First, Harris argues that he should have been allowed to more thoroughly question T.D. about two books she wrote or was writing. However, the District Court properly found that some facts related to the books were relevant, while others were not because any minimal probative value was substantially outweighed by unfair prejudice and confusion of the issues.

Next, Harris argues that two different witnesses should have been prohibited from testifying as to statements made to them by Miss Ann. The first, a statement made to a medical doctor, was admissible as a statement for the purpose of medical diagnosis or treatment. The second, a statement made to a police officer was also admissible because it was not offered for the truth of the matter asserted.

Further, Harris argues that he was denied the right to confront a witness when the Court curtailed his cross-examination of multiple witnesses regarding V.D.'s virginity. The irrelevance of V.D.'s sexual history cannot be overstated, and the Court properly prohibited this line of questioning.

Harris additionally argues that insufficient evidence was presented to sustain his kidnapping charges because the movement of the victims was incidental to the commission of other crimes. However, the movement was not incidental and Harris fails to recognize that under NRS 200.310, the confinement of a minor in order to perpetrate an unlawful act upon her constitutes an independent theory of kidnapping and does not require an analysis of incidental movement.

Harris also argues that two instances of alleged juror misconduct entitled him to a new trial. The first act of misconduct involved a juror posting a photo on Facebook of his juror badge, which led him to learn he and another juror had a mutual friend. As no deliberations took place outside the jury room, nor did any outside influence effect either of the jurors involved, Harris cannot show prejudice.

The second instance of alleged misconduct involved a juror who Harris contends was sexually abused as a child. Harris argues that she was untruthful by failing to disclose this purported abuse during voir dire. However, the juror in question was *not* the victim of childhood sexual abuse, and therefore no misconduct occurred.

Finally, Harris argues broadly that the State offered insufficient evidence to sustain any of his forty-two convictions and that the trial was tainted by cumulative error. These arguments are without merit as no error occurred and ample evidence was presented at trial.

ARGUMENT

I.

The District Court properly excluded irrelevant testimony during the cross-examination of T.D.

Harris argues that he was denied his Constitutional right to confront witnesses against him when his cross-examination of T.D. was partially limited to restrict testimony regarding two books she allegedly wrote.

However, he was allowed to cross-examine T.D. on both books and the District Court's limits properly struck the balance between probative evidence on the one hand and unfair prejudice and confusion of issues on the other. The first book, titled "Secret Revenge" was a fictitious story about a teenage rape victim who killed her rapist. 11 AA 1740-1741. Regarding the first book, Harris asked:

> Q: One thing further, [T.D.]. Do you write?
>
> A: Yes, I do write.
>
> Q: Okay. And when I say write I mean like books or novel.
>
> A: Yes. I've written my first book completed, finished it, and my publicist – my publisher has it, my producer has it.
>
> Q: Okay. And have you written and submitted just one book, or more than one book?
>
> A: One so far. I'm working on my second one.
>
> Q: Okay. And these books that you write, are they fiction, or nonfiction?
>
> A: It's based on a true story with a twist.
>
> Q: Okay. So it's based true, but there may be some fiction included?
>
> A: Yes, at the end of the book.
>
> Q: Okay. In either of these two books is Fred Harris a character?
>
> A: No. Well, the second one, I'm not done with it, but – I just started my second book. But my first book he's not in the book.
>
> Q: He's not featured in that one at all?
>
> A: No.

11 AA 1740-1741.

The second book was an untitled work in progress (or its title was unknown) and Harris believed a character in the book was based on him. Regarding the second book, he asked:

> Q: Okay. [T.D.], you were talking about the second book. And first let me ask you is Fred Harris a character in that book?
> A: Not yet.
> Q: Okay.
> A: Not yet. I just started my second book.
> Q: Okay. And will the – will facts from this trial be included as part of the plot line in the book?
> A: No.

11 AA 1745.

Defendant now raises a Sixth Amendment claim, arguing that he was denied the right to fully confront T.D. Defendant fails to appreciate that the Sixth Amendment right to Confrontation only entitles a criminal defendant to effective cross-examination, not any cross-examination that Defendant wishes. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431 (1986). It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. In general, the district court "retains wide discretion to limit cross-examination based on considerations such as harassment, prejudice, confusion of the issues, and relevancy." Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16, 31 (2004); see also, Van Arsdall, 475 U.S. at 679, 106 S. Ct. 1431.

On appeal, Harris claims the title of T.D.'s first book, "Secret Revenge," spoke to her mastermind plot to exact revenge on him for "rejecting" her. AOB at 32. However, this argument contrasts with his position at trial, where he argued that "our theory is that this accusation by **V.D.** is brought on by a revenge motive and that she's incorporated her mother." 11 AA 1744 (emphasis added). Harris argued that he did not intend to introduce any evidence as to the contents of the book, merely the title and fact of its existence. The State argued that Rape Shield laws applied to the content and that the title was irrelevant. 11 AA 1502-1504. The court properly found the title of the book irrelevant.

> Court: But why do you have to state the name [of the book]?
> Ms. Allen (for Harris): That's the whole theory of the case.
> Mr. MacArthur (for Harris): Because our theory of the case is that –
> Ms. Allen: V.D.--
> Mr. MacArthur: V.D.'s getting revenge against the defendant and that she's helping her.
> The Court: But she really didn't write the book.
> Mr. MacArthur: No. But she's—
> Ms. Luzaich (for the State): No. Was involved in it.
> Mr. MacArthur: -- She's enlisted her mother's aid in doing that.
> The Court: Okay. But you haven't read the book, you don't know what the book says, but the book's part of your theory.
> Mr. MacArthur: We can cross-examine her on it.

11 AA 1503-1504. As noted supra, Harris was permitted to cross-examine T.D. as to the existence of the book and even elicited evidence as to the general content of the book and that it was a work of fiction. Any connection between the title of the first book and Harris's theory of the case was tenuous at best and substantially

outweighed by prejudice and confusion of the issues. Whether arguing the trial theory that V.D. was exacting revenge on Harris and "incorporating" her mother, or the appeal theory that T.D. sought her own revenge through V.D.'s accusation, Harris's argument fundamentally relies upon the jury believing that because T.D. once wrote a story with the word "revenge" in the title, all of her testimony and the testimony of V.D. was fabricated.

Additionally, although Harris also generically complains he was entitled to cross-examine T.D. concerning the untitled book she was in the process of writing, he provides absolutely no authority or analysis to support his contention. See, Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (finding arguments not cogently made or supported by authority should not be responded to or considered); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority).

At trial, Harris told the court "If he's not a character yet [in the second book], I don't think I can really ask any questions." 11 AA 1744. And, when T.D. testified that Harris was not a character in the second book, Harris did not seek to elicit any additional information about the book but simply moved on to other matters. 11 AA

1745. At no point was he denied the opportunity to ask a question he sought to ask about the second book on cross-examination. Harris's complaint on appeal appears to be more directed toward the answers he received to his questions, not the District Court's rulings.

In sum, Harris's argument is that he was denied his Sixth Amendment right to confront witnesses against him because he was not allowed to ask T.D. for the name of her first book. The court properly found this specific evidence to be more prejudicial than probative, and committed no error in excluding the testimony.

II.
The District Court properly admitted statements to medical personnel.

In June of 2012, Miss Ann took Taq. D. and Tah. D. to see an Obstytrician-Gynecologist, Dr. Gondy. At that appointment, Miss Ann told Dr. Gondy that the girls had reported that Tah. D. had been sexually assaulted, and that was the reason for bringing both girls to the doctor for exams. At trial, the State elicited testimony to this effect, and Harris now argues that this violated his rights under the Confrontation Clause.

At trial, Harris objected and argued that allowing Dr. Gondy's testimony regarding Miss Ann's statement implicated Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968), NRS 51.115, and the Confrontation Clause. On appeal, Harris appears to abandon his Bruton claim and only raises the alleged Confrontation Clause violation in conjunction with the NRS 51.115 claim. This claim is reviewed

for an abuse of discretion. Hernandez v. State, 124 Nev. 60, 188 P.3d 1126 (2008); see, e.g., Mclellan v. State, 124 Nev. ___, 182 P.3d 106, 109 (2008) ("We review a district court's decision to admit or exclude evidence for an abuse of discretion."). There was no Confrontation Clause violation as Miss Ann's statement to Dr. Gondy was exempted hearsay and was not testimonial.

Harris argued at trial that it was questionable whether Miss Ann's statements to Dr. Gondy met the statutory requirements of a hearsay exception under NRS 51.115, and that they should be excluded, regardless, to preserve his Confrontation rights. 15 AA 2273. The State countered that the statements did not violate rules against hearsay or the Confrontation Clause and the probative nature outweighed any prejudicial effect. 15 AA 2 275-2277. The court overruled the objection. On appeal, Harris re-fashions the same argument, to say that Dr. Gondy's testimony would reveal Miss Ann's suspicions of Harris's guilt, thereby rendering her an "accuser." AOB at 37. However, the statements do not fall within the parameters of Sixth Amendment protections.

Dr. Gondy's testimony was entirely admissible under NRS 51.115 which states "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof are not inadmissible under the hearsay rule insofar as they were reasonably pertinent to

diagnosis or treatment." NRS 51.115. The Statute does not contemplate whether the declarant must be the patient, and to assume it includes the statements of a guardian in order to obtain care for a child is an eminently reasonable use of discretion on the District Court's part.

In order to get adequate care for Tah. D., Miss Ann had to disclose what the girls had told her. Miss Ann's statements were directly related to the receipt of medical care as Dr. Gondy testified that this disclosure dictated the course of her exam. When asked why she conducted gonorrhea testing, chlamydia testing, and a vaginal secretion swab, she responded "because of her history they were suggesting." 15 AA 2290. Just as a doctor would look at arm pain differently based on whether someone fell on the arm or spontaneously began experiencing pain, the possibility of sexual assault affects a doctor's pelvic exam. Perhaps more saliently, the sexual assault explained why Miss Ann was taking two young girls to a gynecologist. Harris asks in his brief "What difference does it make to the finder of fact whether Ms. Cooks had brought Tah. D. to a physician for an examination because of an allegation." AOB 36-37. The answer is that Dr. Gondy acknowledged that it would be unusual for girls so young to be seen by a gynecologist, so to know that they had alleged sexual assault explains the purpose of the visit in the first place. 15 AA 2298.

To clarify, Dr. Gondy's statements were not necessarily introduced for the purpose of showing that Tah. D. had in fact been assaulted, but that Tah. D. had made a disclosure and that Miss Ann had taken Tah. D. to a doctor as a result of the disclosure. In other words the "matter asserted" is that Tah. D. *told* Miss Ann she was assaulted, not that Tah. D. *was* assaulted. As the State noted in the bench conference at trial ". . . their defense is that they're making it up and that nobody tells anybody about the abuse. . . Here is somebody that was told." 15 AA 2280. For the purposes of medical treatment, it did not matter whether or not Miss Ann believed Tah. D.

Further, admission of the same did not violate the Confrontation Clause. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S. Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("[C]ritical phrase within the Clause is 'witnesses against him'"). Under Crawford, casual statements or statements made due to the immediacy of the surrounding event are not testimonial because they were not made "under circumstances which would lead an objective witness to reasonably

believe that the statement would be available for later use at trial." Crawford, 541 U.S. at 36, 124 S. Ct. at 1354

This Court has clarified that determining whether a hearsay statement is testimonial, "requires examination of the totality of the circumstances surrounding the making of the statement." Harkins v. State, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006). A statement is testimonial if the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution and "creat[e] an out-of-court substitute for trial testimony." Michigan v. Bryant, 562 U.S. 344, 358, 131 S. Ct. 1143 (2011). In contrast, a statement is non-testimonial if the context surrounding the statement objectively demonstrates that the primary purpose of the statement was the assessment and resolution of an ongoing emergency. Michigan v. Bryant, 562 U.S. at 363-65, 131 S. Ct. at 1158. The United States Supreme Court has held that statements made to persons other than law enforcement are "much less likely to be testimonial than statements to law enforcement officers." Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015). In Clark, a preschooler told his teacher that "Big Dee" caused various bruises all over his body. Id. at 2177-2178. The child victim was subsequently deemed incompetent to testify but his statements to his teacher, who was a mandatory reported, were admitted. Id. Finding the teacher's questions and the child victim's answers did not demonstrate a primary purpose of prosecuting the defendant, but instead objectively showed the assessment and resolution of an

emergency involving child abuse, the Court found the statements non-testimonial. Id. at 2181-2182.

None of the evidence in this case points to the conclusion that Miss Ann made the statements to Dr. Gondy about Tah. D.'s disclosure for the purposes of establishing Harris's criminal culpability. Miss Ann, in fact, protected Harris on multiple occasions by refusing to believe claims of sexual abuse, failing to alert authorities to abuse occurring at the home, chastising V.D. for her disclosures, and ultimately earning a conviction in her own case arising out of the same facts. 17 AA 2654-2655; 13 AA 1895; 17 AA 2882. Further, Miss Ann did not report Tah. D.'s disclosure after the visit to Dr. Gondy. Thus, whatever Miss Ann's motive was for taking Tah. D. to Dr. Gondy and informing Dr. Gondy of Tah. D's disclosure, the evidence objectively demonstrates it was not primarily for use in the future prosecution of Harris. Because the surrounding circumstances objectively demonstrate that Miss Ann did not intend for her statement to Dr. Gondy to be "an out-of-court substitute for trial testimony," it was not testimonial and this claim must be denied.

Finally, any error that occurred was harmless. Miss Ann's statement, admitted through Dr. Gondy, was that Tah. D. disclosed sexual abuse to Miss Ann. At no point did Dr. Gondy identify a possible perpetrator of the sexual assault. The

information was limited to that needed for treatment purposes and did not directly implicate Harris. Further, Tah. D. herself testified to her disclosure to Miss Ann:

> Q. Okay. You said that you told [Taq. D.] after the laundry room. After you told [Taq. D] do you know what [Taq.D.] did?
> A: She – she went to Ms. Ann, thens he told Ms. Ann.
> Q: And after she told Ms. Ann, did Ms. Ann talk to you was well?
> A: Yes.
> …
> Q: After you and [Taq. D.] talked to Ms. Ann, did Ms. Ann take you somewhere? You're nodding your head again.
> A: Oh. Yes.
> Q: Where did she take you?
> A: She had took me to the doctor.

17 AA 2650-2651. Because Tah. D. testified as to her disclosure to Miss Ann, and because Miss Ann never identified Harris as the person Tah. D. accused of sexual abuse, admission of Dr. Gondy's testimony on this matter was harmless.[1]

III.
The Court properly excluded irrelevant testimony about V.D.'s sexual history.

Harris argues that V.D. told the jury she was a virgin until Harris assaulted her in August of 2007 and his right to confrontation was denied when he was not allowed to introduce extrinsic evidence to the contrary. He sought to introduce evidence that V.D. ceased to be a virgin at some point prior to August of 2007, and

[1] To the extent Harris's argument can be read to assert his rights under Bruton were violated, this claim is also without merit. Bruton only applies when a codefendant would have reason and ability to invoke their Fifth Amendment rights. Because Miss Ann had already been convicted and sentenced, she no longer had a Fifth Amendment right and Bruton no longer precluded the introduction of her statements.

use this supposed inconsistency to impeach her credibility. He argues that he should have been allowed to introduce this alleged proof through T.D.'s testimony and Detective Aguiar's testimony. However, extrinsic evidence of specific instances of conduct of a witness is inadmissible to impeach a witness. NRS 50.085(3); Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000). Prior inconsistent statements may be admitted as impeachment through extrinsic evidence, but only if the witness alleged to have made the prior inconsistent statement is confronted with the statement. NRS 50.135(3). And, impeachment on a collateral matter is not allowed. McKee v. State, 112 Nev. 642, 647, 917 P.2d 940, 943 (1996). Further, the court is allowed wide discretion in admitting and excluding evidence. McLellan v. State, 124 Nev. 263, 182 P.3d 106 (2008).

To formulate his arguments, Harris depends on the erroneous assertion that "V.D. testified on direct and cross examination that Mr. Harris was responsible for taking her virginity," and cites to Volume 18 of the Appellant's Appendix. AOB at 38. However, V.D.'s testimony is not found in that particular Volume. Instead, what Harris cites to is a statement by his own attorney in which she claims "V.D. testified that she was a virgin up until she came back from Utah…" 18 AA 2824. At this point in the trial, Harris was attempting to introduce his own statements to the police that V.D. told him that she had been engaging in sexual activity while she

lived in Utah. 18 AA 2823-2824. However, this statement to the court during trial by Harris's attorney was an erroneous recitation of V.D.'s testimony.

A review of V.D.'s actual direct and cross-examination testimony reveals that at no point did she make any factual assertions as to when she lost her virginity. Rather, as she recounted the ways in which Harris harassed her, V.D. included the detail that Harris wanted to believe that he was taking her virginity. On direct she testified:

> Q: I'm going to ask you, what did Fred say to you only, not what your mom said, just what Fred said to you.
> A: He said that I was – that he wasn't going to leave me alone and that he liked women, and that if I don't do what him and my mother say that I was going to wind up in a crazy home or in Child Haven and that I would never be able to see my siblings again because I can't be trusted and I wasn't listening to my mom when I was in Utah. And that he wasn't going to leave me alone, he wasn't going to let me do anything. **He was going to bother me and bother me because he wanted to take my virginity.**

14 AA 1902 (emphasis added). V.D.'s virginity came up again when she testified about her disclosure to Miss Rose:

> Q: When did you tell Miss Rose?
> A: In November of 2011.
> Q: Can you describe how that happened?
> A: She was talking to me about staying a virgin and waiting until you get married and being with God.
> Q: Where were you at when you told Miss Rose this?
> A: At her house.
> Q: Would you stay at her house sometimes?
> A: On the weekends.
>
> . . .

Q: Describe how you told Miss Rose.
A: I asked her if she could keep something to herself if I told her. And I told her that I wasn't a virgin and I did not – and I didn't wait.
Q: What else did you tell Miss Rose?
A: I told her about what had happened between me and my mom August 2007, the 24th of August.
Q; What else did you tell her?
A: I told her about what happened between me, my mom, and Fred.

14 AA 1963-64.

This testimony was limited to recounting a conversation with Miss Rose and V.D. did not assert that Harris took her virginity. V.D. was a girl suffering from the effects of repeated sexual assaults and when Miss Rose talked to her about her virginity, she finally found her opportunity to speak about the horrific abuse she had endured over the course of several years. Her disclosure was not specific as to whether she was a virgin before the assaults or not and her virginity ceased to be the central topic of the conversation when she began to open up to Miss Rose.

n cross-examination, Harris did not question V.D. about this testimony, or her virginity generally. 14 AA 1971- 2134. Rather, several days later, he sought to introduce extrinsic evidence in the form of his own statement to police. 18 AA 2824.

As this court is well aware, the body of evidence which it is able to review is only that which was presented to the trier of fact, the jury. The jury was charged with making its own determinations of credibility, reliability, and ultimately guilt, based on the testimony presented. Harris relies on a misconstruction of this record to claim that the State first opened the door of V.D.'s sexual history. V.D. never

testified that she lost her virginity when Harris assaulted her. As the State never elicited such testimony, V.D.'s sexual history is irrelevant to either Harris's guilt or V.D's veracity as a witness such that it is inconceivable that Harris was deprived any right to confrontation under the Sixth Amendment.

Additionally, even if Harris's construction of the record were accurate, his argument would still be without merit. Harris declined to confront V.D. during cross-examination with what he believed to be inconsistent statements and/or specific instances of conduct but instead sought to impeach her with extrinsic evidence. Such was properly prohibited by the District Court in accordance with NRS 50.135(2) and 50.085(3). Further, V.D.'s virginity was a collateral matter, and did nothing to address the issue of whether Harris sexually abused her on multiple occasions. In contrast, evidence that Harris *believed* V.D. was a virgin when he sexually assaulted her in the back of a car was relevant to provide detail and context to the sexual abuse itself.

The Rape Shield Statute further precluded Harris's proposed evidence. Discussion of V.D.'s virginity and sexual history falls squarely under NRS 50.090 as interpreted by Johnson v. State, 113 Nev. 772, 942 P.2d 167 (1997). In Nevada, with narrow exception, evidence of previous sexual conduct of a victim of sexual assault is inadmissible to challenge a victim's credibility. NRS 50.090. The statute exists to: (1) Reverse the common law rule that use of evidence of the victim's

general reputation for morality and chastity is admissible to infer consent and attack credibility; (2) Protect the rape victim from degrading and embarrassing disclosure of intimate details about private lives; and (3) Encourage rape victims to come forward and report crimes and testify in court protected from unnecessary indignities and needless probing into their respective sexual histories. See, Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992); Brown v. State, 107 Nev. 164, 807 P.2d 1370 (1991); Lane v. Second Judicial Dist. Court, 104 Nev. 427, 760 P.2d 1245 (1988); Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985). Rather than tolerate Harris's thinly veiled attempt to circumvent the statute and impeach V.D.'s credibility based on her sexual history, the court properly followed the directive of the law. To the extent possible, V.D. was protected from the exposure of her personal life in front of family, friends, and strangers at trial. This Court must uphold the District Court's decision to properly exclude the irrelevant and inadmissible testimony about V.D.'s sexual history.

Further, although Harris argues that this testimony was admissible under the Rule of Completeness, the Rule is misapplied. AOB at 41-42. The Rule of Completeness allows one party to introduce additional statements that preceded or followed the admitted testimony in order to put the admissible evidence into context. "The Rule of Completeness is not so broad as to require the admission of all redacted portions of a statement, without regard to content." United States v. Vallejos, 742

F.3d 902, 905 (9th Cir. 2014); See also United States v. Collicott, 92 F.3d 973 (9th Cir. 1996). In this case, Harris did not seek to introduce his comments to Detective Aguiar about V.D.'s virginity in order to put his statement, as admitted, into context. He sought to introduce it for the entirely separate purpose of impeaching V.D., which perverts the Rule of Completeness. Indeed, on appeal, Harris fails to even articulate precisely what context the double hearsay he sought to admit provided. The court appropriately excluded this testimony.

IV.
The Court properly admitted statements made to police.

Detective Nicholas Madsen interviewed Miss Ann at the Children's Assessment Center around September of 2012. 17 AA 2899. The State sought to elicit information regarding Tah. D. and Taq. D.'s disclosure to Miss Ann through Detective Madsen and Harris objected, arguing that the statement constituted hearsay. 17 AA 2878-82. The State argued that Miss Ann's statement constituted a statement against penal interest, and the Court overruled the objection. 17 AA 2879-2886.

Though Harris could have called Miss Ann as a witness, he declined to call her because she had been convicted on related child endangerment charges and he feared the introduction of the Judgment of Conviction would undermine her credibility to the jury. 17 AA 1884-85. Defendant now argues that because Miss Ann did not testify, his rights under the Confrontation Clause were violated and this

warrants a reversal. Specifically, he claims that Miss Ann's statements did not properly fall within the hearsay exception for a statement against interest and because they lacked reliability, they could not be introduced under the Sixth Amendment without the opportunity to cross-examine Miss Ann. AOB at 47.[2]

First, Harris is estopped from complaining about this question under the doctrine of invited error. Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002) (invited error not reviewable). At trial, Harris clearly indicated "[the State] and I came to an agreement that [Miss Ann] was not going to testify." 15 AA 2279. Harris argued that he did not wish to call Miss Ann as a witness, and did not wish to examine her because he worried her Judgement of Conviction for child endangerment pursuant to this case would impeach her reliability. 17 AA 2878-2303. Harris had a number of options available to him at trial, including cross-examining Detective Madsen on non-hearsay statements from Miss Ann's interview, calling Miss Ann as a witness, and even arguing for the State to call Miss Ann. Instead, he agreed with the State that Miss Ann would not be called only to now complain that he suffered a violation of his rights to confront the same witness. This

[2] The State submits that because the statement was not offered for the truth of the matter asserted, reaching a conclusion about whether it fell within this exception was unnecessary. The court properly allowed the testimony, though it appears to have applied the wrong analysis and admitted it as an exception to the hearsay rule, rather than as non-hearsay. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

is the very definition of invited error and this Court should decline to consider the issue.

Further, there was no violation of the Confrontation Clause or evidentiary rules prohibiting hearsay, as the State did not introduce any testimonial hearsay. As Harris raises the Confrontation Clause complaint for the first time on appeal, it is subject to review for plain error. Generally, the failure to properly preserve an issue for appellate review precludes appellate review. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001). However, the Supreme Court maintains discretion to address unpreserved issues under the plain error doctrine. Plain error has been defined as that which is "'so unmistakable that it reveals itself by a casual inspection of the record.'" Patterson v. State, 111 Nev. 1525, 907 P.2d 984, 987 (1995), citing Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n. 2, 793 P. 2d 839, 842 (1990), quoting Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973). Under the plain error doctrine, the Court "must consider whether error exists, if the error was plain or clear, and if the error affected the defendant's substantial rights. The burden rests with [the defendant] to show actual prejudice." Calvin v. State, 147 P.3d 1097, 1101 (2006).

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony"

against him. Crawford, 541 U.S. at 51, 124 S. Ct. at 1364; see also White, 502 U.S. at 359, 112 S. Ct. at 744 (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay - i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony - may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S. Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "*testimonial statements for purposes other than establishing the truth of the matter asserted*." Id. at 59, 60 n.9, 124 S. Ct. at 1369 n.9 (emphasis added) (citing Tenn. v. St., 471 U.S. 409, 105 S. Ct 2078 (1985)). Thus, there is an important distinction between non-hearsay and a statement that is hearsay but falls within an exception for purposes of the Confrontation Clause. Cf. Melendez-Diaz, 557 U.S. at 324, 129 S. Ct. at 2539-40; Conner, 327 P.3d at 511 (Gibbons, J., concurring) (noting that an autopsy report's status as a business record did not prevent it from being testimonial). In the non-hearsay realm, the Confrontation Clause is simply not implicated. Such is the case here.

Miss Ann's statements to Detective Madsen were not hearsay because they were not offered for the truth of the matter asserted. At trial, the State clarified that

its intent was to show that Miss Ann "knew it, she did nothing, and the girls, therefore, remained in the home." 17 AA 2898. The State asserted Harris was attempting to impeach the victims' credibility by admitting evidence that they remained in the home with Harris after the alleged sexual assaults took place. Miss Ann's statements showed that the victims did indeed disclose sexual abuse but it was not reported to the proper authorities. Whether or not the underlying claim that Harris had actually assaulted the younger children was true was irrelevant to show what Miss Ann did with the disclosure she received—took the girls to the doctor and took no further action. 17 AA 2303. This is especially true given the fact that Miss Ann did not believe the allegations. 11 AA 1537; 13 AA 1194-95; 17 AA 2878. Because Miss Ann's statement to Detective Madsen was offered merely to show the victims disclosed sexual abuse and was not offered to prove the truth of the abuse itself, it was not testimonial hearsay and therefore did not implicate the Confrontation Clause or NRS 51.[4]

Further, because the information introduced through Detective Madsen's testimony was introduced elsewhere in the trial, any error did not prejudice Harris's substantial rights. Namely, Dr. Gondy testified Miss Ann took Taq. D. and Tah. D. to her after the girls reported sexual abuse and both V.D. and T.D. testified they

[4] Because Miss Ann's statement was not offered for the truth of the matter asserted, an analysis as to whether the statement was "reliable" under NRS 51.345 is unnecessary.

disclosed the abuse to Miss Ann and she did not report it to authorities. 11 AA 1670-77; 13 AA 1893-95. Further, the fact that Miss Ann did not believe the allegations of sexual abuse when they were disclosed was thoroughly documented throughout the testimony of T.D and V.D. 11 AA 1537; 13 AA 1194-1195.

V.

Sufficient evidence supports Harris's convictions for kidnapping.

Harris argues that his kidnapping convictions (Counts 19, 25, 28, and 37) should be overturned because any movement of V.D. was incidental to the sexual assaults which he perpetrated upon her. However, the kidnappings were not merely incidental to the sex assaults. When a defendant is charged with first degree kidnapping for moving a victim with the specific intent of committing an enumerated offense, the kidnapping will be deemed incidental to the associated offense unless it substantially increased the risk of harm to the victim, substantially exceeded the movement necessary to commit the associated offense, or had an independent purpose and significance. Mendoza v. State, 122 Nev. 267, 274-275, 130 P.3d 176, 180-181 (2006); Doyle v. State, 112 Nev. 879, 893, 921 P.2d 901, 910-1 (1996). In Mendoza, this Court upheld a kidnapping conviction where the defendants seized the victim, took him inside the residence, severely beat him, and took his keys and wallet and found the restraint resulted in increased danger and injury to the victim.

In each of the instances in which Harris kidnapped V.D., the movement substantially increased the risk of harm and exceeded the movement necessary to

commit the sexual assaults. Count 19 pertained to the incident which occurred between December 2004 and May 2005, wherein Harris took all the children from Miss Ann's house on Trish Lane to his apartment when they were sick. After he dropped T.D. off at work, he returned to the apartment where he assaulted V.D. 15 AA 1886-1890. Harris's movement of V.D. from Miss Ann's home to his increased her risk of harm as it decreased the likelihood of detection by Miss Ann. Further, the sexual assault of V.D. could have occurred at Miss Ann's house (though with less privacy) and, therefore, moving V.D. to Harris's house substantially exceeded the movement needed to commit the sexual assault itself. 15 AA 1886-1890.

Count 25 pertained to the assault in August of 2007 in Harris's car. 11 AA 1549, 15 AA 1902-1907 Again, this movement substantially increased V.D.'s risk of harm. On a remote ridge, away from buildings and populated areas V.D. was far less able to escape or seek help. 11 AA 1549; 15 AA 1902-1907. Further, the movement also far exceeded that necessary to commit the actual sexual assault itself and was done to decrease the likelihood of detection.

Count 28 pertained to an assault between September 2007 and July 2008 when Harris confined V.D. to her mother's room at the Walnut Street apartment and sexually assaulted her. 11 AA 1559-61, 15 AA 1908-13. In this instance, Harris moved V. D. from another area of the apartment to confine her to her mother's bedroom and forced V.D. and her mother to engage in sex acts together. 11 AA

1559-61; 15 AA 1908-13. This movement substantially increased the risk of harm to the victim. By confining her to one room, away from others and with another authority figure present, Harris effectively decreased V.D.'s ability to escape or resist. 11 AA 1559-61; 15 AA 1908-13.

Count 37 pertained to Harris's assault on V.D. at the St. Andrew's apartment wherein he was supposed to be taking V.D. to an appointment at the welfare office. V.D. knocked on the bedroom door which Harris answered while T.D. was performing oral sex on him. He proceeded to confine V.D. to the bedroom where he also forced V.D. to perform oral sex on him. This confinement, done for the purpose of perpetrating an unlawful act upon V.D. constitutes kidnapping.

In addition, Counts 19, 25, and 28, were charged in the alternative to include the theory that Harris committed the offenses by leading, enticing, or carrying away or detaining V.D., a minor, with the intent to keep, imprison, or confine her from her parent, guardian, or any other person having lawful custody of her and/or perpetrate upon her a sexual assault 7 AA 860-863. Mendoza and its progeny only apply to first degree kidnapping when it is charged as being committed with the intent to commit an enumerated offense, such as robbery. Harris points to no authority applying the Mendoza test to a case where a minor is carried away or detained and kept from their legal guardian or has any felony committed against them. Additionally, the policy concerns are completely distinct as the former theory applies

to the movement or restriction of anyone and this Court has expressed concern that the terms of the statute are overbroad. However, the latter theory applies only to the movement or restriction of a limited class of victims, namely minors, and so the same concerns of the statute being overbroad are not present.

Here, Count 19 met the requirements under the alternative theory of kidnapping because Harris detained V.D. away from her legal guardian in order to commit a felony upon her. Additionally, Harris is guilty under the alternative charging theory in Counts 25 and 28 for detaining V.D. in order to commit the crime of sexual assault upon her. Thus, because Mendoza only applies to one theory of first degree kidnapping, even if this Court finds that the movement of V.D. in Counts 19, 25, and 28 was incidental under that theory, it must nevertheless affirmed the conviction under the alternative theory.

VI.
The District Court properly denied Harris's Motion for New Trial based on alleged misconduct of a juror who posted a photo of his jury badge on Facebook.

Harris is not entitled to a new trial based on a juror's innocuous Facebook post made in violation of the Court's instruction. Although there is no doubt the juror posted a photo of himself wearing a juror badge in contravention of the court's instruction, this conduct did not prejudice Harris, and therefore the District Court's denial of the motion does not warrant reversal.

Harris brought his Motion for a New Trial under NRS 176.515(1). "The grant or denial of a new trial on this ground is within the trial court's discretion and will not be reversed on appeal absent its abuse." Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991) (internal citation omitted). In an oral motion at a June 30, 2015 hearing, Harris argued that the violation of the judge's admonition constituted misconduct and the mere presence of misconduct warrants a new trial. 24 AA 3419-3420. The State rejected Harris's argument that any misconduct or prejudice had occurred and the court denied the motion.

In this case, a juror posted a photo of himself on Facebook wearing his juror badge, which led him to discover that he and another juror had a mutual friend. 23 AA 3335-3337. He and the other juror acknowledged their shared acquaintance at some point during the trial, without further conversation. 23 AA 3342. Harris presented no evidence that the two jurors engaged in any discussion outside the jury room during deliberations.

The Nevada Supreme Court in Meyer v. State, 119 Nev. 554, 563-65, 80 P.3d 447, 455 (2003), held:

> Before a defendant can prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial. . . . Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict.

Here, regardless of whether misconduct occurred, Harris is not entitled to a reversal because he cannot show prejudice. 23 AA 3337. Harris simply states "In the instant case, the jurors [sic] violation of the admonition prejudiced Mr. Harris. The quality and character of the misconduct was not minor." AOB at 54-55. In fact, the misconduct *was* minor and failed the test Harris offers in his own brief, that whether prejudice is shown depends on "whether other jurors have been influenced by the discussion, and the extent to which a juror who had committed misconduct can withhold any opinion until deliberations." AOB at 54.[5] In this case, the nature of the misconduct was not related to the content of the trial or juror's opinions. While the Facebook post elicited "comments" (posts made in response to the original post) there was no evidence of any kind of reciprocity between the juror and other non-jurors in communicating about the case, eliminating the possibility of resulting "influence" on other jurors. The juror's only misconduct, if any, was violating the court's prophylactic instructions, and this violation had no effect on deliberations or the outcome of the trial whatsoever.

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[5] Harris misattributes this quote to McKenna v. State, 96. Nev. 811, 815, 618 P.3s 348, 349 (1980). It is properly attributed to Viray v. State, 121 Nev. 159, 164, 111 P.3d 1079, 1082 (2005).

VII.
The District Court properly denied Harris's Motion for New Trial based on alleged misconduct of a juror during voir dire.

Harris further speculates that another juror, Lewis, was the victim of sexual abuse as a child, failed to reveal this in voir dire, and subsequently acted with bias. AOB at 55-57. These claims are unfounded and the trial court exercised appropriate discretion in denying Harris's Motion for New Trial. Again, as Harris brought his Motion for New Trial under NRS 176.515 (1), the District Court's decision is reviewed for an abuse of discretion. Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

This claim was brought before the court through a supplemental motion for New Trial to Harris's initial Motion for New Trial. According to Harris, juror Smith told Harris's counsel that another juror, Lewis, told the jury during deliberations that she (Lewis) had been sexually abused as a child. At the evidentiary hearing, however, Smith testified that she did not remember Lewis making such a statement during deliberation:

> Q: Did [Lewis] disclose that she had been sexually abused as well?
> A: From what I – I think she may have; I can't really recall that vividly but I do recall her talking more so about the beatings.
> Q: Do you remember telling Harrison, my investigator, that you recalled specifically that it was sexual abuse? She talked about sexually abused?
> A: Yea, I can't recall.
> …
> Q: Okay. And do you remember talking or writing in here that one of the jurors put strong emphasis on a personal experience of being sexually abused? Do you remember writing that?

A: I don't remember.

23 AA 3300.

Another juror testified at the evidentiary hearing that he had not heard Lewis say she was the victim of sexual abuse. 23 AA 3343-3345. And Lewis testified that she was neither a sexual abuse victim nor had she said she was. 23 AA 3343-44. Specifically, Lewis testified:

> Q: And did you ever say at any point during jury deliberation that you had been a sexual abuse victim?
> A: No.
> Q: In any way, shape or form?
> A: Never. Because I never have been.

23 AA 3321.

The alleged misconduct was lying during voir dire, and there is no evidence that Lewis's original statement- that she was not a victim of sexual abuse as a child- was false. Absent any showing of misconduct, the court appropriately denied the Motion for a New Trial.

VIII.
Sufficient evidence was presented at trial to sustain Harris's convictions.

Harris's sufficiency of the evidence claim turns on the reliability of the witnesses at trial. Harris makes two overarching arguments as to the sufficiency of the evidence. First, he argues generally that the witnesses were untrustworthy. Second, he implies that the jury was not a rational trier of fact because they found him not guilty on 6 counts, while finding him guilty on the other 42.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing 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." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (holding it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) ("In all criminal proceedings, the weight and sufficiency of the evidence are questions for

the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court"). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S. Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S. Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S. Ct. at 2789.

Not only is it within the discretion of the trier of fact to determine the credibility of the witnesses, but to impeach their credibility on appeal Harris relies on numerous facts that were never adduced at trial. Without citation to the records he claims: "When Henderson officials initially investigated allegations of sexual abuse, Tah. D. and Taq. D…. [stated] that they thought the world of Mr. Harris." AOB at 59. In actuality, Detective Madsen testified as follows:

> A: [Taq. D.'s crying] was – it was loud. I mean, it was where you – where at certain point you almost couldn't make out some of the words she was saying. I'd have to lean in and ask her can you repeat that, I can't hear you.
> Q: And when she was crying like that, what did she tell you about witnessing abuse?
> A: She indicated that she had witnessed two of her siblings being physically hit or struck.

17 AA 2837-38. Further, Detective Madsen testified that Taq. D. feared what would happen to her if Harris found out what she had said to Detective Madsen. 17 AA 2838.

Harris also contends, without support in the record, that V.D. and T.D. admitted they were angry Harris had rejected T.D. in favor of Miss Ann. AOB at 61. However, at trial, T.D. testified on cross examination:

> Q: Okay in 2007 when… Fred chose to pursue a relationship with [Miss Ann] instead of you did that make you angry?
> A: No, it didn't make me angry. It just made me sad, because I thought that he loved me.

11 AA 1735.

Harris also re-argues that inconsistencies between the victims' testimonies and other witnesses indicate that the evidence was insufficient to sustain a conviction. Clearly, this is an instance where the jury's discretion and credibility determinations must be respected. It is reasonable that these inconsistencies failed to raise reasonable doubt in light of the overwhelming evidence of Harris's guilt.

In sum, the jury was presented with adequate information to make its own determination as to the credibility of each witness's testimony. That it came to different conclusions for different charges says nothing of the witnesses' credibility. First, it is entirely possible that the jury found the witnesses equally credible in how they recounted each act and found sufficient facts were proven for some charges and not others. Each count in the information must be regarded by the jury separately.

Dunn v. United States, 284 U.S. 390, 393, 52 S. Ct. 189 (1932). When the jury reaches seemingly inconsistent verdicts, "the verdicts may have been the result of compromise, or of mistake on the part of the jury . . . [b]ut verdicts cannot be upset by speculation into such matters." Id. at 394, 52 S. Ct. at 191. Second, a reasonable trier of fact can make more nuanced assessments of witnesses than their simply being "trustworthy" or "untrustworthy." A reasonable trier of fact would analyze the body of evidence as a whole, measured against the trier's common sense, to determine what actually happened and come to a verdict based on that conclusion. A very simple example is where the witness has a clearer memory of an event the trier of fact might be more inclined to accept the witness's version of events exactly as stated, whereas when the same witness has a less clear memory of another event the trier may require additional evidence in order to draw a conclusion about the latter event. Such does not show there was insufficient evidence but instead demonstrates a conscientious jury.

IX.
Harris has not suffered from cumulative error.

Reversal, based on cumulative error, is proper only if the aggregate effect of actual errors are the cause of an unfair trial to a criminal defendant. Libby v. State, 109 Nev. 905, 859 P.2d 1050 (1993), Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985). The cumulative error doctrine has no application if no errors were committed and if the defendant received a fair trial. State v. Scott, 828 P.2d 958,

963-64 (N.M. App. 1991). Furthermore, the doctrine of cumulative error requires that numerous errors actually be committed, not merely alleged. People v. Rivers, 727 P.2d 394, 401 (Colo. Ct. App. 1986). Harris has failed to demonstrate that any errors occurred during his trial. Further, even if this Court finds some error, there cumulative impact does not require reversal as 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). Here, Harris received a fair trial and his conviction and sentence should be affirmed.

CONCLUSION

Harris committed numerous, egregious, crimes of sexual assault against T.D. and two of her children over the course of many years. He was simultaneously forcing T.D. to engage in sex work and physically assaulting T.D., as well as her five children. Over the course of trial, these facts were revealed by a series of competent witnesses and Harris presented his own witnesses in response. After many hours of deliberation, the jury came to its ruling on the case based on ample, properly admitted evidence. Harris was sentenced accordingly and this Court must uphold the conviction.

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Dated this 17th day of November, 2016.

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 12,516 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 17th day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 17th day of November, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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