IN THE SUPREME COURT OF THE STATE OF NEVADA

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FREDERICK HARRIS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 69093

APPEAL FROM JUDGMENT OF CONVICTION
(JURY TRIAL)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE MICHELLE LEAVITT, PRESIDING

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement stands as enunciated in the Opening Brief.

ROUTING STATEMENT

The Routing statement stands as enunciated in the Opening Brief.

STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in the Opening Brief.

STATEMENT OF FACTS

The Statement of Facts stands as enunciated in the Opening Brief.

ARGUMENT

VIII. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO CONVICT MR. HARRIS OF THE CHARGES AGAINST HIM.[1]

There was insufficient evidence to convict Mr. Harris of any of the charges. In Mr. Harris' Opening Brief, approximately five pages of text was dedicated to a careful factual analysis demonstrating the insufficiency of the evidence to convict. In contrast, the State entirely ignored the invitation to present facts disputing Mr. Harris' contention. Instead, the State dedicated approximately one page of text

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[1] Mr. Harris recognizes that this issue is being addressed out of order. Specifically, the issue is addressed out of order because it best illustrates the State's failure to properly analyze the issues presented for this court's review.

addressing Mr. Harris' factual contentions. The State's argument was limited to their claim that "...Harris relies upon numerous facts that were never adduced at trial. Without citations to the record he claims..." (State's Answering Brief p. 46). The State spends one page complaining that Mr. Harris has relied upon facts without citations to the record. The State does not present any facts which directly dispute Mr. Harris' argument.

More importantly, the State's contention that Mr. Harris relied upon facts that were never adduced at trial and no citations to the record were provided is patently false.

First, the State claims that Mr. Harris argued that Taq. D. and Tah. D. thought the world of Mr. Harris. The State claims there was no citation to the record for this contention. The State then cites the testimony of Detective Madison that accurately reflects his testimony that at one point, Taq. D. feared what would happen to her if Mr. Harris found out she had made damaging statements to Detective Madison. The State claims there was no citation to the record that Henderson officials has received information from Tah. D. And Taq. D. that they thought highly of Mr. Harris. The following facts were specifically outlined in Mr. Harris' Opening Brief with citations to the record. Obviously, the State failed to carefully read Mr. Harris' brief as will be proved below.

In Mr. Harris' Opening Brief he states "Tah. D. admitted she denied that Mr. Harris had ever hurt her when she talked to Henderson detectives (A.A. Vol. 17 p. 2658). Tah. D. also told Henderson detectives that Mr. Harris did not hurt her siblings (A.A. Vol. 17 p. 2658)." (Opening Brief p. 20).

"Tah. D. also admitted she told child protective services that Mr. Harris was not harming her (A.A. Vol. 17 p. 2660). In fact, Tah. D. told child protective services she enjoyed living with Mr. Harris (A.A. Vol. 17 p. 2660-2661)." (Opening Brief p. 21).

"Tah. D. recalled telling Henderson Police that Mr. Harris ensured the welfare of her and her siblings even after Mr. Harris moved out of the house (A.A. Vol. 17 p. 2730). Tah. D. described Mr. Harris as a good man (A.A. Vol. 17 p. 2730)." (Opening Brief p. 21). "In a subsequent interview, Tah. D. stated she felt safe in the home (A.A. Vol. 17 p. 2734)." (Opening Brief p. 21).

Mr. Harris cited to Detective Nicholas Madsen's testimony where he admitted there were significant differences between the two statements of Tah. D. "For example, there were interviews claiming Mr. Harris had raped a child and that same child had previously told law enforcement and CPS that Mr. Harris was a good care giver (A.A. Vol. 18 p. 2926-2927)." (Opening Brief p. 22).

For the State to inform this Court that Mr. Harris relied upon these facts

without citations to the record is disingenuous or simple negligence in failing to properly review the trial transcript and Mr. Harris' Opening Brief.

Unbelievably, the State again claims that Mr. Harris argues, without support in the record, that V.D. and T.D. admitted they were angry Mr. Harris had rejected T.D. in favor of Ms. Anne (State's Answering Brief p. 47). These are the two factual contentions that the State claims Mr. Harris failed to cite in the record and were not adduced at trial. In fact, these were the only facts the State addressed in this entire argument.

In Mr. Harris' Opening Brief he explained, "V.D. previously admitted she hated Mr. Harris and that she was going to "get Mr. Harris" (A.A. Vol. 12 p. 1728). T.D. admitted that it made her very sad that Mr. Harris chose to have a relationship with Ms. Anne as opposed to herself. This also made V.D. angry (A.A. Vol. 12 p. 1736)." (Opening Brief p. 9). "V.D. admitted that she told her mother she was "going to get Fred" (A.A. Vol. 14 p. 2128)." (Opening Brief p. 14).

For the State to inform this Court that Mr. Harris "...contends, without support in the record, that V.D. and T.D. admitted they were angry Harris' had rejected T.D. in favor of Ms. Anne" is false (State's Answering Brief p. 47).

It is difficult for Mr. Harris to properly respond to the issue of insufficient

evidence when the State utterly refuses to address the lengthy factual scenario provided by Mr. Harris. In lieu of addressing the facts, the State simply claims that Mr. Harris relies upon facts without citation and more troubling, facts that were not elicited at trial. Yet, a simple review of Mr. Harris' Opening Brief proves the State's entire premise grossly inaccurate. Not only did Mr. Harris provide numerous citations to the record to support his facts, the citations come directly from the trial transcript. The State should not be rewarded for negligence. They failed to address the issue. Moreover, they made up a claim that Mr. Harris could not even support his factual position with citations.

Based upon Mr. Harris' careful factual analysis and the State's failure to address the issue, Mr. Harris is entitled to a new trial. As will be demonstrated, Mr. Harris respectfully requests that this Court take notice that the State's Answering Brief has a pattern of either failing to address important points made by Mr. Harris or the State alleging disingenuous arguments.

I. MR. HARRIS WAS DENIED THE RIGHT TO CONFRONTATION BASED ON THE DISTRICT COURT'S PRECLUSION OF QUESTIONING REGARDING BIAS AND MOTIVE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During trial, defense counsel bitterly complained that the Court precluded proper cross-examination of T.D. regarding her bias. T.D. had authored a book

titled "Secret Revenge". At trial, the prosecutor admitted that T.D. was allegedly sexually assaulted in Michigan and then drafted a book with a fictional portion where she killed the rapist in an act of revenge (A.A. Vol. 13 p. 1514-1515). The prosecutor argued the content of the book was irrelevant while the defense argued that the information established bias and motive (A.A. Vol. 13 p. 1516). Additionally, Mr. Harris was denied the opportunity to question T.D. regarding a second book wherein Mr. Harris believed he was a character. The Court denied this request as well.

The State claims that Rape Shield laws apply to the content of the book and the title was irrelevant (State's Answering Brief p. 18).[2] The State also contends that Mr. Harris was allowed to cross-examine T.D. regarding the existence of the book and the general content.

The State cites to the questions and answers T.D.'s testimony reflected during trial (State's Answering Brief p. 16). Anyone can observe from the limited questioning that Mr. Harris was completely precluded from presenting any bias that was obvious from the title and substance of the book. Mr. Harris wished to present T.D. as angry and disgruntled because she had been rejected. Mr. Harris

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[2] Interestingly enough, T.D. was not an alleged sexual assault victim in this case. Therefore, rape shield should not apply.

cited extensively to the trial transcript where T.D. made admissions that she was angry having been rejected. Mr. Harris desired to present that T.D. had previously made up a scenario by which she obtained revenge for an alleged sexual assault by killing the rapist. None of this was permitted during cross-examination. The State correctly explains that district court's retain wide discretion in limiting cross-examination (State's Answering Brief p. 17) (citing Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16, 31 (2004)). The State claims that Mr. Harris was permitted to elicit the general content of the book and that permitting further cross-examination would have been prejudicial and would have confused the issue (State's Answering Brief p. 18-19).

Although district courts have wide discretion to control cross-examination attacking a witnesses general credibility "a trial court's discretion is ...narrowed when bias is the object to be shown, and an examiner must be permitted to elicit any facts which might color a witnesses testimony". Bushnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979); See also, Ransey v. State, 100 Nev. 277, 279, 680 P.2d 596, 597 (1984).

"Where the purpose of cross-examination is to expose bias...the examiner must be permitted to elicit any fact which might color a witnesses testimony, and the trial court's usual discretion to control the scope of cross-examination is

circumscribed" Eckert v. State, 96 Nev. 96, 101, 605 P.2d 617, 620 (1980); Jones v. State, 108 Nev. 651, 659, 837 P.2d 1349, 11354 (1992).

In Lobato v. Nevada, 120 Nev. 512, 96 P.3d 765 (2004), this Court explained,

> There are nine basic modes of impeachment. The first four involve attacks upon the competence of a witness to testify, Ie. Attacks based upon defects of perception, memory, communication, and ability to understand the oath to testify truthfully. The second four modes of impeachment involve the use of evidence of prior convictions, prior inconsistent statements, specific incidents of conduct, and ulterior motives for testifying. The ninth mode of impeachment, not pertinent to this appeal, permits attack upon a witnesses reputation for truthfulness and necessarily involves the use of extrinsic evidence.

In Lobato, this Court specifically addressed impeachment involving ulterior motives for testifying. The United States Supreme Court has found that motive and bias is almost always relevant.

Mr. Harris also addressed, in his Opening Brief, the consideration by this Court of a harmless error review pursuant to Lobato. Again, the State utterly failed an invitation to claim that the error was harmless. The examination was more than appropriate given the extensive credibility flaws cited throughout the trial. There is clearly established state and federal law to support Mr. Harris' right to effectively cross-examine a witness pursuant to their bias. The extent of the error is best articulated by the following:

The Court: But why do you have to state the name?
Defense Counsel: That's the whole theory of the case (11 AA 1503-1504).

Mr. Harris is entitled to a new trial.

II. MR. HARRIS WAS DENIED THE RIGHT TO CONFRONTATION WHEN THE DISTRICT COURT PERMITTED INADMISSIBLE HEARSAY TESTIMONY FROM A SEPARATELY CHARGED CO-OFFENDER IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Prior to the testimony of Dr. Anita Gondy, the defense objected to Dr. Gondy being permitted to testify as to statements made by Lealer Cooks (Ms. Anne) (A.A. Vol. 15 p. 2272-2273). The defense argued that the State had informed the defense they were not going to call Ms. Cooks as a witness (A.A. Vol. 15 p. 2279). Therefore, introducing statements or allegations made by Ms. Cooks to Dr. Gondy violated the Sixth Amendment's confrontation clause (A.A. Vol. 15 p. 2274).

Apparently, Ms. Cooks brought Tah. D. and Taq. D. into Dr. Gondy's office in June of 2012, approximately a month after allegations had surfaced (A.A. Vol. 15 p. 2272-2280). During Tah. D.'s medical examination, Ms. Cooks made statements to Dr. Gondy (A.A. Vol. 15 p. 2273). During the examination, Tah. D. did not say a word (A.A. Vol. 15 p. 2273).

The State contends there was no confrontation clause violation as Ms.

Anne's statement to the doctor was a hearsay exception and was not testimonial (State's Answering Brief p. 21). The State relies upon NRS 51.115 as to statements made for medical diagnoses or treatment and describing medical history. Importantly, the State freely admits that the patient, Tah. D., did not say a word (A.A. Vol. 15 p. 2273). The State concedes that the statute is silent regarding whether the declarant can be someone other than the patient. Then, the State explains that they **"assume"** that it includes someone other than the patient and it is an "imminently reasonable use of discretion" (State's Answering Brief p. 22).

The patient did not say a word. The statute does not address that someone other than the patient can make hearsay statements that would be deemed admissible under this statute. Now, the State requests that this Court "assume" that a third party's statement would still be an exception pursuant to NRS 51.115. The State was permitted to elicit testimony that Ms. Anne, who the State failed to call, reported that the girls had been sexually assaulted. Ms. Anne clearly became an accuser.

Even the district court was concerned that the statement was being used during the time period that there was an effort to build a case against Mr. Harris (A.A. Vol. 15 p. 2276). The trial transcript presents a picture that Ms. Anne actually believed Mr. Harris was guilty. Yet, the State refused to call her as a

witness. Comically, the prosecution at one point explained, "there choosing not to call Leeler." (A.A. Vol. 18 p. 2882). There was absolutely no legal basis for the State to introduce this hearsay evidence without presenting the witness for confrontation. It is ridiculous that the State would claim that the defense had a responsibility to call the witness. The State has the burden of proof not the defendant. The State cannot circumvent the Sixth Amendment to the United States Constitution by assuming that statutes, which are silent on the issue, permit them an opportunity to avoid clearly established federal law.

The United States Supreme Court has held that "confrontation means more than being allowed to confront the witnesses physically. Our cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination" Davis v. Alaska, 415 U.S. 308, 315, 39 L.Ed.2d. 347, 94 Sup. Ct. 1105 (1974)(Quoting, Douglas v. Alabama, 380 U.S. 415, 418, 13 L.Ed. 2d. 934, 85 Sup. Ct. 1074 (1965).

The United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed 2d 177 (2004) explained,

> The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the right...to be confronted with the witnesses against him, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the

time of founding.

Not only did the State elicit this testimony during the questioning of the doctor, they informed the jury the importance of the allegations made by the hearsay statement, during closing argument. During closing argument, the prosecutor explained, "...she told you that ***the guardian*** who had brought [Tah. D.] in told her that. ... So in the reports it specifically said, possible sexual abuse suspected one month prior. That's why she said it, ***because the guardian told her that...*** " (A.A. Vol. 20 p. 3235-3236) (emphasis added). Here, the prosecution recognized the value of the incriminating nature of the hearsay statement. The district court was concerned that the statement may be testimonial because it occurred during the time period when the State was building a case against Mr. Harris. Moreover, the State relies upon a statute where they ask this Court to "assume" that third party hearsay statements would be admissible. Then, in a desperate effort, the State actually informed the district court that the defense failed to call the witness as though the burden of proof fell squarely upon Mr. Harris.

Lastly, the State presents facts from a United States Supreme Court case to support their position. In Ohio v. Clark, the child victim who told his teacher that "Big Dee caused bruises on the body." The child victim was deemed incompetent

to testify, but the statements to his teacher were admitted. 135 Sup. Ct. 2173, 2181 (2015) (State's Answering Brief p. 27). Unfortunately, the State misses the point. The United States Supreme Court was considering whether a child victim's statements to his teacher could be deemed admissible pursuant to a hearsay exception. Whereas here, Mr. Harris complains that a third party, who was not called to testify, had hearsay statements admitted that were highly incriminating. The child made no statement to Dr. Gondy. The State's reliance on this particular case is misplaced.[3]

III. THE DISTRICT COURT VIOLATED THE CONFRONTATION CLAUSE BY DENYING THE DEFENSE THE OPPORTUNITY TO QUESTION WITNESSES AS TO V.D.'S PRIOR INCONSISTENT STATEMENTS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Defense counsel desired to question V.D. and T.D. regarding evidence that V.D. had lost her virginity at age eleven in Louisiana (A.A. Vol. 12 p. 1696). The defense requested permission, through an offer of proof, that there was "another witness who was going to testify that [V.D.] had admitted she lost her virginity in

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[3] Argument number two should be carefully considered with argument number four where the State was permitted to again violate Mr. Harris' right to confrontation regarding hearsay statements of the same witness.

Louisiana prior to coming to Las Vegas." (A.A. Vol. 12 p. 1697). Additionally, the defense also requested permission to introduce a portion of Mr. Harris' recorded statement that established this inconsistency.

Now, on appeal, the State claims that V.D. never made an assertion that she lost her virginity while being assaulted by Mr. Harris (State's Answering Brief p. 27). Unbelievably, the State informs this Court **"V.D. never testified that she lost her virginity when Harris assaulted her."** (State's Answering Brief p. 29-30) (emphasis added). The State then provides trial testimony of V.D. claiming her testimony was vague on this issue. First, V.D.'s statements cited by the State, can clearly be interpreted to mean that V.D. was a virgin and Mr. Harris was "bothering her" because he was going to "take her virginity" (State's Answering Brief p. 28). The State then provides a portion of the trial transcript where V.D. explained to Ms. Rose what had occurred between herself and Mr. Harris. This was clear to the defense and to the jurors that V.D. had made the claim that Mr. Harris had assaulted her and "taken her virginity". For the State to claim that this interpretation is invalid is fatally flawed. More importantly, for the State to inform this Court that V.D. had never made this statement is disingenuous. In A.A. Vol. 1 p. 49, V.D. stated, "he told me I had to figure out when I was going to lose my virginity otherwise he was going to figure it out for me." Then, the following

testimony occurred:

> Q: When you say he had sex with you, what did he do?
> A: He took my virginity (A.A. Vol. 1 p. 49).

How does the State claim that V.D. never said that Mr. Harris took her virginity when she could not have been more explicit. The State has implied that Mr. Harris has improperly manufactured an issue. The State's argument is false. Additionally, Mr. Harris noted that the State made this type of argument during the insufficiency of the evidence issue before this Court. The State should not be permitted to make patently false statements. It is also extremely difficult to draft a proper Reply when wasting considerable time checking cites to prove the State inaccurate. Now, there is no confusion that V.D. had made such assertions (that the defendant took her virginity).

The defense requested permission to refute this fact. NRS 50.090 permits the defense to challenge a victim's claims of the absence of previous sexual conduct. However, "the accused's cross examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or the victim". Johnson v. State, 113 Nev. 772, 942 P.2d 167 (1997). In Johnson, this Court explained,

> Consequently, once Nicole testified that she had never sexual intercourse prior to the night of the rape, the defense had the right to attempt to discredit this testimony by showing that Nicole was not a virgin. However, counsel did not cross-examine Nicole on the issue, attempt to introduce any evidence to challenge Nicole's statement, or

make any relevant objection on the record in this matter. The defense may not use the appellate court's to relitigate strategic decisions made during trial. Id.

Mr. Harris made all appropriate efforts, outside the presence of the jury, to present evidence that V.D. had previously made inconsistent statements. Pursuant to Johnson and to the right to present relevant testimony, Mr. Harris was denied an opportunity and a fair trial. Undoubtedly, if the jury had been aware that V.D. had been deceptive as to this issue, this easily could have affected the outcome of the trial.

IV. MR. HARRIS RECEIVED AN UNFAIR TRIAL WHEN THE DISTRICT COURT PERMITTED PORTIONS OF LEALER ANN COOKS' (MS. ANNE) STATEMENTS TO THE POLICE IN VIOLATION OF THE UNITED STATES CONFRONTATION CLAUSE.

Over the defense vehement objection, the court permitted the State to introduce limited portions of Ms. Cooks statements made to the police in violation of the confrontation clause. Outside the presence of the jury, the State requested permission to introduce a portion of Ms. Cooks statement to the police wherein she stated that Tah. D. And Taq. D. told Ms. Cooks that Mr. Harris had sexually assaulted Tah. D. (A. A. Vol. 18 p. 2878). The defense objected complaining that "...I can't cross examine a statement". The State rebutted the defense objection by claiming that Ms. Cooks could be called as a witness as she had already pled

guilty (A. A. Vol. 18 p. 2879). Yet, the State made no effort to call the witness. The prosecutor explained, "they are choosing not to call Lealer" (A.A. Vol. 18 p. 2882). However, the reality was that the State was required to call the witnesses against the defendant. Outside the presence of the jury, the court determined that the State would be permitted to ask limited questions of the detective (A.A. Vol. 18 p. 2882-2883).

Thereafter, the detective stated,

> That's where I, little by little, would tell her a little bit more about what I felt she knew. She would give a little more. I would push her a little bit further about what I thought she knew and she would give a little more. And it went on like that basically for the entire interview. (A. A. Vol. 18 p. 2902).

The questioning continued,

Prosecutor:	And ultimately what did she admit that she knew from the girls?
Defense Counsel:	Judge, objection. Hearsay.
The Court:	Overruled.
The Detective:	She eventually admitted that the girls had claimed that they - - that [Tah. D.] had - - I believe the word they used were molested by Fred Harris.(A. A. Vol. 8 p. 2902).

The Court permitted the State to blatantly present testimonial hearsay in violation of the confrontation clause.

Pursuant to Crawford, hearsay evidence is to be separated into that which is testimonial and that which is non-testimonial. If the statement is testimonial, the

statement should be excluded at trial unless 1) the declarant is available for cross-examination at trial, or 2) if the declarant is unavailable, the statement was previously subjected to cross-examination. Crawford. 541 U.S. 36 124 S. Ct. 1354 158 L. Ed 2d 177 (2004).

Here, the State elicited testimony from a non-testifying witness to a detective. In Davis v. Indiana, 547 U.S. 813, 823, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the United States Supreme Court held that statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Statements are "testimonial when the circumstances objectively indicate there is no ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. There can be no argument that this was not testimonial as it was a statement provided to law enforcement where the police were clearly not responding to an ongoing emergency.

Next, by the State's own admission, this witness was available for testimony. Mr. Harris had a right to confront the witness. The prosecutor's contention that the defense should call the witness is entirely inconsistent with the United States Constitution. Incredibly, even on appeal, the State complains that

Mr. Harris declined to call the witness (State's Answering Brief p. 32). This type of unconstitutional argument is woeful as the defendant has no burden of proof. In essence, the State would have this Court believe that Mr. Harris cannot complain of a confrontation clause violation because he could have called the witness. Therefore, the State can present testimonial hearsay on a consistent basis arguing that the defendant has the burden to question the witness.

Next, the State contends Mr. Harris had a number of other options at trial including questioning the detective regarding the interview with the witness or insisting that the State call the witness. Again, the State's arguments are extraordinarily troubling. The State has the burden of proof. The State is to elicit admissible testimony through witnesses so that confrontation may occur. This is the cornerstone of jury trials in the United States and throughout English history. In one broad stroke, the State seems to forget hundreds of years of history and ignores clearly established United States Supreme Court law.

The State next claims that Mr. Harris invited the error. How? Mr. Harris objected to the State introducing hearsay statements given by the witness to the detective. This is not invited error. Nor should the State be permitted to reconstruct the principles of the United States Constitution to affirm a conviction in this case.

In another futile attempt to circumvent the United States Constitution, the State claims that this issue is being raised for the first time on appeal. The State claims that the confrontation clause was raised for the first time on appeal and is therefore subject to a plain error standard (State's Answering Brief p. 34). A review of Mr. Harris' Opening Brief and citations to the record reveals this is simply false. Regarding this issue, the defense objected complaining that "I can't cross-examine a statement." The State rebutted the defense objection by claiming Ms. Cooks could be called as a witness as she had already pled guilty. (A.A. Vol 18 p. 2879) (Opening Brief, p. 42). When defense counsel objects, claiming he cannot properly cross-examine a statement, it is obvious that counsel is objecting to a violation of confrontation. The State's argument that this issue was not properly preserved is disingenuous. This Court should not ignore the obvious desperation of the State to justify patently obvious violations of Mr. Harris' constitutional rights.

Next, in a stream of intellectually dishonest arguments, the State claims that the statements were not hearsay because they were not introduced for the truth of the matter asserted (State's Answering Brief p. 35). The State must have forgotten the prosecutor's closing argument where she repeatedly told the jury that the guardian (Ms. Anne) told Dr. Gondy that she suspected sexual abuse. Therefore, in

closing argument the State vehemently argued that Dr. Gondy may have considered sexual abuse because the guardian had said it occurred. Obviously, the hearsay statement was being utilized to demonstrate that Ms. Anne believed that sexual abuse occurred. This is completely in opposite to the State's contention that the statement was not used for the truth of the matter asserted.

Lastly, the State argues that Mr. Harris was not prejudiced because this information was introduced by another witness at trial (Dr. Gondy) (State's Answering Brief p. 36). Mr. Harris has already argued that the statements to Dr. Gondy were a violation of the confrontation clause. Now, the State argues that Mr. Harris was not prejudiced by this hearsay statement because the State successfully violated the confrontation clause through Dr. Gondy. Apparently, two errors make the hearsay statement non-prejudicial.

In sum, the State's arguments are almost indecipherable. The reality was the State refused to call the accuser. The witness told a detective in a recorded statement that Mr. Harris was guilty of the crime charged. This is obviously testimonial hearsay. The State had every opportunity to call the witness. Now, the State claims the issue is not preserved even though defense counsel bitterly complained that they could not cross examine a statement. The State claims that the defense had the burden of proof to call the witness and failed to do so. The

State claims in some convoluted manner that the statement was not introduced for the truth of the matter asserted. This is a pattern throughout Mr. Harris' appeal.

V. MR. HARRIS SHOULD NOT HAVE BEEN CONVICTED OF KIDNAPPING AS IT WAS INCIDENTAL TO THE SEXUAL ASSAULT AND LEWDNESS COUNTS.

This argument stands as enunciated in the Opening Brief.

VI. THE DISTRICT COURT ERRED WHEN IT FAILED TO GRANT MR. HARRIS' MOTION FOR A NEW TRIAL AFTER IT WAS LEARNED THAT A JUROR VIOLATED THE DISTRICT COURT'S ADMONITION.[4]

This argument has been addressed simultaneously with argument seven.

VII. THE DISTRICT COURT ERRED IN DENYING MR. HARRIS' MOTION FOR A NEW TRIAL REGARDING JUROR MISCONDUCT.

Mr. Harris is entitled to a new trial based upon jurors willfully disregarding the Court's repeated admonition as well as related juror misconduct. First, the State concedes "...there is no doubt the juror posted a photo of himself wearing a juror badge in contravention of the court's instruction..." (State's Answering Brief, p. 40). The State does not dispute, initially, that the juror committed misconduct by failing to follow the Court's admonition. However, the State claims that the

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[4] For purposes of the Reply Brief, Mr. Harris will address arguments six and seven simultaneously based upon interconnecting facts pertaining to both issues.

misconduct was "innocuous" and did not prejudice Mr. Harris (State's Answering Brief, p. 40).

A careful analysis of the facts adduced at the evidentiary hearing illustrate a more sinister juror misconduct than the State recognizes. Mr. Bell blurted out, during the evidentiary hearing, that he was communicating with a friend, during the middle of trial, when he realized that his friend knew another person that was on the same jury.

Without going further, the question becomes: Why are you talking to another individual about your jury service, while the trial is occurring? Next, logic would dictate that Mr. Bell's mutual friend must have also been communicating with Ms. Lewis, the other juror that was known to this friend. How could the mutual friend have known that both of these jurors were impaneled on the same criminal trial unless both of these jurors were communicating in violation of the oath. Clearly, the mutual friend could not have been clairvoyant. There are multiple trials occurring at any one time so to recognize that two people you know are sitting on the same jury leads to the obvious conclusion that the parties are all communicating.

Assuming *arguendo* that both jurors violated the admonition and told their mutual friend that they were on a criminal jury, how would the friend know they

were on the same jury? This was the exact inquiry of the district court when the court became aware that the juror had posted a picture of himself. The court then inquired of Mr. Bell whether he had posted the picture of himself with the jury badge before the jury was impaneled. Mr. Bell immediately attempted to deceive the court claiming that he had posted the picture before the impaneling of the jury. Obviously, Mr. Bell recognized he had violated the admonition and began to cover his tracks.

Then, the district court scolded Mr. Bell, informing him that the court does not hand out the blue badges until the jury is impaneled. The Court then informed Mr. Bell that he had been admonished on several occasions not to go on Facebook (A.A. Vol. 23 p. 3339). Mr. Bell was completely unable to logically inform the Court how his friend knew he and Ms. Lewis were on the same jury. Mr. Bell admitted that he came to the evidentiary hearing and had previously discussed with Ms. Lewis that he could come and testify if Ms. Lewis needed his assistance (A.A. Vol. 23 p. 3343).

By ignoring the admonition, Mr. Bell invited comments on Facebook which included a comment stating, "hang him high" (A.A. Vol. 22 p. 3277). If we are to believe Mr. Bell that his jury service was unearthed by his friend because he posted a picture to Facebook, we can assume that his friend and Ms. Lewis would

have also been aware of the comments on Facebook. By ignoring the admonition, Mr. Bell had invited friends to make inappropriate comments.

Ms. Lewis' conduct as a juror came into question for two reasons. Obviously, as discussed above, Ms. Lewis had a mutual friend with Mr. Bell and communicated with him during and after the trial. Separately from that incident, another juror approached the defendant's mother at the conclusion of the trial and appeared to complain that juror Lewis had been expressing her own abuse while deliberating on this case (A.A. Vol. 23 p. 3297-32-99). Ms. Smith (the juror who revealed that juror Lewis began discussing abuse she had suffered) had been reluctant to vote guilty and felt sympathetic to Mr. Harris' mother.

At the evidentiary hearing, Ms. Lewis admitted that her mother had physically abused her but denied being a victim of sexual abuse (A.A. Vol. 23 p. 3319-3320). During voir dire, Ms. Lewis did explain that she had been a victim of physical abuse. However, the defense became aware of an allegation that Ms. Lewis had been discussing being a victim of sexual abuse (both Ms. Smith and Ms. Lewis deny that this was discussed). During the evidentiary hearing Ms. Lewis stated,

> When I was a young girl I would sleep with knives under my pillow. I would also sleep with a phone in my bed with me so in case anyone would ever try and get me, than I could protect myself. So I think maybe that is the instance she is thinking that she heard I say I was

> molested, that somebody touched me, that somebody did something to me. Nothing ever happened, no one ever came in my room. (A.A. Vol. 23 p. 3321).

These answers were given in response to claims that her mother was abusive and she would bring home strange men.

What is particularly curious, is that the record demonstrates that the defense became aware of juror Smith's statements to the defendant's mother and then brought pleadings before the court. Only then during the evidentiary hearing, did the parties realize that Ms. Lewis and Mr. Bell had been communicating and that Mr. Bell had violated his admonition. Now, Ms. Lewis denies sexual abuse but did not mention at the evidentiary hearing her communication with Mr. Bell and the mutual friend. It was Mr. Bell who blurted this information out during the testimony.

The State claims there is no prejudice and there is no evidence the two jurors engaged in a discussion outside the jury room during deliberations. Mr. Harris would contend that the two jurors being accused of misconduct were evasive. In fact, a review of the transcript from the evidentiary hearing illustrates Mr. Bell's attempt to cover up his initial admission that he had a juror that he also knew on the jury. Thereafter, Mr. Bell began to be evasive and appeared to be dishonest when the court asked questions about the timing of the posting of the

picture. Having been immediately admonished by the court that the had violated the admonition, juror Bell began to be more guarded.

Curiously, Ms. Lewis did not mention this relationship. Additionally, had the court and parties initially believed Mr. Bell, no misconduct regarding the posting of the Facebook would have been discovered until the court recognized that Mr. Bell was not being truthful (he claimed to have posted the picture before impaneling and the court recognized that he would not have the blue badge before impaneling).

This court has adopted a standard for appellate courts to consider in determining juror misconduct. In Meyer vs. State of Nevada, 119 Nev. 554, 561 (2003), this Court has divided jury misconduct into two categories: 1) Conduct by jurors contrary to their instructions or oath; and 2) Attempts by third parties to influence the jury process.

In Meyer, the issue was presented was whether a juror misconduct had established prejudice. In Meyer, a material issue at trial was the source of the victims bruises and whether or not they were cause by the defendant, or if it was a reaction from medicines she was ingesting. During trial one of the jurors conducted independent research by consulting a physicians desk reference and the side effects of Accutane. The juror then discussed her findings with other jurors

during deliberations. This court held that the jurors actions constituted juror misconduct because this was the introduction of extrinsic evidence. Id. at 571-72. The court found that the introduction of the outside material was prejudicial and remanded the case for a new trial. Id.[5]

The Ninth Circuit has held, "we do not have a bright line for determining whether a defendant has suffered prejudice from an instant of juror misconduct, but instead weigh a number of factors to determine whether the jury exposure to extraneous information necessitates a new trial." These factors include:

> 1) Whether the material was actually received, and if so, how; 2) the length of the time it was available to the jury; 3) the extent to which the juror discussed and considered it; 4) whether the material was introduced before a verdict was reached, and if so what point in the deliberation, and 5) any other matters which may bear on the issue of reasonably possibility of whether the extrinsic material affected the verdict. Dickson vs. Sullivan, 849 F.2d at 406. (See also Sassounian vs. Roe, 230 F.3d 1097, 1109 (9th Cir. 2000)).

In exercising the court's discretion, a trial court must conduct a hearing to

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[5] In State of Nevada v. Rosemary Vandecar, 2015 Nev. Unpub. Lexis 248 (Mar. 2, 2015) (No. 61649) (unpublished disposition), this Court concluded the district court did not abuse its discretion by removing a juror who simply told the jury pool that he made statements to his wife regarding the case.

determined if the violation of the admonition occurred and whether the misconduct was prejudicial to the defendant. "Prejudice requires an evaluation of the quality and character of the misconduct, 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." Mckenna vs. State, 96 Nev. 811, 815, 618 P.2d 348, 349 (1980).

Here, the quality and character of the misconduct is significant. The juror willfully disregarded the district court's repeated admonitions. Then, the juror attempted to deceive the district court about the timing of the posting of the picture. Curiously, Ms. Lewis never mentioned this relationship with Mr. Bell. A jurors direct disregard for the district court's admonishment should be categorized as significant misconduct. As a result of this misconduct, Juror Bell invited at least one comment from a friend that the juror "hang him high" in referring to Mr. Harris. Thereafter, Mr. Bell admitted to communication with Ms. Lewis, yet, Mr. Bell was not willing to provide much information after he realized the court had caught him in his misconduct.

Next, there is a totally separate juror (Ms. Smith) complaining to the defendant's mother that Ms. Lewis was injecting personal opinions into the jury deliberation room which Ms. Lewis denied at the evidentiary hearing. Yet, Ms.

Lewis was not forthright about nay relationship with Mr. Bell and the mutual friend. In essence, the jury misconduct was significant. Jurors deliberated for days. As was best illustrated in the argument that there was insufficient evidence, the case was close. Mr. Harris was not entitled to a perfect trial, but Mr. Harris was entitled to a trial free of jurors ignoring the court's instructions, inviting derogatory statements from a juror's friend on Facebook, and one where jurors are open and honest during the process. In a close case, this misconduct can hardly be construed as harmless.

IX. MR. HARRIS' CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

This argument stands as enunciated in the Opening Brief.

CONCLUSION

Based on the above, Mr. Harris would respectfully request that this Court reverse his convictions.

DATED this 7 day of February, 2017.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

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 14 point font of the Times New Roman style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b), this appellate brief complies because excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 7,000 words, to wit, 6,856 words.

Finally, I hereby certify that I have read this amended 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 7 day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 7 day of February, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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