No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

_____

CAMERON THOMAS, Petitioner

v.

THE STATE OF NEVADA, Respondent

_____

On Petition for Writ of Certiorari to the
Supreme Court of the State of Nevada

_____

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

VOLUME 2

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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CAMERON THOMAS, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 71044

APPEAL FROM JUDGMENT OF CONVICTION (JURY TRIAL)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE KERRY EARLEY PRESIDING

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APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The Judgment of Conviction was filed on August 12, 2016 (A.A. Vol. 8 p. 766-769). A Notice of Appeal was filed August 10, 2016 (A.A. Vol. 8 p. 764-765).

ROUTING STATEMENT

This matter is presumptively assigned to the Nevada Supreme Court pursuant to NRAP 17(b)(1) which states that the Court of Appeals is only presumptively assigned direct appeals not involving a conviction for a category A or B felony. This case involves a direct appeal of multiple category A felonies. Mr. Thomas has no objection to this case being assigned to the Court of Appeals.

STATEMENT OF THE CASE

Mr. Thomas was charged by way of Information on November 22, 2011, with six counts of sexual assault with a minor under fourteen years of age; fifteen counts of lewdness with a child under the age of fourteen; and two counts of attempt lewdness with a child under the age of fourteen (A.A. Vol. 2 p. 72-79).

Mr. Thomas pled not guilty and a jury trial began before the Honorable Kerry Earley on May 16, 2016 (A.A. Vol. 12 p. 1235). On June 7, 2016, the jury returned with a verdict as follows: Guilty of counts 1, 5, and 11 (sexual assault with a minor under fourteen years of age); Guilty of counts 2, 6, 8, 12, 13, 16-18 (lewdness with a child under the age of fourteen); Guilty of counts 10, 15 (attempt

lewdness with a child under the age of fourteen); and Not Guilty of counts 3-4, 7, 9, 14, 19-23 (A.A. Vol. 17 p. 2586-2601).

Mr. Thomas was formally sentenced on August 5, 2016 (A.A. Vol. 17 p. 2602-2663). Mr. Thomas received an aggregate sentence of a maximum of life with a minimum of forty years (A.A. Vol. 26 p. 4591-4592).

The Judgment of Conviction was filed on August 12, 2016 (A.A. Vol. 8 p. 766-769). A timely Notice of Appeal was filed August 10, 2016 (A.A. Vol. 8 p. 764-765).

STATEMENT OF THE FACTS

A. EVIDENTIARY HEARINGS PURSUANT TO NRS 51.985

On May 20, 2016, the district court held an evidentiary hearing pursuant to NRS 51.385. April Reed is the mother of Z.F. (AA. Vol. 13 p. 1592-1593). In December of 2010, April learned from Arizona authorities (CPS) that Z.F. claimed to be the victim of sexual abuse (AA. Vol. 13 p.1593-1594). This was the first time April became aware of the allegations (AA. Vol. 13 p.1594) April then contacted her fiancé (who Z.F. refers to as "Mommy Kay") (AA. Vol. 13 p.1595). Later that day, April had a conversation with Z.F. in her bedroom (AA. Vol. 13 p.1598). Mommy Kay was also present during the conversation (AA. Vol. 13 p.1599). April then asked Z.F. if Cameron had been touching her inappropriately

(AA. Vol. 13 p.1600). Z.F. began crying and affirmed the allegation (AA. Vol. 13 p.1600). Z.F. told April that Cameron had touched her private area and that he had put his mouth on her vagina (AA. Vol. 13 p.1600).

On December 9, 2010, Ms. Amanda Rand, an elementary school teacher, had a conversation with Z.F. at the school (A.A. Vol. 16 p. 2373-2374). Z.F. relayed that she had been sexually abused by Cameron Thomas (A.A. Vol. 16 p. 2376). On cross-examination, defense counsel was advised not to violate the courts order by questioning Ms. Rand about the real reason she was questioning Z.F. The real reason was she was conducing an investigation was because of Z.F mother's physical abuse. In fact, Ms. Rand talked to Z.F based upon another report (A.A. Vol. 16 p. 2379) (the jury was not permitted to know this). However, Z.F turned the allegations against Cameron Thomas (A.A. Vol. 16 p. 2380-2381). Additionally, Ms Rand did not recall any discussion about "god dad." (A.A. Vol. 16 p. 2378-2380, 2415).[1]

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[1] Interestingly enough, Z.F claimed the reason why Cameron Thomas came up in the discussion with Ms. Rand was because Cameron Thomas was her godfather. The conversation about Cameron Thomas came up towards the end of the discussion (A.A. Vol. 10 p. 870-871). It was April Reed who was the target of the investigation (A.A. Vol. 10 p. 874). April had allegedly whipped Z.F. with an

The district court held an evidentiary hearing, concerning Officer Kathleen Vangordon. Officer Vangordon did a forensic interview with Z.F., who was nine years old at the time of the interview (A.A. Vol. 10 p. 864-865). Z.F. described the allegation against Cameron to defective Vangordon (A.A. Vol. 10 p. 868-871). At the conclusion of Vangordon's testimony, the court determined that he would be permitted to testify regarding Z.F. disclosure pursuant to NRS 51.385 (A.A. Vol. 10 p. 881)

The district court held another hearing concerning Office James Sink. Officer Sink traveled to Madison Rose Elementary School to interview Z.F (AA. Vol. 10 P. 896). Officer Sink then described his conversation with Z.F where she disclosed the allegations against Cameron Thomas (AA. Vol. 10 P. 898). At the conclusion of the hearing the court determined that Officer Sink would be permitted to testify pursuant to NRS 51.385.

The district court held another hearing concerning Ms. Faiza Ebrahim. Ms. Ebrahim is a forensic interviewer at Southern Nevada's Children's Assessment Center (AA. Vol. 19 P. 2987). Ms. Ebrahim conducted an interview with M.S. on

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electrical cord (A.A. Vol. 10 p. 874). Ms. Rand explained that after she was finished questioning Z.F. about the physical abuse at the hands of her mother, Z.F. turned the conversation to Cameron Thomas (A.A. Vol. 10 p. 874).

January 14, 2011 (AA. Vol. 19 P. 2988). During the interview, M.S. identified Cameron Thomas as the man who sexually abused her (AA. Vol. 19 P. 2991). At the conclusion of the hearing, the district court determined pursuant to NRS 51.385 that the she was reliable and permitted Ms. Ebrahim to testify.

The Court held a hearing pursuant to NRS 51.385 concerning Ms. Cheryl Barbian. Cheryl is the mother of M.A.S. (AA. Vol. 20 P. 3079). M.A.S. was born August 7, 2002 (A.A. Vol. 20 p. 3079).

On January 6, 2011, Cheryl heard the television news surrounding Cameron Thomas. Later, M.A.S. told Cheryl that Cameron was in jail (AA. Vol. 20 P. 3082). Cheryl raised the topic to determine whether M.A.S. had been abused (AA. Vol. 20 P. 3083). During the conversation, Cheryl directly asked M.A.S. whether Cameron had touched her inappropriately (AA. Vol. 20 P. 3085). M.A.S. shook her head in the affirmative (AA. Vol. 20 P. 3085). M.A.S. demonstrated with dolls what had happened to her (AA. Vol. 20 P. 3086). M.A.S. demonstrated how Cameron Thomas had allegedly touched her vagina with his fingers (AA. Vol. 20 P. 3087-3088).

Cheryl explained that M.A.S. had been at a neighbors house and had conversations about Cameron being arrested, prior to the Sunday conversation (AA. Vol. 20 P. 3095). M.A.S. had been impacted by the conversation at the

neighbors but did not reveal any allegations until she was directly questioned by her mother (AA. Vol. 20 P. 3096).

The Court determined that the factors enunciated in NRS 51.385 had been met (AA. Vol. 20 P. 3103-3106).

The Court held a hearing pursuant to NRS 51.385 in regards to Ms. Ramona Slatterly. Romona is the mother of M.S. (AA. Vol. 20 P. 3242). M.S.'s date of birth is January 25, 2002 (AA. Vol. 20 P. 3243). On January 6, 2011, Romona learned from a friend that Cameron Thomas had been arrested for sexual assault (AA. Vol. 20 P. 3245). When M.S. returned from school, Romona questioned her regarding Cameron Thomas (AA. Vol. 20 P. 3249-3247). Romona asked her daughter if Cameron Thomas had ever touched her inappropriately (AA. Vol. 20 P. 3247). At the time of the conversation, M.S. was only eight years old (AA. Vol. 20 P. 3248). After a pause, M.S. then stated that Cameron would put his hands down her shirt (AA. Vol. 20 P. 3248). The next day, M.S. stated that Cameron used to put his hands "..down her pants and watch me bathe" (AA. Vol. 20 P. 3249). The district court determined that Romona would be permitted to testify.

Ms. Martha Mendoza has been employed with the Department of Family Services, as a forensic interviewer (AA. Vol. 21 P. 3344). On January 12, 2011, a forensic interview was conducted of M.A.S. (AA. Vol. 21 P. 3346). M.A.S.

explained to the forensic interviewer that Cameron had touched her "bathroom part" area with his hand while she sat on his lap (AA. Vol. 21 P. 3352-3354). The judge ruled that the forensic interviewer would be allowed to testify as to the hearsay statements (AA. Vol. 21 P. 3356).

B. STATEMENT OF FACTS

A.P. (also known as B.P.) was born March 11, 1999. At the time of trial, A.P. attended eleventh grade and was 17 years old (AA. Vol. 13 p. 1743). A.P. was being raised by her mother April and her mother's lesbian partner, Kay (AA. Vol. 13 p. 1744-1745). A.P. has three sister, Z.F., Z.F., and K.W. (AA. Vol. 13 p.1745). At one point, A.P. began attending Kids "R" Kids when she was six or seven years old (AA. Vol. 13 p.1753). When she began attending Kids "R" Kids, April, Kay and Cameron all worked at the day care (AA. Vol. 13 p.1753).

When A.P. was six or seven years old, A.P. spent the night at the defendant's house (AA. Vol. 13 p. 1763). Allegedly, Cameron placed his fingers in A.P. vagina when she was in bed with her sister. (AA. Vol. 13 p.1765).

On another occasion, the defendant alleged placed his penis inside A.P.'s vagina. (AA. Vol. 13 p.1772). It is important to remember that A.P. testified that there were multiple children on or around the bed at the time this occurred (AA. Vol. 13 p.1772-1773).

In a separate incident, Cameron allegedly lifted A.P. shirt up and placed his tongue on her breast (AA. Vol. 13 p.1788). Allegedly, D.T. was present in the room when this occurred (AA. Vol. 13 p.1790). Later that day, Cameron and A.P. went to the store (AA. Vol. 13 p.1791). During the drive to the block buster store, Cameron allegedly placed his fingers in A.P.'s vagina (AA. Vol. 13 p. 1792).

On another occasion A.P. was helping Cameron clean his fish tank (AA. Vol. 13 p.1796). Allegedly, Cameron placed his penis in her vagina during this incident (AA. Vol. 13 p.1800). On another occasion, Cameron allegedly took A.P. home and was watching television. The news was reporting that Michael Jackson had died (AA. Vol. 13 p. 1802). A.P. had gone home because she was not feeling well (AA. Vol. 13 p.1805). Allegedly Cameron had placed his mouth on A.P.'s vagina (AA. Vol. 13 p.1809).

A.P. admitted that at the preliminary hearing she testified that Cameron kissed her breast but did not mention that Cameron had placed his penis in her vagina (AA. Vol. 14 p.1912-1913). Also, A.P. admitted that she had failed to tell the story of the fish tank cleaning incident when she talked to the police in her voluntary statement in 2010 (AA. Vol. 14 p.1928). A.P. explained that she disclosed this incident for the first time at the preliminary hearing (AA. Vol. 14 p.1928). A.P. also admitted that she never informed the police, in her formal

statement, about the Michael Jackson incident. She revealed the Michael Jackson incident at the preliminary hearing as well (AA. Vol. 14 p.1944-1945).

At one point, A.P. became aware that her mothers and Cameron had a dispute which caused them to move out of Cameron's house (this is before the disclosure) (AA. Vol. 14 p.1981).

A.P. admitted that she would get in trouble a lot and that she was fearful to make her mother angry (AA. Vol. 14 p.2073).

At the time of her trial testimony, Z.F. was fifteen years old having been born May 17, 2001 (AA. Vol. 14 p.2094). Z.F. was approximately four or five years old when she began attending Kids "R" Kids (AA. Vol. 14 p.2096). Z.F. explained that on one occasion she was folding clothes and Cameron came and pulled her pants down and placed his mouth on her vagina (AA. Vol. 14 p.2106-2107).

On another occasion in D.T.'s room, Z. F. was playing with toys and Cameron came in and attempted to place his penis in Z.F. vagina (AA. Vol. 14 p.2112). Z.F. claimed that her littler sister, K.W. was present in the room at the time (AA. Vol. 14 p.2112).

On another occasion, Z.F. was playing hide and go seek and while in the closet the defendant came in and removed her pants and placed his mouth on her

vagina (AA. Vol. 14 p.2117).

On another occasion in D.T. room, Z.F. was watching spongebob when Cameron allegedly came in the room and pulled her pants down, but nothing occurred (AA. Vol. 14 p. 2121-2123).

At Z.F.'s house, when she was in first or second grade, she was watching television and Cameron allegedly told her to touch his penis (AA. Vol. 14 p.2124). This occurred on the couch in the living room (AA. Vol. 14 p.2126-2127). Z.F. did not touch his penis (AA. Vol. 14 p.2128). On yet on another occasion, at the same house, Cameron allegedly made the same request again, Z.F. resisted. (AA. Vol. 14 p.2132). On one occasion, Z.F. was present in the jacuzzi with the defendant (AA. Vol. 14 p.2133). All of Z.F. sisters, with the exception of K.W., were present in the Jacuzzi (AA. Vol. 14 p.2134). Allegedly, Cameron placed his hand underneath Z.F. bathing suit and started to rub her vagina (AA. Vol. 14 p.2136).

Z.F. was getting in trouble right at the time she first revealed the allegations to Ms. Halpern (AA. Vol. 15 p.2211-2212). Z.F. also admitted that she got in trouble for lying and stealing before she disclosed the allegations (AA. Vol. 15 p.2220). In fact, Z.F. described her conduct as "lying all the time " (AA. Vol. 15 p.2221).

Z.F. testified that her mother April was very upset with the Thomas family

during this time period (AA. Vol. 15 p.2214). Additionally, Z.F. explained that both April and Kay told her that she could not talk to Cameron (AA. Vol. 15 p.2215). They also told her that she would not be able to see Cameron anymore (AA. Vol. 15 p.2215).

April Reed is the mother of both A.P. and Z.F. (AA. Vol. 15 p.2245-2247). April's significant other is Kay (Koshonda Williams) (AA. Vol. 15 p.2246). April was a teacher at Kids "R" Kids for approximately two years, between 2005 and 2007 (AA. Vol. 15 p.2249). Kay began working shortly thereafter (AA. Vol. 15 p.2249). Kay and Cameron were best friends during this time period (AA. Vol. 15 p.2252).

April, Kay and their children became very close with Mr. Thomas and his family (AA. Vol. 15 p.2253). The two families would socialize on a regular basis (AA. Vol. 15 p.2253). Cameron was considered April's daughter god father (AA. Vol. 15 p.2254). Cameron treated the girls very nicely (AA. Vol. 15 p.2255).

In order to assist April and Kay, Cameron was generous enough to obtain a loan so that April and Kay would have funds to relieve the financial distress (AA. Vol. 15 p.2265). At Christmas time, Cameron and April were involved in a heated discussion; April speculated this was because of the loan (AA. Vol. 15 p.2268). April admitted she told her children that they would not be able to speak to or see

the defendant (AA. Vol. 15 p.2269).

April admitted that at the time that she and Kay defaulted on the loan from Cameron, Kay had a gambling problem (AA. Vol. 15 p. 2312-2315). Kay began to lie to April about the finances (AA. Vol. 15 p.2315). These lies impacted the family (AA. Vol. 15 p.2315).

During the argument with Cameron, he referred to April as an unfit mother (AA. Vol. 15 p.2320). Cameron also told her during the argument that he felt that she and her family had taken advantage of him (AA. Vol. 15 p.2320).

Kay testified that when Z.F. and B.R. disclosed the allegations, neither one of them stated that Cameron had vaginally penetrated them with his penis (AA. Vol. 16 P. 2521).

M.S. was born January 25, 2002 (AA. Vol. 10 P. 970). M.S. attended Kids "R" Kids (AA. Vol. 10 P. 972).On one occasion, M.S. parents went up to Mountain Charleston and Cameron babysat her (AA. Vol. 10 P. 976-977). M.S. claimed that Cameron touched her on her breast while they were sitting on the sofa (AA. Vol. 10 P. 981).

M.S. also claimed that Cameron touched her rear end underneath her clothes (AA. Vol. 10 P. 984). After the Mount Charleston incidents, M.S. spent the night at Cameron's again (AA. Vol. 10 P. 992). On this occasion, M.S. was in the living

room and she was sitting on the couch watching television (AA. Vol. 10 P. 993-994). Again, M.S. claimed that Cameron touched her breast and rear end (AA. Vol. 10 P. 999). M.S. did not disclose these allegations until her mother told her that Cameron had been arrested (AA. Vol. 10 P. 1001).

M.S. had seen the news coverage on Fox (AA. Vol. 10 P. 1005). The news reported that Cameron had been accused of doing "bad things" to other children (AA. Vol. 10 P. 1006). Prior to talking to the authorities, M.S. talked to family and "people from the church" (AA. Vol. 10 P. 1016-1017).

M.A.S. was thirteen years old at the time of her trial testimony (AA. Vol. 20 P. 3131). M.A.S. would attend Kids "R" Kids after school (AA. Vol. 20 P. 3134). Cameron Thomas allegedly touched M.A.S.'s "private areas" at both Kids "R" Kids and Bright Child (AA. Vol. 20 P. 3148). M.A.S. explained she was sitting on Cameron's lap when Cameron touched her vaginal area over her clothing (AA. Vol. 20 P. 3149-3151). M.A.S. explained there would be other children around when this occurred (AA. Vol. 20 P. 3153).

M.A.S. recalled her mother stating that Cameron was going to go to jail because he was touching other children on their "privates". (A.A. Vol. 20 p. 3171).

The defense called Bonnie Hart (AA. Vol. 21 P. 3402). Ms. Hart was the

owner of Kids "R" Kids for approximately thirteen years (AA. Vol. 21 P.3403). Ms. Hart explained that there is a video camera system that operates twenty-four hours seven days a week (AA. Vol. 21 P. 3403).

Ms. Hart described Cameron as a very professional employee who worked well with children (AA. Vol. 21 P. 3420-3421). Ms. Hart never noticed any unusual interaction between Cameron and the children (AA. Vol. 21 P. 3452). Ms. Hart explained that it would not be unusual for a child to sit on a teachers lap (AA. Vol. 21 P. 3477).

Ms. Mada Eddins-Smith stated that she observed A.P. and Z.F. interact with Mr. Thomas and they seemed excited to be in his presence (in October of 2010) (AA. Vol. 21 P. 3501-3503). Ms. Eddins-Smith provided good character evidence on behalf of Cameron (AA. Vol. 21 P. 3497-3505).[2]

On June 25, 2009, Lisa Rampolla, along with Cameron Thomas, and a

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[2] The defense called a series of good character witnesses on behalf of Cameron Thomas (AA. Vol.21 3323-3546, AA. Vol. 22 P. 3547-3744). Character witnesses testified that Cameron watched their children and that he was very good with the children (A.A. Vol. 22 p. 3457-3733). The character witnesses included parents, teachers and friends who testified they had the highest respect for Cameron.

group of children went on a trip to the Rancho Zoo (AA Vol. 11 p. 1138). Lisa stated that the children would like to "hang out" with Cameron because he was "cool" (AA. Vol. 11 P.1163).

The field trip lasted from 10:00 a.m. to 1:00 p.m. (AA. Vol. 11 P.1168).[3] After the zoo field trip, Lisa and the children would go back to the classroom at Kids "R" Kids (AA. Vol. 11 P. 1179).

Cameron Thomas testified on his own behalf (AA. Vol. 23 P. 3780-3781). Mr. Thomas was adamant that he had never inappropriately touched the children (AA. Vol. 23 P. 3836-3838).

ARGUMENT

I. MR. THOMAS WAS DENIED HIS FUNDAMENTAL RIGHT TO PRESENT A THEORY OF DEFENSE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Very rarely can a defendant argue that he received such a fundamentally unfair trial as a result of the district court repeatedly refusing to permit him to present his only valid theory of defense. Importantly, during closing argument, the State, with unbelievable repetition, continued to argue facts that are completely belied by the truth of the case.

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[3] Michael Jackson died on June 25, 2009.

A brief summary of the factual portion of this issue is necessary to understand the unconstitutionality of the court's ruling. There were a total of four accusers. Z.F. initially disclosed these allegations to a teacher/administrator. At trial, the court permitted, and the State took advantage of the opportunity to continuously explain to the jury that Z.F. spontaneously disclosed sexual abuse to this teacher/administrator. As can be expected, the State continuously seized on the lack of motivation for an eight year old to spontaneously reveal these allegations. However, this was patently false and misleading.

In reality, this is what occurred just prior to Z.F.'s disclosure: April Reed had been physically abusing Z.F. There is some indication that April was beating Z.F. with an electrical cord[4] and the authorities became aware of this child abuse. As a result of April's abuse, Z.F was being brought to the principal's office to be questioned by this same administrator. Officer Sink responded to the school to

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[4] The allegation against April was that she had left marks on Z.F. as a result of physical abuse with an electrical cord (AA. Vol. 13 P. 1633). Defense counsel argued this was relevant in part to Z.F.'s state of mind and to the general theory of defense (AA. Vol. 13 P. 1634). The State conceded that the case against April Reed was substantiated (AA. Vol. 13 P. 1638). Yet, the district court still refused to permit the defense to introduce the truth of the matter (AA. Vol. 13 P. 1638).

investigate April's child abuse of Z.F.

Unbelievably, the defense was precluded from mentioning any of this. Thereafter, the sanitized version presented to the jury, dictated that Z.F. made a spontaneous disclosure followed by a full police investigation.

More importantly, the State continuously mocked the defendant's lack of theory of defense for why Z.F. and A.P. would be motivated to disclose sexual abuse at the hands of the defendant. Yet, the defendant's hands were completely shackled as a result of the court's ruling.

The United States Supreme Court has noted,

> Whether rooted directly in the due process clause of the Fourteenth Amendment, Chambers v. Mississippi, 410 U.S. 284 (1973), or in the compulsory process or confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23 (1967); Davis v. Alaska, 415 U.S. 308 (1974), the constitution guarantees defendants "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. at 485. Crane v. Kentucky, 476 U.S. 683, 690 (1986).

The United States Supreme Court has noted, "we break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard." In re Oliver, 333 Us. 257, 237 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914). "The opportunity would be an empty one if the state were permitted to exclude component, reliable evidence bearing on the credibility." In California v.

Trombetta, 467 U.S. 479 (1984), the United States Supreme Court explained, "under the due process clause of the fourteenth amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." See also, United States v. Vamezuela-Bernal, 458 U.S. 858, 867 (1982).

The fact that April was abusing Z.F. was admissible because "extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy..." See, Lobato v. State, 120 Nev. 512, 96 P. 3d 765 (2004).

It is important to remember that Z.F. and A.P. had a lengthy relationship with Cameron Thomas (i.e.. Godfather). Thus, once the children disclosed the allegations, the defendant would have had no viable defense surrounding identity. Therefore, the only available defense to Mr. Thomas was the notion that the children were falsifying the allegations.

Obviously, the best defense would be that Z.F. and A.P. told authorities that Mr. Thomas was molesting them in order to deflect attention away from their

mom's child abuse that was being investigated. Both Z.F. and A.P. admitted that they were frightened of their mother (this was the only fact that the defense was permitted to present).

During trial, the State then meticulously demonstrated the unbelievability of the defense that the children would make up these allegations based upon a loan between Mr. Thomas and the girls moms (April and Kay). The State also repeatedly argued that the children's lawsuit would present no viable motivation.

The following are excerpts from the trial which should conclusively establish the fundamental miscarriage of justice which occurred in this case. First, during the defendant's testimony, the defendant was asked about an angry phone conversation between himself and April (April had already testified about this conversation) (AA. Vol. 23 P. 3823-3824). The defendant stated that during the conversation, he probably made April mad because he called her an "unfit mother" (AA. Vol. 23 P. 3824). Then, Mr. Thomas was asked why he referred to her as an "unfit mother" and the court sustained the objection. The defendant was not permitted to explain why he called April an "unfit mother" and ultimately made her mad. Interestingly enough, the defendant's testimony occurred on the very last day of trial. The court would have been able to see almost all of the testimony at this point, yet still precluded the defendant from stating that April was an unfit

mother. Surely, beating your child with a cord gives rise to the defendant concluding that April was an unfit mother.

Comically, it did not go unnoticed that the district court was extraordinarily concerned about protecting April's reputation in front of the jury. During a pretrial hearing addressing the issue of introduction of the child abuse by April, the district court stated,

> I mean I will tell you this, I don't want them to have to defend a case that's not in front of this court, that's not part of this trial, and that it is a major concern I have. I do not I do feel I don't want them to have to defend mom on a child abuse case. I want you to have to defend you client, which you should, on the sexual assault. (AA. Vol. 22 P.3585).

Not only was the defendant not permitted to introduce evidence that April had abused her child, the State was actually permitted to question Mr. Thomas' wife about unsubstantiated, implicit abuse. The following questions by the prosecutor occurred during examination of Cameron Thomas' wife, Jennifer Thomas.

Q: Does punishment in your home ever include corporal punishment?
A: Define corporal punishment.
Q: Spanking, hitting with a belt, any kind of physical hands on things, on a child. Does that ever include that.
A: We have had hands on.
Q: Do you have hands on with Dontae?
A: We have.

Q: Does your husband have hands on punishment with Dontae?
A: We have.
Q: Has it been excessive?
A: No.
Q: Never?
A: No.
Q: But he would never hurt a kid right?
A: Well, you're twisting that to be able to say that it was intended to cause harm and to hurt that wasn't an intention. (AA. Vol. 22 P. 3712-3713).

...

Q: So you said he would never hurt anyone, so I'm asking you, was he, has he used excessive corporal punishment on Dontae.
A: I said no (AA. Vol. 22 P. 3713).

Unbelievably, the defendant's wife is questioned about some vague notion of excessive corporal punishment at the hands of the defendant on his own child. The court found this perfectly acceptable. Yet, bent over backwards to ensure that the substantiated abuse of Z.F. at the hands of her mother was excluded. Again, the authorities were investigating April's abuse of Z.F. at the very moment in time she deflected to discuss allegations of sexual abuse against Cameron Thomas. The court's ruling and the prosecutor's questioning of Ms. Thomas is shocking. On the one hand, unsubstantiated child abuse allegations against Mr. Thomas were permitted and substantiated abuse by April on Z.F. was precluded. The district court made clear that the defendant was at no time to violate the court's order as to the real reason why Z.F. was brought to the principle and the police were

beginning an investigation.

Abuse of discretion is synonymous with the "failure to exercise a sound, reasonable, and legal discretion." (BLACK'S LAW DICTIONARY 1610 (6th ed. 1990). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005) (citing, Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). At one point, the district court indicated it had reviewed State v. Shade, 111 Nev. 887 (1995), which supported the court's conclusion that the child abuse should be excluded (AA. Vol. 22 P. 3580). A review of Shade provides no rational to exclude the child abuse. The case is completely off point with the instant matter. The district court wrongfully identified the issue as an attempt by a defendant to preclude evidence, as in Shade, whereas in this case the defendant was seeking to present evidence consistent with his theory of defense. The case cited by the district court is simply misplaced.

Here, the district court's discretion was clearly abused when the defendant's wife was subjected to this type of speculation regarding the defendant's potential child abuse of his own child versus exclusion of the defendant's desire to present April's substantiated abuse of Z.F. This defies logic and reason. In essence, the trial provided a flavor that the prosecution would be permitted carte blanche

permission to attack the defendant irregardless of the validity of the questions. Whereas, the defendant was precluded from even presenting a viable defense. This alone should result in reversal.

A. COMMENTS FROM CLOSING ARGUMENT THAT DEMONSTRATE THE UNFAIRNESS.

Unfortunately, this error became substantially worse during closing argument. During closing argument, there were numerous comments by the prosecution that establish the manifest injustice that occurred.

1. The prosecutor argued: "August 2010. Kay and April visit Vegas. Again, no bad feelings, this is prior to the disclosure of [Z.F.]. This is all months prior to [Z.F.'s] disclosure. So everyone is in a good place at this time. There is no revenge at this time. There is no animosity, if you will." (AA. Vol. 23 P. 3910).

This was a false statement. Clearly there was animosity and trouble based upon the fact that April was physically abusing Z.F. Again, the prosecutor could never make such a statement to the jury if the jury had been aware that April had been beating Z.F.

2. The prosecutor explained, "on December 9 of 2010, notice four months and seven months after everyone has been getting together, that's when [Z.F.] discloses. Officer Sink, with his sergeant goes to Madison Elementary

School down in Phoenix (AA. Vol. 23 P. 3710-3711).

The prosecutor's statement is true in part. It is true that Officer Sink and his sergeant went to the elementary school. Unfortunately, the defendant was not permitted to state that Officer Sink and his sergeant went to the school to investigate the physical abuse that April was inflicting upon Z.F. Instead, the jury fully understood this to mean that the police were investigating Z.F.'s disclosure of sexual abuse at the hands of Cameron Thomas. This is actually a falsehood.

3. The prosecutor further explained, "there's no testimony. There is no evidence in this case that there were any fights, any disagreements, any unresolved issues on December 9 of 2010." (AA. Vol. 23 P. 3911).

Again, the prosecution is right, there is no evidence before the jury of any fights or disagreements. That is because the district court precluded the defense from presenting the only viable defense and that was that April was physically abusing Z.F.

Instead, the jury received a completely false picture of what was occurring on December 9, 2010. It is clear that the investigation of Ms. Rand and the police was targeting the child abuse by April. Yet, the jury would have undoubtedly all unanimously believed that the investigation involved the spontaneous disclosure of sexual abuse by Z.F.

4. The prosecution then continuously mocked the lack of motive for Z.F. and A.P. to accuse Mr. Thomas of sexual abuse. The prosecution stated,

> Were there motives at eight and nine years old money and revenge? Were they greedy and vengeful eight - and nine year olds? I submit to you there is not one piece of evidence in this case to impute the motives and suggest motives, no evidentiary motives, but suggested motives of the mother to those kids. The innuendo that mothers were trying to get out of a 1,200 dollar bill, or, foresaw a 2014 lawsuit. (AA. Vol. 23 P. 3918).

Alarmingly, the district court continued to observe this travesty of justice. This was compounded by the prosecution rubbing it in the defendant's face that he could establish no viable motive. The error continued.

5. The prosecution told the jury that it would be impossible for April to tell Z.F. what to say because she did not know that Z.F. would tell a teacher that day (AA. Vol. 23 P. 3945). Well, if April was aware that she was being accused of child abuse, then she would know that the investigation was imminent. Therefore, the defendant wished to argue a reasonable inference that the mother advised her children to deflect away from her own abuse and to accuse Cameron Thomas. Again, it is not important whether or not the court agrees with that inference. It is only important that the defendant had a fundamental right to present it and let the trier of fact make that determination.

6. In rebuttal closing argument, the State continued to mock the defense

and their lack of viable motive for the children to fabricate a story. The prosecutor argued, "so what is there motivation or what is the defense trying to say." (AA. Vol. 23 P. 4024).

The defense was trying to say that the children were motivated in an effort to deflect from their mother being punished for her "vile" conduct.[5]

7. The prosecutor informed the jury that the only two possible defenses were intentional lying or false memory, "there's only two options." (AA. Vol. 23 P. 4024).

The State was right, and the State was successful in preventing Mr. Thomas from presenting evidence that the children were intentionally lying in an effort to deflect punishment away from their mother.

8. The prosecution further explained, "there is no motivation for revenge." Then, the prosecution stated, "maybe that was genesis for April, this vile human being, to have her children make this story up." (AA. Vol. 23 P. 4026). This is completely improper argument. If the jury had been aware of the

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[5] Mr. Thomas specifically refers to April's conduct as "vile" because in rebuttal closing argument the prosecutor refers to April as a vile mother not because the prosecution was serious, but because they mocked the lack of motivation. Basically, informing the jury that April was a good mother.

substantiated abuse at the hands of April, undoubtedly the jury would have all agreed with the prosecutor's reference to April as vile. Yet, the prosecution used the word to describe April as a mockery to the defense (because there was no evidence presented that April was anything other than a loving, caring, and concerned mother). Again, this demonstrates a travesty of justice and a continuous abuse of discretion. The district court should have *sua sponte* warned the prosecutor that their arguments belied the truth of the situation.

9. The prosecutor further argued,

> So for you to find that April is making these girls lie, this is a pretty well thought out plan. So what would've happened was April would've had to tell the girls what to say, and then just by chance wait for a day that [Z.F.] gets called up to the office, and this eight year old girl is going to know this is my time. This is the time to - - the plan is now in motion, and I'm going to shout sexual abuse." (AA. Vol. 23 P. 4027).

The answer to the question is simple, April would know that the authorities were probably going to investigate her for child abuse, which they in fact did.

10. Particularly disturbing, the prosecutor argued, "somehow there is this devious plan in the works and it always hinges on this eight year old going up to her teacher and saying that she was sexually abused. Does it make sense, ladies and gentleman? No." (AA. Vol. 23 P. 4028).

The prosecutor is right, it makes no sense based upon the state of the

evidence presented to the jury. However, it would make reasonable sense and a viable defense if the jury had been aware that Z.F. did not just go up to her teacher and disclose sexual abuse allegations, spontaneously. In fact, Ms. Rand was questioning Z.F. about her abusive mother. By changing the entire truth of what occurred, the jury undoubtedly believed that Z.F. spontaneously disclosed based upon years of legitimate frustration and pain. Although defense counsel specifically requested permission to introduce this evidence in order to develop the argument that Z.F. disclosed to deflect, this fell on deaf ears.

11. Again, the prosecution argues, "there was no master plan, it makes no sense. Mr. Mann points to April. She has to be this vile women to do this, right?" (A.A. Vol. 23 p. 40229). The prosecution further explained, "putting her girls up to be interviewed by police, by child protective services, being forensically interviewed, getting medical examinations." (AA. Vol. 23 P. 4029).

The prosecution was able to portray defense counsel as making a desperate attempt to vilify April when she had done nothing wrong. The prosecutor's facetious reference to April as a "vile women" was correct in part. April's abuse of her child was vile and the jury would have agreed had they known the truth and not been completely misled throughout the trial.

Next, the prosecution argues to the jury that what mother would put their

girls up to being interviewed by the police and child protective services. The prosecution's argument was successful in demonstrating that no good mother would want their child to endure those type of interviews. However, the reality and truth was that April's physical abuse of Z.F. was causing Officer Sink and his sergeant to go to Z.F.'s school to interview her and child protective services was undoubtedly involved. The truth is that April's "vile" abuse of Z.F. did result in the police, child protective services and school officials having to interview Z.F. In sum, the truth was so horribly twisted and the district court continued to permit this travesty.

12. Again, the prosecution stated, "do you really think April Reed is going to put her children up to that? Absolutely not." (AA. Vol. 23 P. 4029-4030).

Throughout the trial and extensively in closing argument, the jury was hopelessly misled. The quotes in this brief come directly from the record. In the State's Answering Brief, they will be given no choice but to claim that these quotes are taken out of context. None of them are taken out of context and Mr. Thomas would respectfully invite the court to carefully review the entire closing argument for the flavor of this trial. It is astonishing that the district court permitted this.

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B. TESTIMONY ELICITED BY THE PROSECUTION THAT FURTHER DEMONSTRATES THE UNFAIRNESS.

During the prosecutor's examination of A.P., the following exchange occurred:

> Q: Are you scared if you say something wrong here today that Mommy April is going to be upset?
> A: No.
> Q: Are you saying these things because you think Mommy April is going to be upset with you?
> A: No.
> Q: When you spoke wit the police back in 2010, did you say things because you were afraid of Mommy April?
> A: At that point, I knew that I wasn't going to get in trouble that she had my back and she believed in me (AA. Vol. 23 P. 2086-2087).

Here, the prosecution was presenting evidence to relieve any suggestion that A.P. and Z.F. would fabricate a story based upon fear of their mother. Presumably, A.P. and Z.F. would be very fearful of Mommy April given the fact that she physically beats Z.F. The child abuse was so obviously admissible as a theory of defense that it seems unreasonable for Mr. Thomas to have to argue that the State opened the door to this during this exchange with A.P. However, surely, this would have opened the door to fair cross examination about whether A.P. was frightened of her mother based upon knowledge or observation that her mother was physically abusing Z.F.

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C. AUTHORITY IN SUPPORT OF MR. THOMAS' RIGHT TO PRESENT HIS THEORY OF DEFENSE.

In 2013, the United States Supreme Court addressed the right of the defendant to present a theory of defense. Nevada v. Jackson, 569 U.S. __, 133 S. Ct. 1990 (2013). Jackson was charged with raping his ex-girlfriend. Shortly before trial, the ex-girlfriend sent a letter to the judge recanting her testimony. At trial, the theory of the defense was that the ex-girlfriend had fabricated the sexual assault charge. To support the theory, the defense sought to introduce testimony of police reports showing that the ex-girlfriend had called the police on several prior occasions falsely claiming the defendant had raped her. Id. Ultimately, the United States Supreme Court noted that the trial court gave the defense wide latitude in cross examination of the ex-girlfriend regarding the prior reports but refused to admit the reports themselves. Id.

The United States Supreme Court determined that the proffered evidence had little impeachment value because it merely showed that the victim's reports could not be corroborated and the defendant had been given wide latitude to cross examine the ex-girlfriend. Whereas here, Mr. Thomas was specifically precluded from ever mentioning April's substantiated physical abuse on Z.F. The district courts ruling is clearly an unreasonable application of clearly established United States Supreme Court law. In fact, the district court's decisions amounted to

blatant abuse of discretion which permitted the State to present the facts that occurred surrounding Z.F.'s disclosure in the most disingenuous manner.

Pursuant to the fundamental principles of the United States Constitution, Mr. Thomas had a right to present a reasonable inference that April had manipulated her daughter's into fabricating these allegations in order to deflect punishment away from her physical abuse and directly onto Cameron Thomas. The issue is not whether the jury would have acquitted had this information been presented, but rather the denial of the defendant to have a jury consider his theory of defense. Reversal is mandated.

II. THE DISTRICT COURT IMPROPERLY PERMITTED THE STATE TO INTRODUCE BAD ACT TESTIMONY AND QUESTION THE DEFENDANT REGARDING SPECULATIVE BAD ACTS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. BAD ACTS ELICITED DURING MR. THOMAS' TESTIMONY

The district court canvassed Mr. Thomas about his constitutional right to testify (AA. Vol. 22 P. 3629-3630). Mr. Thomas did testify. During the canvass, Mr. Thomas was advised that the State could impeach him with an appropriate felony conviction. At the conclusion of the canvas, the following occurred:

> Prosecutor: Judge, just for the record, he doesn't have any felony convictions, but based upon the testimony if he does take the stand, the State intends. **We**

	believe there is bad act information that will confront.
District Court:	Okay
Defense counsel:	**I'm not being provided with that information (AA. Vol. 23 P. 3631).**
The prosecutor:	**It's impeachment. Don't need to.**
District Court:	Just for the record so we know. Alright. (AA. Vol. 23 P. 3632).

The starting point for this issue is that the defendant was properly advised of his right to testify and the law surrounding the State's ability to properly impeach Mr. Thomas with felony convictions. However, the State was not concerned with the necessity for felony convictions, the State was prepared to cross examine Mr. Thomas with "bad act" information which they thought could be used for impeachment without any type of notice. As is cited above, defense counsel explained that he was unaware of what these bad acts were. True to the prosecutors word, the following cross-examination of the defendant occurred:

Q: And there was this – S.K., she spent the night at your house on several occasions, correct?
A: Correct.
Q: And that she also attended parents night out, correct?
A: Correct.
Q: That there was an incident at the daycare where you took S.K. upstairs to change, correct?
A: Correct.
Q: And that was at Kid "R" Kids, correct?
A: Correct.
Q: And there was an issue that ultimately resolved with Kids "R" Kids in relation to that, correct?

A: Not necessarily an issue but correct.
Q: Alright, and ultimately you were terminated, correct?
A: I was on, I went on leave, and then I was arrested.
Q: Okay, you were on leave prior to being arrested, correct?
A: Correct (AA. Vol. 23 P. 3868-3869).

Here, the defendant was questioned about a child, S.K., and there is nothing in the record to explain this peculiar set of questions from the prosecution. However, the tenner of the questions implied that something sinister had occurred with this innocent child which resulted in the defendant being terminated from his position. Appellant counsel is at a complete loss to determine the legal authority which would permit the prosecution to question the defendant regarding this type of sinister innuendo.

B. BAD ACTS ELICITED FROM THE DEFENDANT'S WIFE

This particular error must be considered simultaneously with the prosecution's examination of the defendant's wife regarding the defendants use of corporal punishment on his own child, D.T.[6]

Incredibly, the district court insured that there would be no questioning of April or any other witnesses regarding her substantial abuse of Z.F. Yet, the

[6] The prosecution's examination of the defendant's wife concerning corporal punishment of Mr. Thomas' child, D.T., is explained in detail *supra* at pages 40-41.

defendant and his wife were subjected to extremely prejudicial innuendo without the State or the district court insuring that the rules of evidence or constitutional principles were being applied.

C. BAD ACTS ELICITED FROM THE STATE'S WITNESSES

1. Mr. Thomas' presence in a fitting room and the daycare attic

Outside the presence of the jury, the State requested permission to introduce bad acts surrounding the following incidents:

a) The defendant is present, shopping for bathing suits in Wal-Mart, and is inside the changing room (AA. Vol. 14 P. 2016-2017).

b) The accusers described being in the attic area of Kids "R" Kids (AA. Vol. 14 P. 2016-2024).

Unlike when the State examined the defendant and his wife, here the district court actually applied the standard enunciated by this court in Tinch and Petrocelli. The district court found that the allegations had been proved by clear and convincing evidence and that the evidence is more probative than prejudicial (AA. Vol. 14 P. 2023-2024). Curiously, the district court also conducted analysis that somehow, the defense had opened the door to these bad acts (AA. Vol. 14 P. 2023). Additionally, the district court agreed with the State that these bad acts were admissible to refute the allegations of recent fabrication (AA. Vol. 14 P.

2024).

2. Mr. Thomas' son was acting out in a sexual manner

During the prosecutors examination of April Reed, the following exchange occurred:

> Q: Do you know how [Z.F.] knew this word?
> A: That was a word we used around the house to identify with good touch and bad touch with other children because that was one of our concerns at the time because Cameron's son was doing that (AA. Vol. 15 P. 2292).

Admittedly, there was no objection. April Reed's statement implicitly illustrated that Cameron's child was acting out sexually, perhaps for some sinister reason that should be projected on the defendant. Where an error has occurred and there is no objection, this court can consider plain error. In Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000) this Court held that "to be plain, an error must be so unmistakable that it is apparent from the casual inspection of the record." Here, the errors were plain.[7]

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[7]After April Reed's testimony, during a break, defense counsel stated, "there are so many things today. I'm trying to remember." (AA. Vol. 15 P. 2346-2347). Defense counsel further stated, "the defense complained there were statements that were highly prejudicial again and inappropriate." (AA. Vol. 15 P. 2346). Defense counsel elaborated, "during [Z.F's] cross examination, we had several bench

3. An allegation of sexual abuse concerning M.S. never mentioned prior to trial

During the prosecutors examination of Ramona Slattery, the district court permitted hearsay statements of Ms. Slattery's daughter into evidence. During Ms. Slattery's testimony she blurted out, in an unsolicited style, that her daughter said "mommy, I want to talk to you." Ms. Slattery relayed how her daughter stated, " I remember now that Mr. Cameron used to put his hands down my pants close to my peeps and watch me bathe and then he wanted me to sleep in with him naked. And he used to make me put lotion down on my peeps and watch me." (AA. Vol. 20 P. 3277).

Defense counsel requested permission to approach (AA. Vol. 20 P. 3277, 3282). The prosecution agreed that the statement should be stricken, and the district court agreed that the defense had made a contemporaneous objection (AA. Vol. 20 P. 3282). Defense counsel then complained that the district court had

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conferences ... I was hoping that we could put those objections on the record." However, the court informed defense counsel that since he had not contemporaneously objected, that the court considered the matter waived (AA. Vol. 15 P. 2347). Therefore, although defense counsel did object, the court stated that there was a waiver because of the lack of a contemporaneous objection.

permitted the mother to testify to these statements of her daughter pursuant to NRS 51.385 and was now in the position that the witness had blurted out numerous prejudicial bad acts (AA. Vol. 20 P. 3283). Defense counsel moved for a mistrial and complained that this was the first time that he had ever heard of these allegations (AA. Vol. 20 P. 3290,3292). Defense counsel requested the district court not admonish the jury to disregard the statement, as it would highlight the prejudice (AA. Vol. 20 P. 3295). During argument, the court stated "right now I'm not sure what to do with her [the witness]. How to handle it" (AA. Vol. 20 P. 3302).

Admittedly, the prosecution did not elicit these bad acts. However, it is disturbing that the witness completely ignored the State's admonition in an effort to convict Mr. Thomas. The district court denied the defense motion for mistrial.

D. AUTHORITY AND ANALYSIS

Mr. Thomas specifically objected at trial to the admission of these bad acts.

In Tinch v. Nevada, 113 Nev. 1170, 946 P.2d 1061 (1997), this Court held that a trial court "...must determine, outside of the presence of the jury, that: 1) the incident is relevant to the crime charged; 2) the act is proven by clear and convincing evidence; and 3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." 113 Nev. 1170, 1176.

(citing Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996).

NRS 48.045(2)'s list of permissible nonpropensity uses for prior-bad-act evidence is not exhaustive. Bigpond v. State, 128 Nev. _, 270 P.3d 1244, 1249 (2012). Nonetheless, while "evidence of 'other crimes, wrongs or acts' may be admitted ... for a relevant nonpropensity purpose," Id. (quoting NRS 48.045(2)), "'[t]he use of uncharged bad act evidence to convict a defendant [remains] heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.'" Id. (quoting Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001)). Thus, "'[a] presumption of inadmissibility attaches to all prior bad act evidence.'" Id. (quoting Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)).

This court reviews a district court's decision to admit or exclude prior-bad-act evidence under an abuse of discretion standard. Fields v. State, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009).

In this case, the State utterly dismissed clearly established law. The State questioned Mr. Thomas' wife over sinister innuendo connected to corporal punishment and questioned Mr. Thomas regarding S.K., implying something sinister happened. Defense counsel complained that he was on no notice of the bad

acts the State could be referring to. Rather than ensure that the district court conducts a Petrocelli hearing after appropriate notice, the State simply announced their intention to use unknown bad acts.

Cleverly, the State did not bring notice because this would not have been admissible pursuant to NRS 48.045. Again, as there was no Petrocelli hearing, there was no determination that there was no clear and convincing evidence the defendant had committed acts of excessive corporal punishment on his own child or that something sinister had occurred with S.K. The district court did not weigh the probative value versus the prejudicial effect. The district court did not even make a ruling as to whether this type of questioning was even relevant, which it was not. This was highly improper and extraordinarily prejudicial. To make matters worse, the prosecutor made the following argument in closing:

> [A.P.] was on the stand for almost seven hours, what else do you need ? Do you need a fifth victim? A sixth victim? How about even a dozen? (AA. Vol. 23 P. 4020-4021).

Defense counsel objected on the basis that the State was implying there were other victims. The district court determined the prosecution did not imply there were other victims and found the argument to be proper. (AA. Vol. 23 P. 4020-4021).

This argument was improper. The prosecutors argument dovetailed with her

questioning of the defendant and the defendant's wife. The fifth victim would have been the defendant's child for excessive corporal punishment. The sixth victim would have be S.K. for some sinister unknown act that occurred.

Often, this Court wrestles with the determination of whether bad act testimony is more prejudicial then probative after the district court entertained the appropriate motions to permit the introduction of the bad acts testimony. Here, there was no such motions filed and no hearing held. The failure to comply with the rules of evidence, and clearly established case law resulted in highly prejudicial improper cross-examination of the defendant and his wife which deprived the defendant of his due process rights under the Fifth and Fourteenth amendments to the United States Constitution.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REPEATEDLY PERMITTED HEARSAY STATEMENT PURSUANT TO NRS 51.385 IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During trial, through seven different witnesses, the district court permitted hearsay statements pursuant to NRS 51.385. On every single occasion, the district court found there was sufficient trustworthiness surrounding the hearsay statement rendering it admissible.

The following individual's testimony was considered by the district court at

an evidentiary hearing pursuant to NRS 51.385.

1. Ms. Amanda Rand

Ms. Rand, a school teacher, was assigned to question Z.F. regarding April's electrical cord whipping of Z.F. Ms. Rand was questioning Z.F. when she decided to allege Mr. Thomas had been sexually abusing her. The State desired to have Ms. Rand testify, requesting the district court exclude any mention of Ms. Reed's child abuse so that the facts would best suit the State's theory of prosecution. The district court found the statement was trustworthy (AA. Vol. 16 P. 2393).

In Jefferson v. Nevada, 2014 Nev. Unpub. LEXIS 1222, (62120) (2014), this Court considered the factors enunciated by NRS 51.385(1)(a)-(b), that the district court must consider. This Court explained,

> In determining the trustworthiness of the statement, the court shall consider, without limitation, whether: a) the statement was spontaneous; b) the child was subjected to repeated questioning; c) the motive to fabricate; d) the child used terminology unexpected of the child of similar age; e) the child was in stable mental state.

Defense counsel objected citing the factors enunciated by this court (AA. Vol. 16 P. 2387-2388).

First, could the allegation really be considered spontaneous given the fact that Ms. Rand was investigating child abuse of Z.F. by April Reed. Assuming *arguendo* this Court determines that the statement was spontaneous, Z.F. clearly

had a motive to fabricate regardless of the district court's determination. Z.F. claimed that this abuse had occurred over a lengthy period of time, yet waited for the very moment that her mom was in serious jeopardy to reveal this information. Additionally, this Court considers the motive to fabricate and the mental stability of the child. Defense counsel argued and Z.F. admitted that she had a history of lying and theft.

The district court would have only had a short period of time to observe Z.F. The district court was fully aware that Z.F. was an admitted liar and thief yet found sufficient trustworthiness. It is very rare that the defense would be able to obtain an admission from a witness that they had a history of lying and stealing. For the court to determine that there is trustworthiness, appears to fly in the face of logic and reason.

Comically, after the district court had made its decision, the court was left with the dilemma of how to explain why Z.F. was in the principles office (AA. Vol. 16 P. 2397).[8] The district court would have had no difficulty with this dilemma if the truth was told and the defense was able to put on their theory of the

[8] The district court stated, "you know what, I don't know how to get out of the context when you get called to the principle's office." (AA. Vol. 16 P. 2397).

case. The district court's solution with sanitation resulted in a clear cut demonstration of a spontaneous statement made by Z.F. It appeared Z.F. told the principle out of the blue about the alleged sexual abuse.

Additionally, Z.F. and her sister freely admitted that they were fearful of their mother, giving rise to more evidence of a potential fabrication to avoid a future whipping with an electrical cord. Moreover, Z.F. claimed the reason she revealed to Ms. Rand the allegations is because they began to have a discussion about "god dad" or "god father". Yet, Ms. Rand denied having any such conversation about "god dad" or "god father" (A.A. Vol. 16 p. 2378-2380, 2415). Again, even more evidence of untrustworthiness and fabrication.

2. Officer Kathleen VanGordon

Officer Van Gordon conducted the forensic interview of Z.F. (AA. Vol. 10 P. 889). Defense counsel again objected stating,

> Specifically, the -- we have heard from now three separate witnesses regarding hearsay statements that [Z.F.] has said. Three separate witnesses. The State is now asking for number four and I believe that they are going to be later asking for number five (AA. Vol. 10 P. 889).

The district court overruled the objection, again finding the trustworthiness of Z.F., the admitted liar and thief.

There is no doubt, that the State's presentation of credible professionals gave an heir of believability to Z.F. The court ultimately concluded that the hearsay statements of Z.F. could be testified to by April Reed, K, Ms. Rand, Officer Van Gordon, and Officer Sink.

3. Officer Sink

Officer Sink stated that Z.F. complained that Mr. Thomas had sexually abused her. (AA. Vol. 10 P. 898). The district court permitted this testimony.

4. Ms. Faiza Ebrahim

The district court determined that M.S.'s mother, Ms. Ebrahim, would be permitted to testify to the hearsay statements of M.S. (AA. Vol. 19 P. 3000-3001).

5. Cheryl Barbian

M.A.S. had conversations with people surrounding Mr. Thomas a couple of days before she disclosed these alleged allegations. The district court found sufficient circumstantial guarantees of trustworthiness (AA. Vol. 20 P. 3105). Defense counsel objected as to the lack of trustworthiness.

Interestingly enough, although the district court found the statement trustworthy, the jury must not have. The jury acquitted Mr. Thomas of all of the charges related to M.A.S.

6. Ramona Slattery

The district court found trustworthiness and permitted the hearsay statements of M.S. (AA. Vol. 20 P. 3242-3255).

7. Ms. Martha Mendoza

At the conclusion of this hearing concerning Ms. Mendoza, defense counsel stated, "**your honor, considering your other rulings, I'll submit it."** The district court replied, "well, I am not quite sure considering my other rulings - -." Defense counsel then stated, "sorry, I'll submit it, your Honor." (AA. Vol. 21 P. 3355).

The district court's rulings amounted to Mr. Thomas receiving a grossly unfair trial. Additionally, it must be noted that defense counsel complained that the forensic interviewers were clearly not spontaneously made, but made for the purpose of a criminal investigation. This was testimonial hearsay in violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) and Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006).

IV. MR. THOMAS IS ENTITLED TO A REVERSAL OF COUNTS ONE AND TWO BASED UPON THE INSUFFICIENT NOTICE TO THE DEFENDANT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The defense filed a pretrial motion arguing improper notice in the Information (A.A. Vol. 4 p. 277-299). Defense counsel also argued there was a lack of specificity (AA. Vol. 13 P. 1696-1697). The defense complained that the

State was arguing three separate and distinct incidents where A.P. complained of penile-vaginal penetration in a single count. Defense counsel objected pretrial and again prior to closing argument. Defense counsel continuously complained of lack of notice and confusion (AA. Vol. 13 P. 1702). Importantly, defense counsel complained that A.P. never testified to penile vaginal penetration during the preliminary hearing (AA. Vol. 13 P. 1704). In sum, defense counsel complained that there was a complete lack of notice and requested a mistrial (AA. Vol. 13 P. 1716).

The issue before this Court is best illustrated during the prosecutor's closing argument. The prosecutor meticulously describes each allegation and count. On count one, sexual assault of A.P., the prosecutor carefully illustrated three separate incidents of penile-vaginal assault for the jury to choose from for a single count.

The prosecutor stated, "first count for [A.P.] is count one." (AA. Vol. 23 P. 3927). The prosecutor then described how A.P. testified that she would watch Saturday cartoons in the defendant's bedroom and while watching Tom and Jerry on the bed, the defendant placed his penis in her vagina (AA. Vol. 23 P. 3927-3928). The prosecutor then described a completely separate and distinct incident that she refers to as the "fish tank" incident where she was sexually assaulted while helping to clean the fish tank (A.A. Vol. 23 p. 3930-3932). On the third

occasion, A.P. described the "pizza incident." (AA. Vol. 23 P. 3929). The prosecutor explained how the defendant was present with her and K had left to purchase pizza when she was sexually assaulted (AA. Vol. 23 P. 3929). The defendant was charged with one count for these three separate and distinct incidents. This amounts to a complete lack of notice and fails to establish that there was any unanimity by the jury.

"Although any prosecutor might well desire the luxury of having an option not to reveal his or her basic factual theories, and wish for the right to change the theory of the case at will, such practices hardly comport with accepted notions of due process." Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983). This Court has held the information should be "sufficiently definite to prevent the prosecutor from changing the theory of the case." State v. Jones, 96 Nev. 71, 74, 605 P.2d 202, 204 (1980). The information "must include such a description of the acts alleged to have been committed as will enable the accused to defend against the accusation." Lane v. Torvinen, 97 Nev. 121, 123, 624 p.2d 1385, 1386 (1981). Prejudice to the defendant is, of course, a controlling consideration in determining whether an indictment or information is sufficient." Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970). A defendant is denied due process "when the defendant is prejudiced in his defense because he cannot anticipate frm

the indictment what evidence will be presented against him." Hunter v. New Mexico, 916 F.2d 595, 599 (10th Cir. 1990). In Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1980), the Court stated that "the state should, whenever possible, allege the exact date on which it believes a crime was committed, or as closely thereto as possible."

Here, the State did not allege an exact date nor an exact incident. Based on the argument of the prosecutor, it is clear that there is no indication that the jury had any unanimity with regard to any one of these three incidents. Obviously, the defense does not know what the jury believed. Perhaps some jurors believed the pizza incident but not the fish tank incident. Perhaps some jurors believed the Saturday morning cartoons incident, but did not believe the pizza incident. However, all jurors unanimously concluded that the defendant, on one of the three occasions, had committed the crime; thus finding him guilty of count one.

V. MR. THOMAS IS ENTITLED TO A DISMISSAL OF COUNT TWO, LEWDNESS OF A MINOR ON A.P.

The prosecutor explained in closing argument, "count two is the alternative to count one." (AA. Vol. 23 P. 3933). Again, for the reasons cited in the previous argument, it is impossible to determine which incident the jury considered and convicted Mr. Thomas of. Count two causes even more confusion. As the

prosecutor artfully explained,

> So count two for [A.P.] is an alternative to count one. And how that works is if you believe that there was not penetration for purposes of sexual assault in all those acts we just talked about but you believe that the defendant rubbed his penis on her genital area without penetrating than lewdness with a minor would be your appropriate verdict (AA. Vol. 23 P. 3933).

The same analysis for count one applies to count two. There is no way to ascertain what the jury concluded.

A defendant is entitled to a unanimous verdict that he or she is guilty of a particular crime. The State should have been forced to charge three separate counts. Alternatively, an analogy can be made to capital murder proceedings in the State of Nevada where a jury is given a special verdict to make the determination whether the jury unanimously finds first degree murder as a result of felony murder, premeditation, deliberation and willfulness, or any other theory of first degree murder. See NRS 200.010. Pursuant to McConnell v. State, 121 Nev. 25, 107 P.3d 1287 (2005), this Court has mandated that district courts provide such a special verdict.

The same applies to the instant case. Here, there is no way to determine that unanimity resulted. Therefore, Mr. Thomas is entitled to a reversal of counts one and two.

VI. THE DISTRICT COURT ERRED BY PERMITTING THE STATE TO REPEATEDLY INTRODUCE EVIDENCE THAT A CIVIL SUIT HAD RESULTED IN A SETTLEMENT FROM FACTS DIRECTLY ASSOCIATED WITH THE CRIMINAL ACTION.

Just prior to opening statements, the State requested permission to introduce evidence that there had been a civil suit filed by the alleged victims which had resulted in settlement (AA. Vol. 13 P. 1589-1587). The State also requested permission to discuss the settlement in opening statement (AA. Vol. 13 P. 1587). The district court inquired whether defense counsel intended to discuss the civil case in opening statement. Defense counsel admitted that he may desire to question witnesses over the bias of filing a civil suit, but did not intend to discuss any financial settlement (AA. Vol. 13 P. 1588). More importantly, defense counsel remained unsure whether he wished introduce any such evidence and did not intend on mentioning it in opening statement (AA. Vol. 13 P. 1588). Defense counsel admitted that the civil suit could be both helpful and damaging (AA. Vol. 13 P. 1587-1588).The district court explained, "I guess my answer is if he opens the door, then the order will get in once he opens the door. If he doesn't open the door– however you want to handle it." (AA. Vol. 13 P. 1589-1590).

Thereafter, without defense counsel opening the door or stating he was going to introduce any evidence of the civil law suit settlement, the prosecutor

made the following statements in opening argument;

> And that yes [M.A.S., Z.F., A.P. and M.S.] were all plaintiffs in that civil suit. Okay. And so their main common allegations that they were doing – that these allegations arose because of money. And I will tell you that the civil suit had settled and that they did receive money and it is in a locked account. The children and their families do not have access to that money until the children are eighteen, and you will hear what those parents are intending to with the money, its their children's money." (AA. Vol. 13 P. 1690-1691).

Moreover, during the prosecutor's examination of April Reed, the following questions occurred,

> Q: Do you know how much money is in the blocked account?
> A: Its about the thirty one thousand.
> Q: And that was the civil suit against the Kids "R" Kids daycare?
> A: Yes (AA. Vol. 15 P. 2304).

Next, the prosecutor highlighted the civil settlement during closing argument stating,

> And in August of 2014, the civil suit settled. So all financial gain at that inception of the trial is off the table. Nobody is getting anything else. The kids got thirty two thousand. Is thirty two thousand enough to get your kid touched? Is Thirty two thousand that parent cant control, cant touch." (AA. Vol. 23 P. 3912).

April testified that her children received a civil settlement (AA. Vol. 15 p.2303). The money from the settlement remained in a "minors blocked account" (AA. Vol. 15 p.2303). Each one of the children received a settlement of

approximately $30,000.00 from the Kids "R" Kids daycare (AA. Vol. 15 p.2304).[9]

Cheryl Barbin was permitted to state that there was a civil suit and eventual settlement which was placed into a blocked account (AA. Vol. 20 P. 3211-3212). The amount of the settlement was $50,000.00 after attorneys fees (AA. Vol. 20 P. 3212).[10]

M.S. received $32,000 after attorneys fees. Romona denied informing M.S. that Cameron was in jail (AA. Vol. 21 P. 3365).

The adjudication of a fact in a civil proceedings, in view of the difference of degree of proof in a criminal and civil cases, can afford no basis for the doctrine of res judicata, when offered in a criminal case. United States v. Konovsky, 202 F.2d 721 (7th Cir. 1953). In Konovsky, the court explained that the entering of a civil judgment into evidence would lead the jury to believe the same issues have already been determined in the civil action. The court stated nothing could be

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[9] Up until this time, the defense had yet to make mention of any type of lawsuit (AA. Vol. 15 p.2337). A short time later, a juror asked a question concerning the lawsuit: How have the children received money from the lawsuit; who sued them and why? (AA. Vol. 15 p.2337).

[10] At this time, defense counsel had not mentioned the civil lawsuit. This was all elicited by the State.

more prejudicial to a fair trial. 202 F.2d 721, 727. In United States v. Satuloff Bros., Inc, 79 F.2d 846 (2nd Cir. 1935), the court held that judgments and decrees rendered in civil suits are inadmissible in evidence in criminal prosecutions as proofs of any facts determined by such judgments or decrees.

Defense counsel was unsure whether he intended to utilize the existence of the law suit because he recognized it could be harmful to the defendant. Defense counsel clearly seemed reluctant to state whether he intend to use the information. However, the district court then determined that if defense counsel opened the door, the court would make a decision as to the extent to which the civil law suit could be considered. Then, without explanation, the State, in opening statement, explains the existence of a civil law suit and the terms of the settlement. The State then questioned witnesses about the settlement. Further, the State utilized this information in closing argument.

Undoubtedly, the defendant should be permitted to question witnesses as to the existence of a law suit for purposes of bias. However, the finality of a settlement would lead a reasonable to juror to believe the matter at issue has already been decided. Surely, a reasonable juror would recognize that tens of thousand of dollars were not provided to alleged victims unless there had been some type of finding the defendant was culpable for the alleged conduct.

No doubt the State will argue they addressed the issue prior to opening statement and defense counsel appeared to be indecisive. However, this did not give the State the right to then present the existence of the settlement throughout the trial. This is obvious error and intruded upon the province of the jury's ultimate determination.

Interestingly enough, the district court explained that the court had encountered this dilemma in the past (AA. Vol. 13 P. 1590).[11]

Mr. Thomas' is entitled to a new trial. As the Seventh Circuit articulated "..nothing could be more prejudicial to a fair trial." Konovsky, 202 F.2d 72.

VII. THE DISTRICT COURT ERRED BY FAILING TO ENSURE THAT A PROPER RECORD WAS PRESERVED FOR APPELLATE REVIEW.

In this case, the district court held numerous unrecorded bench conferences.[12]

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[11] This Court should take the opportunity to render a published opinion in this matter to avoid further repetition of this prejudicial dilemma.

[12]The following unrecorded bench conferences took place: AA. Vol. 12 P. 1278, 1406, 1437, 1461; AA. Vol. 24 P., p. 4098, 4104, 4172, 4249; AA. Vol. 25 P.: 4272, 4345, 4403, 4429, 4472; AA. Vol. 18 P.: 2700, 2724, 2816, 2860; AA. Vol. 13 P.: 1679, 1732, 1741, 1841; AA. Vol. 14 P: 1868, 1960, 1983, 1986,

In Preciado v. State, 130 Nev. Adv. Op 6, 318 P.3d 176 (2014), this Court stressed that bench conferences should be recorded and/or memorialized either contemporaneously or by allowing counsel to make a record afterward in all cases, not just capital cases. This Court explained,

> Meaningful appellate review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues on appeal; therefore, a defendant is entitled to have the most accurate record of his or her district court proceedings possible...Due process requires us to extend our reasoning in Daniels to defendants in noncapital cases, because regardless of the type of case, it is crucial for a district court to memorialize all bench conferences, either contemporaneously or by allowing the attorneys to make a record afterward. Id.

Here, the district court did not record the bench conferences, which in this case, amounted to the failure to properly preserve issues for appellate review. The

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2072, 2088, 2144; AA. Vol. 15 P: 2174, 2176, 2202, 2205, 2210, 2242, 2297, 2336; AA. Vol. 16 P: 1230: 2419, 2456, 2464, 2480, 2525, 2529, 2564, 2570; AA. Vol. 10 P: 908, 963, 966, 1033, 1034, 1048, 1053; AA. Vol. 11 P: 1151, 1184; AA. Vol. 19 P: 2944, 2946, 2970, 2973, 3018, 3044, 3054, 3056, 3058; AA. Vol. 20 P. 3161, 3167, 3213, 3226, 3237, 3277; AA. Vol. 21 P: 3374, 3399, 3445, 3487, 3495, 3515, 3530, 3531; AA. Vol. 22 P, 3616, 3625, 3627, 3653, 3691, 3726; AA. Vol. 23 P: 3782, 3822, 3835, 3871, 3903.

district court record reflects the following statement every time there is an unrecorded bench conference: "whereupon there was a conference at the bench that was not requested to be reported."

As an initial matter, it appears that the district court and the parties were confused whether the bench conferences were actually being recorded. The district court stated, "we are outside the presence of the jury. Do you want to put what happened on the record? I didn't realize it wasn't on the record. It's up to you. You don't have to - -." (AA. Vol. 16 P. 2570). Defense counsel replied, "I am trying to remember what it was." (AA. Vol. 16 P. 2570). Although vague, it appears the court was unaware of the lack of recording.

There are several reasons why the court's failure to properly record discussions prejudiced Mr. Thomas.

First, the district court permitted juror questions. The jurors questions were addressed during unrecorded bench conferences. There is no record as to these discussions.

Second, there were some attempts to recreate records concerning unrecorded bench conferences. However, portions of the recreations highlight the necessity for a proper recording to preserve appellate review. At one point in trial, the court provided counsel the opportunity to recreate what had occurred during

the bench conferences (AA. Vol. 15 P. 2346-2351, 2354).

Defense counsel appeared to have difficulty recreating the objections. Defense counsel stated, "I remember during my questioning, I think there were two objections by the state that were made." (AA. Vol. 18 P. 2665). Defense counsel further stated, "and the other objection was, I guess, me referring too many times to the possibility of kids lying." (AA. Vol. 18 P. 2671).

The confusion continued concerning other important issues that occurred during the trial. The district court explained, "the one other objection - - and I looked at it at my notes last night, and I don't know if we did it afterwards, so you guys have to help me. Remember the lady who had children who were sexually assaulted herself, number two." (AA. Vol. 18 P. 2674). Then, the following exchange took place,

The Prosecutor:	Right.
District Court:	Yes, right. And you did - - did you object?
The Prosecutor:	To the golden rule argument? (AA. Vol. 18 P. 2674).
Defense Counsel:	First of all, your honor, I absolutely, 100 percent, did not ask her, if that was her kids, how would she feel. What I asked her - - - (AA. Vol. 18 P. 2675-2676).

The confusion and inability to recreate the record continued. Defense counsel stated, "um there is so many things today. I am trying to remember." The

court responded, “it was a long day.” Defense counsel attempted to recreate the bench conference by complaining that April Reed had made statements that were prejudicial (AA. Vol. 18 P. 2852). The district court stated, “and did you do a motion at that time to have it stricken? Did you do a motion or do anything at that time? Because for the record, the witness - - nothing was done. The witness is gone and has been dismissed.” (AA. Vol. 18 P. 2852). The court continued, “I mean it’s been waived as far as I’m concerned under Nevada law.” (AA. Vol. 18 P. 2853). Defense counsel responded to the court stating, “um, there were - - during [Z.F.’s] cross -examination, we had several bench conferences”. (AA. Vol. 18 P. 2853). Defense counsel continued, “several objections by the State to which you ultimately ruled....I was hoping we could put those objections on the record.” (AA. Vol. 18 P. 2853).

Thereafter, defense counsel began to attempt to recreate the bench conferences.

Defense Counsel:	And that’s when it was objected to. Um, and your honor would not let me - - well, that’s what...
The Court:	That’s not - - Mr. Mann, I apologize. Let me rephrase (AA. Vol. 18 P. 2855)
The Court:	Watch your wording because I will tell you, you also were referencing either a voluntary statement she made to the police, either CPS records or preliminary hearing at the time when you were asking those questions. You absolutely were

	referencing that. That's what called the objection.
Defense counsel,	First of all, I wasn't referencing CPS records because I don't have CPS records.
The court:	No. A statement or something made to the cps. I don't know. My - - what I wrote down three times was either a voluntary statement that she gave the police or the preliminary hearing transcript (AA. Vol. 18 P. 2856)

Here, appellate counsel is attempting to decipher what occurred during the bench conferences. The record reveals that defense counsel was attempting to recreate the scenario and the district court disagreed with what occurred. The district court accuses defense counsel of objectionable questioning with CPS records and defense counsel comments that he did not even have CPS records.

Based upon the district court's failure to record the bench conferences, confusion was rampant. Shortly thereafter, in attempting to recreate the record, the district court stated in part, "so I totally agree that was an improper use. You just started reading whatever it was, whether it was from a preliminary hearing or - - I've got two of them here. It doesn't matter. Either way, one of her prior statements, so I agreed and I did sustain the objection. I think there were, I don't know, two or three of those that was improper." (AA. Vol. 18 P. 2856-2857).

Here, the court was unsure whether there were two or three objections regarding this issue and the court was concerned about some statement made to

someone from "whatever". This is a disastrous appellate record. There were extraordinarily important evidentiary rulings that invariably the court ruled against the defendant. And yet this is the state of the record.

At one point, the following exchange occurred,

Prosecutor:	I made an inaccurate record. Your correct - - Mr. Mann is correct. The question is why did she want - -."
District Court:	Why did Ms. Halpren ask about a god dad. She did say that. That was her testimony.
Prosecutor:	Right. And I think she even got out in part of her response that that was somebody that she could talk to (AA. Vol. 15 P. 2353-2355)

At one point, the defense and the court clashed over the accuracy of the recreation of a bench conference. The prosecutor admitted that she had made an incorrect record. Mr. Thomas is entitled to a new trial based upon inadequate and incomplete appellate record.

VIII. THE DISTRICT COURT ERRED IN DENYING MR. THOMAS' MOTION FOR AN INDEPENDENT PSYCHOLOGICAL EVALUATION OF THE CHILDREN.

Pretrial, Mr. Thomas filed a motion requesting an independent psychological evaluation of the children (A.A. Vol. 2 p. 81-118). The district court denied this request (A.A. Vol. 2 p.143-165).[13]

[13] As is discussed *infra* in argument IX, not only did the district court deny

In Abbott v. Nevada, 122 Nev. 715, 138 p.3d 462 (2006), this Court determined that it is within the sound discretion of the district court whether to grant or deny a defendant's request for a psychological examination.

In Abbott, this Court explained,

> First, under Koerschner, whether the State utilizes other tactics, including a psychological expert, is merely a factor to be considered with whether there is little or no corroboration evidence and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. Also, Koerschner contemplated that error was committed when a defendant is refused a psychological examination of the victim where the State has the benefit of an expert analysis and the other two factors are satisfied. Finally, there may be instances where the veracity of a child witness may be brought into question because of his or her emotional or mental state and necessitate a psychological examination, even though the State has had no access to or benefit from an expert opinion. Id. at 468. (citations and internal quotations omitted).

In Abbott, this Court further explained,

> A person need not be a licensed psychologist or psychiatrist in order for their testimony to constitute that of an expert. Where a State's expert testifies concerning behavioral patterns and responses associated with victims of child sexual abuse, courts have recognized that this type of testimony puts the child's behavioral and psychological characteristics at issue. Id. at 470.

Mr. Thomas the opportunity to conduct an independent psychological evaluation, the district court then allowed Mr. Thomas' expert to be cross-examined regarding his failure to conduct such an evaluation.

Therefore, pursuant to Abbott, when there is no independent corroboration combined with a prima facia showing of a compelling need for a psychological exam, the trial court should allow an independent psychological exam.

Here, all of the children had met with psychologists or counselors, and there was reason to believe the state would (and did) use testimony of experts at trial (AA. Vol. 19 p. 3019).

Regarding the second factor, there was no corroborating evidence. There were no adults or other children who witnessed the abuse, even though in many cases the sexual abuse allegedly occurred in front of adults and other children. Specifically, A.P. testified that there were multiple individuals around when the alleged abuse occurred (AA. Vol. 13 p.1772-1773); (AA. Vol. 14 p.1974-1977). There was no security camera footage of any abuse, even though some of the alleged abuse took place in day care facilities with security cameras (AA. Vol. 21 p. 3403). There was no medical evidence that any of the children were sexually abused.

In regards to the third factor, there was a reasonable basis to believe the victim's mental or emotional state affected their veracity. Courts have identified a number of reasons to believe a child's emotional or mental state may have affected her veracity. These include: The child's statements are not consistent, placing

special importance on the child's earliest statements (Felix v. State, 109 Nev. 151, 181 (1993)); the child's testimony is incredible, fantastical or improbable (Id. at 174.); the statements were made in response to questioning, rather than spontaneously (Id., citing Idaho v. Wright, 497 U.S. 805, 821 (1990)); or that the child's memory was "contaminated" by receiving information from other sources such as payments, interviewers and news reports (Felix v. State, 109 Nev. at 182, citing State v. Babayan, 106 Nev. 155 (1990)).

In the instant case, most of the children's statements have been inconsistent, even on important details of the abuse that children would normally remember. Many of the stories told by Z.F., A. P., and M.A.S. are highly improbable because they allege that Mr. Thomas sexually abused them, many times, in front of other people, without anyone noticing (AA. Vol. 13 p.1772-1773); (AA. Vol. 14 p.1974-1977).

Importantly, veractity was in question as Z.F. admitted that she was getting in trouble a lot during that time period, for lying and stealing. (AA. Vol. 15 p. 2211). In fact, Z.F. described her conduct as “lying all the time ” (AA. Vol. 15 p .2221).

Moreover, none of the children made their statements spontaneously, and all the allegations were made in response to questioning (A. A. Vol. 13 p. 1772-

1773). AP revealed allegations when questioned by CPS (AA. Vol. 13 p.1830). M.A.S. recalled her mother stating that Cameron was going to go to jail because he was touching children on their "privates" (AA. Vol. 20 P. 3171). M.S. did not disclose these allegations until her mother told her that Cameron had been arrested (AA. Vol. 10 P. 1001). M.S. stated that she disclosed this information after the news coverage of Cameron's arrest (AA. Vol. 10 P. 1005). M.S. had no idea when these allegations occurred (date or day of the week) (AA. Vol. 10 P. 1004-1005). M.S. had seen the news coverage on Fox (AA. Vol. 10 P. 1005). The news reported that Cameron had been accused of doing "bad things" to other children (AA. Vol. 10 P. 1006). Prior to talking to the authorities, M.S. talked to family and "people from the church" (AA. Vol. 10 P. 1016-1017).[14]

The various contradictory, unclear, and improbable stories told by the

[14] Curiously, Romona, M.S.'s mother, denied informing M.S. that Cameron was in jail (AA. Vol. 21 P. 3365). In contrast to M.S.'s testimony where she said she did tell her this. Curiously, Romona denied that people at her church knew about the allegation and that people comforted M.S. Contrasting M.S.'s testimony, where she said this occurred (AA. Vol. 21 P. 3368). In fact, Romona was a hundred percent sure that no one else knew (AA. Vol. 21 P. 3368).

children clearly indicated a need for such an interview. Importantly, the jury agreed with this contention specifically as to M.A.S. as they found Mr. Thomas not guilty of these counts (A.A. Vol. 26 p. 4589-4590).

A psychological interview with a trained child psychologist would have clarified for Mr. Thomas and the court any mental or emotional issues behind the children's allegations. The psychologist could have discovered the children's mental and emotional issues, clarify the allegations, and provide a safe space for the children to tell the truth.

Mr. Thomas is entitled to a reversal based upon the district court's failure to allow him to conduct independent psychological evaluations of the children.

IX. THE DISTRICT COURT ABUSED THE COURTS DESECRATION WHEN IT PERMITTED HIGHLY IMPROPER AND BLATANT CROSS-EXAMINATION OF THE DEFENDANT'S EXPERT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The defense called Dr. William O'Donohue, a clinical psychologist at the University of Nevada, Reno. (AA. Vol. 16 P. 2371). Dr. O'Donohue's testimony was the subject of pretrial litigation surrounding the extent in which he would be permitted to provide an expert opinion. The district court concluded that Dr. O'Donohue would be permitted to testify regarding the suggestibility of witnesses.

On cross examination, the prosecution questioned Dr. O'Donohue regarding

potential bias, including but limited to his hourly rate of $375.00 dollars. Dr. O'Donohue's was then questioned as follows:

Q: Have you ever met A.P.
A: No.
Q: Have you ever met Z.F.
A: No.
Defense counsel: Objection, your honor. May we approach.

Whereupon an unrecorded bench conference occurred (AA. Vol. 16 P. 2434).

At the conclusion of the unrecorded bench conference, the prosecutor again began questioning as follows:

Q: Have you ever met A.P.
A: No.
Q: Have you ever met Z.F..
A: No.
Q: Have ever met M.S.
A: No.
Q: Have you ever met M.S.
A: No. (AA. Vol. 16 P. 2435)

Later in the proceedings, in an attempt to recreate the bench conference, defense counsel stated there had been an objection and he had began trying to recreate the record as to this issue (AA. Vol. 16 P. 2469). Defense counsel complained that the court had previously denied the defendant's motion for an independent psychological evaluation of all four children and felt it was highly

improper for the prosecutor to question the expert regarding his failure to interview the children (AA. Vol. 16 P.2470) Defense counsel further complained it was suggesting to the jury that "...he didn't do what he was supposed to do in order to evaluate what was going on." (AA. Vol. 16 P.2470) The district court stated, "I overruled his objection because I felt like this is proper cross examination for the foundation of his testimony on the suggestibility, which it happens many times." (AA. Vol. 16 P.2471).

The district court then seemed to express confusion as to whether the prior district court judge was responsible for denying the independent psychological evaluation (AA. Vol. 16 P.2471). The court's concern was of no consequence, because this district court judge was aware that the motion for the independent psychological evaluation had been denied even prior to trial. During a pretrial hearing, defense counsel stated, "he was denied the ability to be able to examine these children." (AA. Vol. 9 P. 823). The district court replied, "well now we have another issue." (AA. Vol. 9 P. 823). Defense counsel explained, "so because of that, you know, obviously he - - any professional could not give a statement as to how the children - -." (AA. Vol. 9 P. 823).

Assuming *arguendo* the district court had understandably forgotten about the denial of the defense request for the independent psychological evaluation,

defense counsel contemporaneously objected and an unrecorded bench conference occurred. It seems to be uncontradicted that defense counsel then informed the district court of the entirely unfair examination that was occurring. The district court overruled defense counsel's objection and let the prosecutor proceed, citing the appropriateness of this type of cross examination. This amounts to a manifest injustice.

"An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005) (citing, Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

The Court grossly abused its discretion. The defense expert should have been permitted to answer that he did not interview any of the children because the court denied him the opportunity to interview the children and he did not want to be in contempt of court. It is extraordinarily difficult to ascertain how the court believed that this was proper cross examination. To the jury, the doctor appeared to be remiss in his duties as an expert by failing to even bother to interview the children. Numerous other witnesses and organizations had interviewed the children. The jury must have wondered why the lazy doctor had not bothered to do the same.

The court denied the doctor the opportunity to interview the witnesses and then allowed him to be cross examined over his failure to do exactly what the defense had requested. Nothing could be more unfair and unreasonable.

X. MR. THOMAS WAS ENTITLED TO SEVERANCE OF COUNTS AS THE COUNTS ARE NOT BASED ON THE SAME ACT OR TRANSACTION AND DO NOT CONSTITUTE A COMMON SCHEME OR PLAN.

Mr. Thomas filed a motion for severance of counts (A.A. Vol. 2 P. 119-142). The district court denied the motion (A.A. Vol. 26 p. 4524-4524). Mr. Thomas was entitled to severance of counts and to proceed to trial separately for each set of counts as they pertained to each alleged victim. It was error for the district court to deny the motion.

NRS 173.115 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
> 1. Based on the same act or transaction; or
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Decisions to join or sever are left to the discretion of the trial court and will not be reversed absent an abuse of discretion. Amen v. State, 106 Nev. 749, 756, 801 P. 2d 1354, 1359 (1990). An error arising from this joinder is subject to harmless error analysis and warrants reversal only if the error had a "substantial

and injurious effect or influence in determining the jury's verdict." Robins v. State, 106 Nev. 611, 619, 798 P. 2d 558, 564 (1990).

In Tabish and Murphy, this Court considered the rational of the United State Court of Appeals for the Ninth Circuit. The Supreme Court quoted the Ninth Circuit, wherein joinder may be so prejudicial "that the trial judge is compelled to exercise his discretion to sever. Prejudice created by the district court's failure to sever the charges is more likely to warrant reversal in a close case because it may prevent the jury from making a reliable judgement about guilt or innocence." Tabish and Murphy, 119 Nev. 293; 305 (citing Zafiro v. United States, 506 U.S. 534, 539, 122 L. Ed. 2d 317, 113 S. Ct. 933 (1993)); see also Lewis, 787 F. 2d at 1322 (considering relative strength of evidence underlying joined charges as factors showing undue prejudice).

In the instant case, Mr. Thomas is in a very similar situation to Tabish and Murphy. As in Tabish and Murphy, there was little correlation between the sets of counts. Essentially, the State sought, and succeeded, to try the counts together to demonstrate that Mr. Thomas is a person of poor character who should be found guilty of all the counts.

The crimes alleged in the information against Mr. Thomas concern four different victims over a period of over four years. They are clearly not part of the

same act. Merely having similar characteristics does not make acts part of a common plan. Richmond v. State, 118 Nev. 924, 993 (2002). A common plan requires that the crimes each be part of an overarching, purposeful design. Weber v. State, 121 Nev. 554, 572 (2005). Mr. Thomas had no such overarching design.

Moreover, the crimes are not connected together because evidence of other crimes would not be admissible in each trial. NRS 48.045 notes that evidence of other crimes may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The evidence satisfies no such purpose.

In order to promote judicial economy, avoid jury confusion, and prevent unfair prejudice, the Court should have separated the charges into separate sets based upon each alleged victim: A.P., Z.F., M.S. and MB.

Even if consolidation of these counts were permissible pursuant to NRS 173.115, it was error for the district court to fail to sever the counts because the failure to do so was unfairly prejudicial to Mr. Thomas. The Court had a duty to ensure that Mr. Thomas received a fair trial. Collier v. State, 101 Nev. 473 (1985). NRS 174.165 makes it clear that counts otherwise properly joined should be severed in cases of unfair prejudice to the defendant.

This Court has expressed, “[i]n assessing the potential prejudice created by

joinder, this Court had held that the test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of this court's decision to sever." (quotations omitted). Tabish and Murphy, 119 Nev. 293; 304, 72 P. 3d 584 (2003).

In the instant case, the district court's failure to sever the counts resulted in great prejudice to Mr. Thomas. As the counts were tried simultaneously, it is highly likely that the jury found Mr. Thomas guilty simply because he had been charged with numerous counts and therefore must be a bad person.

XI. THE DISTRICT COURT ERRED IN SENTENCING MR. THOMAS AS TO COUNT SIX IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Thomas was sentenced ten to life for count six. Mr. Thomas was charged with count five, sexual assault of a minor under fourteen years of age, based upon an allegation of digital penetration of A.P. (AA. Vol. 13 P. 1648). Mr. Thomas was also charged for the same conduct on A.P. with lewdness with a minor under the age of fourteen. During closing argument, the prosecutor meticulously went through each count and argued the facts were sufficient to convict on each count. However, the prosecutor explained,

> Count six is an alternative to count five. Where we have either the penis touching the vagina or fingers touching the vagina. If you don't

believe there was penetration, then your appropriate verdict is lewdness with a minor. "I submit to you that child, well, gee, that it hurt, it hurt." (AA. Vol. 23 P. 3913).

The prosecution explained that count six was an alternative to count five if the jury did not find penetration. Obviously the jury convicted Mr. Thomas of both count five and count six and Mr. Thomas was sentenced on both counts. If the jury found penetration, which it appeared they did as a result of the conviction for count five, then he could not be convicted of count six. At no time has this issue been addressed.

In Townsend v. State, 103 Nev. 113, 120, 734 P.2d 705 (1987), this Court noted that the crimes of lewdness with a child under the age of fourteen and sexual assault are mutually exclusive. This Court explained that lewdness with a child under the age of fourteen cannot be deemed an included offense of the crime of sexual assault because the express language of the statute precludes this. Id. Hence, the conviction and sentence for count six must be reversed.

XII. THE DISTRICT COURT ERRED IN FAILING TO GRANT THE DEFENSE MOTION FOR A NEW JURY PANEL BASED UPON CONTAMINATION AND FOR FAILING TO GRANT A VALID CHALLENGE FOR CAUSE.

After a member of the jury panel made an extremely prejudicial comment that in her experience children do not lie, the district court erred in not providing Mr. Thomas with a new jury panel. Moreover, the district court erred in denying

Mr. Thomas' valid challenge for cause.

The United States Supreme Court concluded in Dennis v. United States, 339 U.S. 162, 168 (1950), that trial courts have a serious duty to determine the question of actual bias, and a broad discretion in it's ruling on challenges. Therefore... "in exercising it's discretion, a trial court must be zealous to protect the rights of the accused". A criminal defendant has a constitutional right to be tried by a fair and impartial jury. U.S. Const. Amend. VI. Nev. Const. Art. I. This "means a jury capable and willing to decide the case solely on the evidence before it..." Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940 (1982).

A. DEFENSE COUNSEL'S MOTION FOR A NEW JURY PANEL WAS IMPROPERLY DENIED.

During voir dire, a perspective juror made a comment that children do not fabricate stories. This caused defense counsel to believe that the defendant was prejudiced by the jurors comment (AA. Vol. 24 P. 4065-4067). The perspective juror was a kindergarten teacher and defense counsel explained that he believed her statement infected the entire jury panel. Defense counsel asked that the panel be stricken.

Specifically, defense counsel stated, "and, your honor, as you remember, there was a juror that had stood up and specifically said that children don't lie

about - - .” The district court noted, “in her experience, as a kindergarten teacher, children don’t lie.” The court continued, “in her experience as a kindergarten teacher, children don’t lie.” Defense counsel then responded, “sure, and the entire panel heard it and I asked to strike the panel. I asked to strike her.” (AA. Vol. 18 P. 2672).

It is important to note the district court summarized the juror as stating “in her experience, as a kindergarten teacher, children don’t lie.” (AA. Vol. 18 P. 2672). This juror was excused, however, defense counsel felt that the prejudice had already occurred. It was error for the district court to not provide a new jury panel as the existing panel was likely infected by this prejudicial comment.

B. DEFENSE COUNSEL’S MOTION TO STRIKE JUROR 151, ANDREA CATERINE WAS IMPROPERLY DENIED.

A juror expressed her opinion that the defendant was guilty even without the presentation of evidence (AA. Vol. 18 P. 2680). The juror expressed doubts as to the presumption of innocence (AA. Vol. 18 P. 2680-2681). The court noted the juror admitted that she would be willing to hear both sides and could be open minded and therefore the cause challenge was denied. The district court erred when it failed to grant Mr. Thomas’ challenge for cause as the juror clearly was not open minded in regards to Mr. Thomas’ presumption of innocence.

///

XIII. THE DISTRICT COURT ERRED BY REFUSING TO INCLUDE THE DEFENDANT'S PROPOSED JURY INSTRUCTION.

The defense offered an instruction which provided:

> If the evidence is susceptible of two reasonable interpretations, one points to the defendant's guilt and the other to his innocence, it is your duty to adopt the interpretation which points to the defendant's innocence and reject the other which points to his guilt (AA. Vol. 23 P. 3750).

The defense cited Bails v. State, 545 P.2d 1155 (1976) in support of the instruction.[15] The court denied the request (AA. Vol. 23 P. 3750). Mr. Thomas contends he was entitled to have the jury read this instruction.

XIV. MR. THOMAS' CONVICTIONS MUST BE REVERSED BASED UPON CUMULATIVE ERROR.

In Dechant v. State, 10 P.3d 108, 116 Nev. 918 (2000), this Court reversed the murder conviction of Dechant based upon cumulative errors at trial. In Dechant, this Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113. This Court explained that there are certain

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[15]Admittedly, a review of Bails holds that the Court had considered this instruction in cases involving both direct and circumstantial evidence and has ruled it is not error to refuse to give the instruction if the jury is properly instructed regarding reasonable doubt.

factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

Mr. Thomas would respectfully request that this Court reverse his conviction based upon cumulative error.

CONCLUSION

Mr. Thomas respectfully requests that this Court grant find Mr. Thomas is entitled to a new trial.

DATED this 5th day of June, 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 pursuant NRAP 32(7)(b) although this brief does not comply with the type-volume limitation of NRAP 32(7)(b), the undersigned has filed the appropriate motion seeking an extension of the word limitation pursuant to NRAP 32(A)(7)(d) as it does contain more than 14,000 words, to wit, 17,778 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 5th day of June, 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 5th day of June, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CAMERON THOMAS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 71044

RESPONDENT'S ANSWERING BRIEF

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

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RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT

This case is not presumptively assigned to the Nevada Court of Appeals because it is a direct appeal from a Judgment of Conviction based on a jury verdict involving convictions for Category A felonies. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion in determining the admissibility of a prior allegation of physical abuse of one of the victims by their parent.
II. Whether the district court abused its discretion by admitting "bad acts" evidence.
III. Whether the district court abused its discretion in admitting child victims' statements under NRS 51.385.
IV. Whether Appellant had notice of Counts 1 and 2.
V. Whether the district court erred in sentencing Appellant on Counts 2 and 6.
VI. Whether the district court erred in admitting evidence of a civil suit and settlement.

VII. Whether the district court preserved a record for appellate review.
VIII. Whether the district court abused its discretion in denying psychological evaluations of the four child victims.
IX. Whether the district court abused its discretion by permitting the cross-examination of Appellant's expert on whether he met with the victims.
X. Whether the district court abused its discretion by denying the motion to sever.
XI. Whether the district court erred in jury selection.
XII. Whether the district court abused its discretion regarding jury instructions.
XIII. Whether there was cumulative error.

STATEMENT OF THE CASE

On November 22, 2011, the State charged Appellant with six counts of Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366), fifteen counts of Lewdness with a Child under the Age of 14 (Category A Felony – NRS 201.230), and two counts of Attempt Lewdness with a Child under the Age of 14 (Category B Felony – NRS 201.230, 193.330). 2 AA 72-79.[1]

On August 1, 2013, Appellant filed a Motion for Independent Psychological Evaluations. 2 AA 81-118. The State opposed this motion. 2 AA 143-65.

On August 22, 2013, Appellant filed a Motion to Sever Charges. 1 AA 119-42. The State opposed. 3 AA 216-40.

[1] An Amended Information, correcting a clerical error, was filed on January 22, 2015. 4 AA 269-76. A Second Amended Information, restructuring how the counts were set out, was filed on May 16, 2016. 8 AA 698-705; 12 AA 1236.

On February 4, 2015, Appellant filed a Motion to Dismiss the Information for Vague and Insufficient Factual Detail ("Motion to Dismiss"). 4 AA 277-99. The State opposed. 4 AA 312-30. After a hearing, the district court denied the motion. 9 AA 836-56.

On April 1, 2015, the State filed a Motion in Limine to Preclude Irrelevant Evidence at Trial. 5 AA 421-30. Appellant opposed. 5 AA 449-56. On June 2, 2015, the district court ordered additional briefing on the matter. 6 AA 498-553. On June 30, 2015, the State filed a Supplemental Brief, as did Appellant. 6 AA 457-69. On March 17, 2016, the court granted the State's motion. 26 AA 4555.

Appellant's jury trial commenced on May 16, 2016, and on June 7, 2016, the jury returned a verdict finding Appellant guilty of three of the five counts of Sexual Assault with a Minor under Fourteen Years of Age (Counts 1, 5, and 11), eight of the fifteen counts of Lewdness with a Child under the Age of 14 (Counts 2, 6, 8, 12, 13, 16, 17, and 18), and both counts of Attempt Lewdness with a Child under the Age of 14 (Counts 10 and 15). 8 AA 716-21; 10 AA 857.

On August 5, 2016, Appellant was adjudged guilty and sentenced to imprisonment as follows: Count 1 (Sexual Assault with a Minor Under Fourteen Years of Age), 20 years to life; Count 2 (Lewdness with a Child under the Age of 14), 10 years to life, concurrent with Count 1; Count 5 (Sexual Assault with a Minor Under Fourteen Years of Age), 20 years to life, consecutive to Count 1; Count 6

(Lewdness with a Child under the Age of 14), 10 years to life, concurrent with Count 1; Count 8 (Lewdness with a Child under the Age of 14), 10 years to life, concurrent with Count 1; Count 10 (Attempt Lewdness with a Child under the Age of 14), 2 to 20 years, concurrent with Count 1; Count 11 (Sexual Assault with a Minor under Fourteen Years of Age), 20 years to life, concurrent with Count 1; Count 12 (Lewdness with a Child under the Age of 14), 10 years to life, concurrent with Count 1; Count 13 (Lewdness with a Child under the Age of 14), 10 years to life, concurrent with Count 1; Count 15 (Attempt Lewdness with a Child under the Age of 14), 2 to 20 years, concurrent with Count 1; Count 16 (Lewdness with a Child under the Age of 14), 10 years to life, concurrent with Count 1; Count 17 (Lewdness with a Child under the Age of 14), 10 years to life, concurrent with Count 1; and Count 18 (Lewdness with a Child under the Age of 14), 10 years to life, concurrent with Count 1. 8 AA 766-69. The district court imposed a special sentence of lifetime supervision to commence upon Appellant's release. 8 AA 766-69. The Judgment of Conviction was filed August 12, 2016. 8 AA 766-69.

On August 10, 2016, Appellant filed a Notice of Appeal. 8 AA 764-65. Appellant subsequently filed his Opening Brief and the State responds herein.

STATEMENT OF THE FACTS

The sexual abuse took place between 2006 and 2010, at multiple locations in Las Vegas, involved four different victims aged approximately five, six, and seven

years old, and included (but was not limited to) vaginal intercourse. 8 AA 707-15.

The first two reporting victims, Z.F. and her sister A.P., were living with their mother in Phoenix, Arizona when they disclosed what Appellant had done to them. 13 AA 1825-33. Appellant was a family friend of Z.F. and A.P., and the girls and their family had previously resided with Appellant when they lived in Las Vegas. 13 AA 1748-49.

When Z.F. and A.P. reported this abuse, Appellant was the director of a children's daycare center, Kids R Kids, and had worked at another Las Vegas daycare previously. 23 AA 3796-3802. Based on this employment history, the Las Vegas Metropolitan Police Department ("LVMPD") issued a media release. Following the media release, two additional victims were identified: M.S. and M.S-B. 20 3080-81; 21 AA 3368-69.

Z.F.

Z.F. first met Appellant at Kids R Kids when she was around five years old. 14 AA 2096. Z.F. testified regarding numerous instances in which Appellant inappropriately touched her Z.F. – the first time was after Z.F. had gone to Appellant's house a few times. 14 AA 2101. On this occasion, Z.F. was spending the night and Appellant asked her to come upstairs. Id. Upon entering Appellant's bedroom, Appellant removed her pants. 14 AA 2102. Z.F., however, knew that it was wrong for Appellant to do that so she pulled her pants up and ran out of the

room. 14 AA 2103.

Another incident occurred when Z.F. was folding some clothes and Appellant approached her, pulled her skirt and underwear down, and put his mouth on her vagina. 14 AA 2106-07. Z.F. could not recall exactly when this happened or how old she was. 14 AA 2111.

Another incident occurred when Z.F. was upstairs in Appellant's son's bedroom. 14 AA 2112. Z.F. was playing with toys in the room when Appellant came in. Id. Appellant pulled down his pants and put his penis near Z.F.'s vagina. Id. Appellant then ejaculated on Z.F.'s leg. Id.

Z.F. testified regarding another incident in which Appellant performed cunnilingus on her. 14 AA 2117. Z.F. and other children were playing hide-and-seek, and Z.F. was hiding in the closet. Id. Appellant entered the closet and took her pants off. 14 AA 2119. Appellant then got on his knees and put his mouth on her vagina. Id.

Z.F. described another incident when she was watching cartoons in Appellant's son's room. 14 AA 2121. She was sitting on the bed when Appellant entered the room. Id. Appellant asked the other children to leave and go downstairs to play video games. 14 AA 2121-22. Appellant then pulled her pants down, but Z.F. quickly pulled them back up and left the room. 14 AA 2123.

Another incident took place in 2008 at Z.F.'s house when she was around

seven years old. 14 AA 2124. Appellant picked her up from daycare and took her back to her house. Id. When Appellant was downstairs alone with Z.F., Appellant told her to touch his penis. Id. Z.F. refused. 14 AA 2128.

However, another time in that same house Appellant made the same request. Id. That tine, Appellant called her upstairs and already had his penis exposed when Z.F. approached him. 14 AA 2131. Appellant grabbed Z.F.'s wrist and pulled her hand towards his penis. 14 AA 2131-32. Z.F. was able to pull her hand away. 14 AA 2132.

Another incident occurred in a hot tub with Appellant. 14 AA 2133. Z.F., her sisters, and Appellant were all in the hot tub. 14 AA 2134. Appellant then put his hands down the bottom of Z.F.'s swimsuit and started rubbing her vagina. 14 AA 2136.

A.P.

A.P. met Appellant at Kids R Kids when she was around six years old. 13 AA 1751, 1753. A.P testified regarding multiple instances when Appellant inappropriately touched her – the first time A.P. could recall was when she first met him. 13 AA 1763. A.P. explained that she and her sister, Z.F., were at Appellant's residence to spend the night. 13 AA 1763-64. Appellant came into the guest room (where A.P. and Z.F. were to sleep) to put them to bed and laid down between A.P. and Z.F. 13 AA 1764-65. Appellant then put his hand in her pants and vaginally

penetrated her with his fingers. 13 AA 1765. The following day, while driving to daycare, Appellant told A.P. not to tell anyone about what happened the night before and made her promise not to. 13 AA 1768-70.

On another occasion while A.P. was at Appellant's residence, she was in Appellant's room with her sisters (Z.F. and Z.P.) and Appellant's son and daughter (D.T. and J.T.). 13 AA 1771-72. All of the children were watching Saturday morning cartoons. 13 AA 1772-73. The children sat at the foot of the bed and watched cartoons while Appellant sat at the head of the bed. 13 AA 1773. Appellant asked A.P. to lay down next to him. Id. Appellant then pulled her shorts and underwear down and vaginally penetrated her with his penis. Id. This happened on multiple occasions. 13 AA 1773-74.

Another incident occurred when A.P. was in fourth grade. 13 AA 1777. Appellant brought her and his son to A.P.'s home from daycare. 13 AA 1777-78. Around dinnertime, A.P.'s mother left to get pizza and A.P., Appellant, and Appellant's son stayed at the house. 13 AA 1778. Appellant played a movie for his son in A.P.'s mother's room. 13 AA 1778-79. Appellant beckoned A.P. to come into the room next door with him. 13 AA 1779. Once there, Appellant told her to lay down next to him, and A.P. complied. Id. Appellant pulled down A.P.'s pants and vaginally penetrated her with his penis. 13 AA 1780. Appellant stopped when his son came into the room to tell him something about the movie he was watching. 13

AA 1784. After that, A.P. left the room and joined Appellant's son in her mother's room. 13 AA 1788. Appellant followed A.P. into the bedroom, pulled up her shirt and training bra, and licked her breasts. Id. Appellant stopped when his son turned around and faced them. 13 AA 1790.

Another incident occurred when A.P. accompanied Appellant to Blockbuster. 13 AA 1791. While on their way to Blockbuster, Appellant put his hand down A.P.'s pants and inserted his fingers into her vagina. 13 AA 1792-93. Appellant stopped once they got to Blockbuster, but attempted to do the same thing on the way home. 13 AA 1794. A.P. kept resisting and pushing his hand away. 13 AA 1795. Eventually, Appellant stopped trying. Id.

Another incident occurred at Appellant's home. 13 AA 1796. After the end of the work day, Appellant and A.P. drove back to Appellant's home where she spent the night. 13 AA 1797-98. The following morning when everyone but Appellant had left the house, Appellant asked A.P. to lay down with him in the bed. 13 AA 1799. A.P. complied. Id. Appellant then penetrated her vaginally with his penis. 13 AA 1800. Afterwards, they went downstairs to clean the fish tank. 13 AA 1801.

Another incident occurred in A.P.'s bedroom. Id. A.P.'s mother asked Appellant to take A.P. home from school during his lunchbreak because A.P was sick. 13 AA 1802. After arriving home, A.P. went to her bedroom and Appellant followed. Id. A.P. got in bed, and Appellant sat on the floor next to her. 13 AA

1807. Appellant then removed A.P's pants and underwear and placed his mouth on her vagina. 13 AA 1808-09. A.P. was in fifth grade. 13 AA 1804.

Appellant performed cunnilingus on her another time. 13 AA 1810. A.P. could not remember exactly when this happened but recalled that it was the night of "some big event that the adults were going to." Id. Afterwards, A.P. overheard a conversation between Appellant and his wife in which his wife told Appellant that "his mouth smelled like pee." 13 AA 1812-14.

Another incident occurred in May of 2010 in Arizona when Appellant visited A.P.'s family there. 14 AA 2045-46. One morning, when all of the other children were asleep, Appellant approached A.P. and told her that "he was lonely." 14 AA 2048. Appellant then laid down next to A.P. Id. Appellant pulled down A.P.'s pants and vaginally penetrated her with his penis. 14 AA 2050.

A.P. also testified to two other incidents: in the first, A.P. and her sister went bathing suit shopping with Appellant at Wal-Mart; Appellant came into the dressing room with them and watched them while they were changing. 14 AA 1992-97. In the second incident, A.P. was helping Appellant organize files in the Kids R Kids attic, and Appellant tried to get A.P. to sit on him, and pulled at the buttons of her clothes and at her hips until A.P. pushed him away. 14 AA 2001-06.

M.S.

On January 7, 2011, Detective Z. Johnson received a call from a parent who

indicated that she became aware of Appellant's arrest and her daughter, M.S., had attended both daycare centers where Appellant worked and told her that Appellant had inappropriately touched her. 21 AA 3368-70. Appellant was a friend of their family. 20 AA 3262-63.

M.S. testified regarding three instances when Appellant touched her – the first time was the weekend of November 22, 2009, when she stayed overnight at Appellant's residence while her parents were at a couples' retreat. 10 AA 976. Appellant was reclined on the couch in his living room and called M.S. over to him. 10 AA 981, 1019. Appellant reached under her clothing and touched M.S. on the top of her breast in a rubbing motion. 10 AA 982-83. Appellant put his hand down M.S.'s pants and touched her buttocks in a rubbing motion. 10 AA 986. Appellant moved his hand towards M.S.'s groin and started rubbing the area where the upper thigh meets the pelvis. 10 AA 987-88, 990. Appellant stopped when he heard the other children coming down the stairs. 10 AA 991. Appellant's wife was at work when these incidents occurred. 10 AA 987.

Another incident occurred in 2009 but M.S. could not remember exactly when. 10 AA 992. M.S.'s mother dropped her off at Appellant's home for a "play date." 10 AA 992-93. Appellant, who had been sitting on the couch in the living room, had one of the other children tell M.S. to come down to see him. 10 AA 994. When they were alone, Appellant told M.S. to sit on his lap. 10 AA 995. M.S.

complied and sat on Appellant's lap facing outwards. 10 AA 996. Appellant then touched M.S. between her breast and armpit. 10 AA 997-98. Appellant moved his hand down to M.S.'s buttocks and towards M.S.'s groin where he again rubbed the area where her upper thigh met her pelvis. 10 AA 998-99.

M.S-B.

On January 7, 2011, Detective Johnson received a call from another parent who stated that she learned of Appellant's arrest and her daughter, M.S-B., had disclosed being touched by Appellant. 20 AA 3197, 3212-13.

M.S-B. testified that Appellant was a teacher and when she was at daycare, Appellant would put her on his lap and touch her bottom, breasts, and vagina. 20 AA 3144, 3147-50, 3152. Appellant would move his hand on her vagina, over her clothes. 20 AA 3150-51. She was seven years old. 20 AA 3178.

This happened more than once while M.S-B. was at Kids R Kids. 20 AA 3149, 3152.

SUMMARY OF THE ARGUMENT

First, the district court did not abuse its discretion by limiting evidence of allegations of physical abuse of Z.F. by her parent, as it was unrelated to Appellant's sexual abuse.

Second, the district court did not abuse its discretion in admitting alleged bad acts evidence because the evidence was appropriate impeachment evidence and/or admissible under NRS 48.045.

Third, the minor victims' statements were admitted under NRS 51.385 after evidentiary hearings and considering the testimonies of the seven adult witnesses. These child victims also testified at trial and were subject to cross-examination.

Fourth, the Information charging Appellant provided sufficient notice of the elements of Count 1 and 2, and the State was not required to provide an exact date for each sexual assault disclosed by A.P.

Fifth, Counts 2 and 6 are alternative counts to Counts 1 and 5, respectively. As such, Appellant's adjudication on Counts 2 and 6 should be vacated. Appellant's sentence on the remaining counts remains unchanged.

Sixth, since defense counsel stated his intent to present evidence of a civil lawsuit and settlement to impeach the State's witnesses, the district court did not err in permitting questions about this topic.

Seventh, the district court preserved a record for appellate review, as the content of all the unrecorded bench conferences was either apparent from the record or later memorialized.

Eight, the district court did not abuse its discretion in denying the motion to compel psychological examinations of the children victims because Appellant failed

to present a compelling reason for such examination and failed to satisfy the Koerschner elements.

Ninth, the district court did not abuse its discretion in permitting the State to cross-examine Appellant's expert as to the foundation of his testimony.

Tenth, the district court did not abuse its discretion by denying the motion to sever the counts because the evidence of Appellant's sexual offenses regarding each victim would have been admissible at severed trials as part of a common scheme or plan.

Eleventh, the district court did not err in jury selection. The juror statement challenged by Appellant did not taint the jury pool, and multiple jurors made statements prejudicial to the State. Moreover, Appellant has failed to show that any empaneled juror was biased against him.

Twelfth, the district court did not err in declining to give Appellant's proposed jury instruction on reasonable doubt.

Finally, there was no cumulative error that deprived Appellant of a fair trial.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION REGARDING THE ADMISSIBILITY OF PHYSICAL ABUSE OF Z.F. BY HER MOTHER.

Appellant argues that the district court erred in limiting testimony about an allegation that Z.F. was physically abused by her mother, April Reed; Z.F. disclosed

this physical abuse to her teacher before disclosing the sexual abuse by Appellant.[2] AOB at 16, 23. Appellant asserts that the allegation of physical abuse was needed to present the complete story of Z.F.'s disclosure of Appellant's sexual abuse and to present his defense that Z.F., A.P., and their parents fabricated the sexual abuse to deflect attention from the physical abuse. AOB at 16-17, 18, 25-27, 30.[3] This issue was extensively litigated pre-trial, and the matter was heard by the district court on June 2, 2015, and again on March 10, 2016.[4] 24 AA 4555.

First, as to Appellant's "complete story" argument, the physical abuse was completely unrelated to Z.F.'s disclosure of Appellant's sexual abuse. On December 9, 2010, Z.F. disclosed to her teacher that her mother had physically abused her.

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[2] Appellant complains that throughout the trial, the State "mocked" his theory of defense, and that the court "comically" tried to protect April Reed's reputation before the jury and "bent over backward" throughout the trial to keep Appellant from bringing up the physical abuse. AOB 17, 20, 21. These claims are belied by the record and the district court's multiple rulings precluding evidence of the physical abuse, as addressed infra.

[3] Here, Appellant cites to the wrong record as to his allegation that A.P. was afraid of her mother. The proper citation is 13 AA 2086-87. Appellant also fails to mention that the re-direct examination he quotes is a follow-up to defense counsel asking A.P. whether she was scared of "Mommy April" when she got upset. See 13 AA 2085. Moreover, defense counsel did not object to the questioning or to any re-cross. Id. at 2087.

[4] Appellant avoids any mention of the pre-trial litigation regarding the admissibility of the physical abuse of Z.F., which the court deemed unrelated to Appellant's sexual abuse of Z.F. 24 AA 4555.

During that conversation, Z.F. also disclosed that Appellant had sexually abused her. 16 AA 2409, 2412; see 6 AA 471. On December 14, 2010, Officer VanGordon concluded that Z.F.'s physical "injuries appeared minor in nature and do not meet filing standards of the Maricopa County Attorney's office." See 6 AA 471-72. Z.F.'s mother's statements to law enforcement occurred after she was told there would not be charges for the physical abuse. Id.

In State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) this Court held that when the doctrine of res gestae is invoked under NRS 48.035(3), "the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts." Shade. (the government could not effectively prosecute on the charged offenses without proffering evidence of uncharged offenses); see also Sutton v. State, 114 Nev. 1327, 1332, 972 P.2d 334, 336 (1998) (testimony pertaining to the uncharged offense was brought in to primarily inflame the jury against the defendant).[5]

As in Sutton, Appellant attempted to bring in evidence of an uncharged offense to inflame the jury against April and Z.F. The district court did not abuse its

[5] Appellant claims that Shade provides no rationale for excluding the child abuse. Yet Shade sets out the standard for a court to allow evidence of uncharged acts, precisely what Appellant was attempting to do with April's uncharged acts. Once more, Appellant cites to the wrong record. Appellant cites 22 AA 3580, however, this refers to the defense's case-in-chief.

discretion when it analyzed Appellant's res gestae argument under this standard. As the court found, there was no need to detract attention from physical abuse by fabricating allegations of sexual abuse, because the physical abuse was not charged and as there is no evidence that Arizona Child Protective Services was seeking to remove Z.F. from April's care.

Second, Appellant contends that by limiting testimony regarding the physical abuse, the district court precluded "his only valid theory of defense," which was that the victims were all fabricating the charges. AOB at 15, 18, 20.[6] Appellant asserts that Z.F. was truthful in her multiple disclosures of her mother's physical abuse – which April admitted and Arizona Child Protective Services substantiated – but untruthful as to Appellant's sexual abuse because she wanted to avoid getting her mother in trouble.

While "'the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense,' *defendants must comply with established evidentiary rules*, 'designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" Rimer v. State, 131 Nev. Adv. Rep. 36, 351 P.3d 697, 712 (2015) (emphasis added) (quoting Crane v. Kentucky, 476 U.S. 683,

[6] Appellant again cites to the wrong record when bringing up one of several pre-trial hearings regarding the physical abuse. AOB at 20.

690, 106 S. Ct. 2142, 2146 (1986); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)).

The court conducted a hearing under NRS 51.385 before April's testimony and held "there's no question [Z.F.'s disclosure] was spontaneous," especially since she had already accused her mother of the physical abuse and thus had no reason to fabricate sexual abuse to protect her mother. 16 AA 2391-92. The court further found that defense counsel's allegations of a possible motive to fabricate were mere speculation. Id. Defense counsel again raised the argument before trial, to which the court responded that his argument on the issue was identical to the previously litigated motion, and denied it. 13 AA 1635, 1638.

Moreover, Appellant's claim that his only valid theory of defense was that Z.F. and A.P. lied to cover up April's physical abuse is misleading since Appellant also argued that all four victims fabricated the abuse to receive money from a civil suit – Appellant argued in his opening statement that the case was about money and revenge, that Z.F. and A.P. had a motivation to lie, and that the families were struggling financially. 13 AA 1722, 1726, 1729, 1730. Appellant told the court before opening statements that he was "definitely" planning on bringing up the civil settlement received by the victims. 13 AA 1588. Thus, Appellant did argue that the victims were fabricating the abuse – because of financial difficulties.

Appellant also claims that he was unable to present evidence that Z.F. and

A.P. were afraid of their mother. This is belied by the record. During cross-examination A.P. testified:

> MR. MANN: Brie, you stated that you got in trouble a lot.
>
> A: Yes.
>
> Q: That your mom at one point was really angry, which was the reason you didn't tell her anything.
>
> A: Yes.
>
> Q: Now, is it fair to say that you were scared of your mom when she was angry?
>
> A: Yes.
>
> Q: And you didn't want to cross your mom when she was angry?
>
> A: I don't want to cross her at all.
>
> Q: And that's because you were in trouble a lot? She was mad at you a lot?
>
> A: No. I was just in trouble a lot. She wasn't mad at me a lot. But when she did get mad, I was afraid.

14 AA 2073.

In addition, on cross-examination, Z.F. was asked whether she "become[s] scared" of April when April gets "really upset," to which Z.F. responded, "yes." 15 AA 2212-13. Thus, evidence that A.P. and Z.F. were frightened of their mother was

elicited. As such, Appellant was able to present this theory of defense at trial.[7]

Further, Appellant's reliance on Nevada v. Jackson, 569 U.S. __, 133 S. Ct. 1990 (2013) is wholly misplaced. AOB at 31-32. In Jackson, the Supreme Court not only held that the Confrontation Clause does not allow a defendant to introduce extrinsic evidence for impeachment of a witness or victim, but also that, while the Constitution guarantees defendants a meaningful opportunity to present a meaningful defense, the court "recognize[s] that 'state and federal rulemakers have broad latitude under the constitution to establish rules excluding evidence from criminal trials." 133 S. Ct. at 1992.[8] The Court did not differentiate between substantiated or unsubstantiated claims, despite what Appellant alleges.

For these reasons, the district court did not abuse its discretion and Appellant's claim fails.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION REGARDING "BAD ACTS" EVIDENCE.

[7] Appellant claims that the district court's ruling was a "fundamental miscarriage of justice" in light of the State's questioning his wife about his corporal punishment of his son and the State's closing argument. AOB at 20-21, 22-29. The cross-examination of his wife was appropriate impeachment, as discussed infra. As to the State's closing argument, Appellant's assertions are belied by the record. 10 AA 896; 16 AA 2380-82.

[8] The defendant in Jackson challenged the application of NRS 50.085(3) pertaining to character evidence. 133 S. Ct at 1992. In contrast, Appellant wanted to introduce the physical abuse under res gestae.

Appellant argues the court abused its discretion in admitting evidence of incidents he claims are "bad acts." The alleged "bad acts" are (1) cross-examination of Appellant regarding changing a child's diaper and letting her sleep over at his house; (2) cross-examination of Appellant's wife about whether Appellant corporally punished their son after she claimed on direct that Appellant would never hurt a child; (3) April Reed explaining Z.F. had learned the word "humping" from Appellant's son; (4) the State's closing statement about the victims' testimony; (5) an unsolicited statement by Ramona Slattery that Appellant chose to cure by cross-examination instead of an admonishment; and (6) A.P.'s testimony that the court admitted after a Petrocelli hearing. AOB 32-41.

A. Appellant's Testimony

Appellant claims that the district court erred in permitting the State to impeach him with questions about his termination from Kids R Kids because of an incident with a child (S.K.). Appellant did not object at trial.[9] Therefore, this issue must be reviewed for plain error.

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,

[9] Although Appellant claims that he "objected at trial to the admission of these bad acts," he does not provide any citation to the record. The transcript of the State's impeachment of Appellant does not reveal any objection once Appellant became aware of the topic of impeachment. 23 AA 3867-69.

987 (1995) (citations omitted). 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, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006).

Here, Appellant testified about his employment at Kids R Kids and his work performance on direct examination:

> [DEFENSE COUNSEL]: Did you ever feel that there was a different standard for male teachers?
>
> [APPELLANT]: Sometimes there was. Um, you know, and I kind of helped to that too though. Um, you know, you always want to make the parents feel, you know, comfortable. I tried to set a rule where men couldn't change diapers. It didn't work, but I tried.
>
> [DEFENSE COUNSEL]: And so when you say 'it didn't work,' does that mean that men were required to change diapers?
>
> [APPELLANT]: Yeah.

23 AA 3797-98.

Appellant testified about how much he enjoyed working at Kids R Kids and Bright Child and implied that he did not face any challenges while there. 23 AA 3797-3801, 3803-04. Appellant also testified victims A.P. and Z.F. came to his house alone, adding that, while it was "not impossible" that he was alone with them at some point, he could not remember a time when he was. 23 AA 3829, 3830.

Appellant was also asked about his termination from Bright Child on direct:

> [DEFENSE COUNSEL]: Was there a time that you stopped working at Bright Child?
>
> [APPELLANT]: Yes.
>
> [DEFENSE COUNSEL]: When was that?
>
> [APPELLANT]: That was when these accusations came out.

23 AA 3803. The phrasing of the question and answer implied that Appellant voluntarily stopped working at Bright Child.

On cross-examination, the State addressed these points:

> [PROSECUTOR]: Did you also have a child at Kids 'R' Kids named [S.K.]?
>
> [APPELLANT]: Yes.
>
> [PROSECUTOR]: And there was this – [S.K.] had spent the night at your house on several occasions, correct?
>
> [APPELLANT]: Correct.
>
> [PROSECUTOR]: And that she also attended parents' night out, correct?
>
> [APPELLANT]: Correct.
>
> [PROSECUTOR]: And that there was an incident at the day care where you took [S.K.] upstairs to change, correct?
>
> [APPELLANT]: Correct.
>
> [PROSECUTOR]: And that was at Kids R Kids, correct?
>
> [APPELLANT]: Correct.

> [PROSECUTOR]: And there was an issue that ultimately resolved with Kids R Kids in relation to that, correct?
>
> [APPELLANT]: Not necessarily an issue, but correct.

23 AA 3868-69.

Also during cross-examination, the State asked Appellant about whether he had been terminated from Bright Child:

> MS. RINETTI: All right. And ultimately you were terminated from Bright Child, correct?
>
> [APPELLANT]: I was, I went on leave, and then I was arrested.

23 AA 3868-69.[10]

In this case, contrary to Appellant's assertion that "there is nothing in the record to explain this peculiar set of questions from the prosecution," AOB at 34, the record provides a clear explanation for the State's questions. The questions regarding the incident with S.K. at Kids R Kids were proper during cross-examination because the questions rebutted Appellant's testimony suggesting he had no problems or issues while he was working at Kids R Kids, and that the victims

[10] At trial, this questioning immediately followed the questions about the incident with S.K. at Kids R Kids. The underlined portion of the excerpt is omitted from Appellant's Opening Brief, creating the impression that Appellant was terminated from Kids R Kids because of the incident with S.K., and exaggerating the prejudicial effect of the questioning regarding the incident with S.K. However, the question regarding termination related to Appellant's termination from Bright Child, to which he had already testified on direct examination.

came to his house only because of the close relationship their families had with him. Additionally, Appellant's testimony that he tried to implement a new rule about male teachers not being allowed to change diapers implied that he was concerned about false allegations and was attempting to be proactive in suggesting such a rule. However, the details about S.K. revealed during cross-examination provide context to Appellant's testimony and change the tone of the testimony he offered during direct examination.

Moreover, Appellant's characterization of the incident used for impeachment as "prior bad act evidence" fails. Evidence is not a prior bad act unless the evidence elicited speaks to chargeable collateral offenses. See Salgado v. State, 114 Nev. 1039, 1042-43, 968 P.2d 324, 326-27 (1998) (cases in which the evidence does not implicate prior bad acts or collateral offense on the defendant's part, a Petrocelli hearing is not required); Colon v. State, 113 Nev. 484, 494, 938 P.2d 714, 720 (1997) (Petrocelli hearing not required when State elicited testimony that defendant knew where marijuana was grown in her building, associated with drug dealers, and bailing out a known drug user). This was not bad act evidence, as the evidence did not speak to a chargeable collateral offense. See id. There is nothing inherently criminal about Appellant taking a child upstairs to change a diaper, taking children

to his house, or even being fired from a job. This testimony was introduced to rebut specific inferences that Appellant made during his testimony.[11]

Accordingly, Appellant's claim fails.

B. Appellant's Wife's Testimony

Appellant claims that the district court abused its discretion and carried out a fundamental miscarriage of justice when it allowed the State to cross-examine his wife about Appellant's corporal punishment of his son.[12] AOB at 20-21, 22-29. As an initial matter, Appellant did not object during trial, therefore this is reviewed

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[11] To the extent this Court construes Appellant's claim as challenging introduction of the evidence under the collateral fact rule, this claim still fails. Collateral facts are facts that are, by nature, "outside the controversy, or are not directly connected with the principal matter or issue in dispute." Lobato v. State, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004). Generally, "extrinsic proof of a prior inconsistent statement is inadmissible unless the statement is material to the case at hand." Id. at 519, 96 P.3d at 770. The purpose of the evidentiary rule banning extrinsic evidence is to focus the fact-finder on the most important facts and conserve "judicial resources by avoiding mini-trials on collateral issues." Abbott v. State, 122 Nev. 715, 736, 138 P.3d 462, 476 (2006). However, this policy is only applicable with regard to collateral issues, and the policy is not served when the extrinsic evidence relates to a central issue in the case. Id. Accordingly, the collateral fact rule does not limit the scope of cross-examination; an examiner can question a witness on practically any aspect of the witness's direct testimony. Jezdik v. State, 121 Nev. 129, 137, 110 P.3d 1058, 1063 (2005). Similarly, the collateral fact rule cannot be used by a defendant to "purposefully, or even inadvertently, introduce evidence giving the jury a false impression through an absolute denial of misconduct and then frustrate the State's attempt to contradict this evidence through proof of specific acts." Jezdik v. State, 121 Nev. 129, 139, 110 P.3d 1058, 1065 (2005).

[12] Appellant claims that this alleged error was compounded when he was not allowed to "question April or any other witnesses regarding her substantial abuse of Z.F." AOB at 34. That claim is addressed in Section I, supra.

solely for plain error. 23 AA 3712-14. Moreover, Appellant's wife opened the door to this issue when she testified that she had never known Appellant to hurt a child. 23 AA 3689. Thus, the State's questions were proper impeachment testimony and Appellant's claim is without merit.

C. Other Witnesses

Appellant argues that the district court abused its discretion in allowing bad act evidence after holding a Petrocelli hearing. Appellant challenges questions regarding: incidents with A.P. during a shopping trip and in the attic of a daycare center; Appellant's son's behavior; and allegations regarding victim M.S.

NRS 48.045(2) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." To admit evidence of a prior bad act, the State must first seek a hearing outside the presence of the jury pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) (modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996)).

Following a Petrocelli hearing, evidence of a defendant's prior bad acts will be admissible where the district court determines, "that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the

probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Bigpond v. State, 128 Nev. ___, 270 P.3d 1244, 1250 (2012).

Under NRS 48.045(3), evidence of prior sexual offenses, proved by clear and convincing evidence, is always relevant. Keeney v. State, 109 Nev. 220, 850 P.2d 311 (1993) (evidence of defendant's prior sexual misconduct was more probative than prejudicial in a case where defendant was accused of sexually abusing minor children).

First, the two incidents that Appellant challenges – in a fitting room on a shopping trip and in the attic – were offered to refute allegations raised by Appellant throughout his cross-examination of A.P. On cross, Appellant repeatedly questioned A.P. about fabricating the allegations against Appellant and introduced a specific incident of sexual assault in Arizona to show such fabrication. 14 AA 2014-2024. Thereafter, the State submitted evidence regarding these two incidents to refute the allegation of fabrication and show that A.P.'s statements had been consistent. Additionally, the district court held a Petrocelli hearing on these incidents and weighed the probative value of the evidence, finding that the acts were proven by clear and convincing evidence. 14 AA 2016-17, 2023-24.

The district court explained its reasoning in allowing the evidence:

> THE COURT: That's fine. Let me think through fabrication again. We're offering it say to counter all the other charge – just let me think through – charged crimes. You're saying even though those are – we're letting it in

> as a prior bad act, that all would go to the allegation that she's fabricating all these?
>
> [PROSECUTOR]: Correct. And that's why Mr. Mann, I believe, made the record that he was introducing the sexual assault in Arizona to show the fabrication, and we're doing the converse.
>
> THE COURT: That's exactly the context of why it was offered. So that's the second purpose. Okay. I'll do a record on that.

14 AA 2023-24. Therefore, the district court did not abuse its discretion and this claim should be denied.

Second, regarding Appellant's son, Appellant concedes he did not object at trial. Accordingly, this Court should review the district court's decision to allow this evidence for plain error. Appellant claims that it was plain error to allow the following testimony from Z.F.'s mother:[13]

> MS. RINETTI: And when she talked about the defendant

[13] Appellant claims he did object during Z.F.'s cross-examination and memorialized the bench conferences after April's testimony. AOB at 36 n.7. However, Appellant's suggestion that the Court should infer an objection to April's testimony from Appellant's objection to Z.F.'s testimony is absurd. Moreover, Appellant misstates the record: during the bench conference memorialized at 15 AA 2346-47, after indeed stating he was "trying to remember," defense counsel brought up a statement by April that he had *not* objected to, which he deemed "wholly inappropriate and very prejudicial." Id. at 2346. The district court did not abuse its discretion when ruling that the objection had been waived, as the witness had already been dismissed. Id. at 2346-47. It was only after the district court's ruling on this first objection that defense counsel brought up his objections to Z.F.'s testimony. Id. at 2347. Appellant, in his footnote, combines April and Z.F.'s testimonies, in an apparent attempt to fashion an argument based on two different testimonies, one of which was not objected to.

> humping her, did she actually use the word humping?
>
> THE WITNESS: Yes, she did.
>
> MS. RINETTI: Is that a word that [Z.F.] knew at the time?
>
> THE WITNESS: Yes, it is.
>
> MS. RINETTI: Do you know how [Z.F.] knew this word?
>
> THE WITNESS: That was a word that we used around the house to identify with good touch and bad touch with other children because that was one of our concerns at the time because Cameron's son was doing that.
>
> MS. RINETTI: I'm just asking you like, so when you have good – good touch bad talk – touch conversations with your children, are you telling them to look out for other children as well as adults?
>
> THE WITNESS: Other children and adults, mostly kids.

15 AA 2292-93.

The State's questioning addressed the suggestion that Z.F.'s testimony was coached and focused on the language used and how a child might have learned that language. The above-quoted excerpt was followed, for example, by the State asking whether Z.F.'s description of Appellant "peeing" on her leg was the victim's own description or a paraphrase of what she said.

Appellant does not provide any cogent argument in support of his claim, and this Court should therefore not consider it. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); see also 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). Instead, he only makes the equivocal claim that the jury "perhaps" read a "sinister reason that should be projected on the defendant" into the actions of Appellant's son. AOB at 36. Appellant cannot even articulate what that "sinister reason" might be nor does he present any evidence that the jury was swayed. Even so, Ms. Reed's answer was a brief comment that occurred over the course of a 16-day jury trial. The State did not solicit the answer and the State immediately refocused the witness on the main point by asking her to clarify the terminology she used when talking to her children about inappropriate behavior. Accordingly, it was not plain error to allow this evidence. Therefore, this claim should be denied.

Third, Appellant claims that the district court abused its discretion in denying his motion for mistrial based on an unsolicited answer from witness Ramona Slattery (victim M.S.'s mother) during questioning by the State.[14] A mistrial should only be granted when the "ends of justice" make it a manifest necessity. Glover v. Eighth Judicial District Court, 125 Nev. 691, 701-02, 220 P.3d 684, 692 (2009). A "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). An abuse

[14] Appellant concedes that the answer was not solicited by the State. AOB at 38.

of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.

This Court has held that "[a] witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." Ledbetter v. State, 122 Nev. 252, 264-5, 129 P.3d 671, 680 (2006) (quoting Carter v. State, 121 Nev. __, __, 121 Nev. 759, 121 P.3d 592, 599 (2005)).

Here, Ramona Slattery testified at trial and. before her testimony, the district court held a hearing in which Ms. Slattery was questioned about what she would testify to at trial about her conversations with her daughter M.S. 20 AA 3280. Ms. Slattery was admonished by the State that she was not to mention any incidents beyond what had been discussed at the evidentiary hearing. 20 AA 3280-81. At trial, however, Ms. Slattery testified about incidents she had been admonished not to discuss:

> MS. KOLLINS: Did [M.S.] initiate a conversation with you?
>
> THE WITNESS: Yes.
>
> MS. KOLLINS: And how did that take place?
>
> THE WITNESS: She said, 'Mommy, I want to talk to you.' And I said, 'Okay, Buddy.' And I went upstairs to her room and left the door open. And she said, 'I remember now that Mr. Cameron used to put his hands down my pants close to my peeps and watch me bathe. And then he

> wanted me to sleep in bed with him naked. And he used to make me put lotion down on my peeps and watch me.'

20 AA 3276-77.

Defense counsel objected to the mention of the "peeps" incident. 20 AA 3277, 3282. The statement had not been solicited by the prosecution, because the question had asked only how the conversation took place, not for the details of an unrelated incident. 20 AA 3284. In fact, the State was not aware of this particular incident until Ms. Slattery testified to it at trial. 20 AA 3301. Following a brief bench conference, the comments were stricken from the record. 20 AA 3282. The district court then asked Appellant which remedy he felt would cure the error. 21 AA 3330. The district court suggested an admonishment, but Appellant felt that cross-examination would be a better remedy:

> MR. MANN: Yes, Your Honor, in going through the analysis of what would be best for my client –
>
> THE COURT: Sure.
>
> MR. MANN: – I believe that cross-examination is really the only real cure for my client, regarding this issue.

21 AA 3330. When questioning resumed, Appellant cross-examined Ms. Slattery to cure the error.

In the context of Ms. Slattery's testimony, which spanned two days and approximately 22 pages and laid out Appellant's sexual abuse of her daughter, one brief mention of an additional incident – cured when Appellant cross-examined the

witness regarding her statements – was not sufficient to irretrievably bias the jury. Moreover, the district court did not act arbitrarily or capriciously in denying Appellant's motion for mistrial. Rather, the court carefully considered the arguments and testimony. 20 AA 3283-3302 (detailing the parties' argument for and against mistrial). As such, the district court's determination should not be disturbed on appeal. Parker, 109 Nev. at 388-89, 849 P.2d at 1066.[15]

For these reasons, the district court did not abuse its discretion regarding these alleged bad acts. Therefore, this claim should be denied.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION ADMITTING STATEMENTS UNDER NRS 51.385.

[15] Appellant also challenges a statement in the State's closing argument and includes it here. Appellant argues that the State's closing argument was improper because of the underlined comment by the State: "In order for you to find this defendant guilty, you have – not guilty, you have to find that lightning struck four times. Because you have to disbelieve [A.P.], oh, no, not just [A.P.], you have to disbelieve [Z.F.]. Oh, wait, you don't' have to just disbelieve [A.P] and [Z.F.], you have to disbelieve [M.S.]. Oh, to find him not guilty, not only do you have to disbelieve [A.P], [Z.F.], [M.S.], but now you have to disbelieve [M.S-B.] as well. You have to disbelieve four victims who took that stand over there.[A.P.] was on the stand for almost seven hours. What else do you need? Do you need a fifth victim? A sixth victim? How about a even dozen?"23 AA 4020. Appellant contends that this argument is improper because the State implied that there were other victims out there. However, a plain reading of the statement shows that the State implied that there were not other victims by suggesting that four victims should be enough to convict Appellant. Appellant's argument relies entirely on a tortured interpretation of a phrase that was proper argument. When taken in context, it is clear that the State was presenting argument on the credibility of witnesses, not suggesting that there were more victims.

Appellant claims the district court abused its discretion in admitting Z.F., M.S., and M.S.-B.'s statements through other witnesses. For some of these witnesses, the issue was preserved and should be reviewed for an abuse of discretion. For other witnesses, however, Appellant did not object and the issue will only be reviewed for plain error.

Under NRS 51.385(1), a statement made by a child under the age of 10 describing any sexual conduct performed is admissible in a criminal proceeding if:

> (a) the court finds that the statement provides sufficient circumstantial guarantees of trustworthiness; and
> (b) the child testifies at the proceeding or is unavailable to testify. In determining trustworthiness, a court shall consider whether:
>
> i) statement was spontaneous,
> ii) child was subjected to repeated questioning,
> iii) the child had a motive to fabricate,
> iv) the child used terminology unexpected of a child of similar age;
> v) the child was in a stable mental health.[16]

Here, the challenged statements were made by children under ten and described sexual conduct.[17] Moreover, the court conducted evidentiary hearings

[16] For this claim Appellant relies on Jefferson v. Nevada, No. 62120, 2014 Nev. Unpub. LEXIS 1222 (Jul. 29, 2014), an unpublished opinion from 2014. Such reliance is improper. Under NRAP 36(c)(3), unpublished orders issued before January 1, 2016 may not be regarded as precedent or cited as legal authority. Id.

[17] Z.F. was nine (9) years old at the time of her disclosure; M.S. was eight (8) at the time she disclosed to Faiza Ebrahim, and M.S.B. was eight (8) when she disclosed to her mother, Cheryl Barbian.

outside the presence of the jury and, after considering the testimony from the hearing and the factors in NRS 51.385, the court found the statements to be trustworthy, as detailed infra. The victims in the case testified and were subject to cross-examination. Therefore, the district court did not err or abuse its discretion in admitting the victims' statements.

A. Plain Error

Appellant failed to object to (and actually submitted) the NRS 51.385 testimonies of Faiza Ebrahim, Ramona Slattery, and Martha Mendoza. 19 AA 2999-20 AA 3255; 21 AA 3356.

When an issue is not preserved for appellate review, this Court has discretion to review for plain error. "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights." Rimer, 351 P.3d at 716 (citation omitted); Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000).

Reversal under plain error requires that an appellant show that a substantial right was prejudiced. Id. "When an appellant fails to raise an issue below and the

asserted error is neither plain nor constitutional in magnitude, this Court will not consider it on appeal." Walch v. State, 112 Nev. 25, 34, 909 P.2d 1184, 1189 (1996). This Court should therefore review the district court's admission of Faiza Ebrahim, Ramona Slattery, and Martha Mendoza's testimonies for plain error, as Appellant failed to object to the admission of the hearsay testimony.[18]

Here, there is no plain error as to these three witnesses. They all testified after the court held an evidentiary hearing and considered the factors required in NRS 51.385, before finding that these statements were trustworthy and, therefore, admissible. 19 AA 3001; 20 AA 3241-56; 21 AA 3356. Ms. Ebrahim[19] is a forensic interviewer who interviewed M.S. and testified about statements M.S. made during a forensic interview; Ramona Slattery (M.S.'s mother) testified about her daughter's statements on two different days. Martha Mendoza, a forensic interviewer, testified about statements made to her by M.S-B. There was no plain error in admitting any of this evidence because the district court held an evidentiary hearing on the

[18] Even if reviewed under an abuse of discretion standard, the court did not abuse its discretion by admitting the testimony under the NRS 51.385, because an evidentiary hearing was held and the court determined the statements were trustworthy and reliable.

[19] Contrary to Appellant's claim, Faiza Ebrahim is not M.S.'s mother, but rather was a forensic interviewer at Southern Nevada Children's Assessment Center. 19 AA 3003, 3004-05. She conducted a taped forensic interview with M.S. on January 14, 2011. 19 AA 2988. It was this taped forensic interview that contained the alleged hearsay statements introduced during Ms. Ebrahim's testimony.

testimony before it was admitted and considered all the factors required in NRS 51.385 in finding that these statements were trustworthy and, therefore, admissible. As such, there was no plain error and this claim fails.

B. Abuse of Discretion

District courts are vested with considerable discretion when determining the admissibility of evidence. Castillo v. State, 114 Nev. 271, 956 P .2d 103, 107 (1998). The district court's determination is given great deference and will not be reversed absent manifest error. Nolan v. State, 122 Nev. 363, 132 P.3d 564 (2006). When considering the admission of evidence, "it is within the district court's sound discretion to admit or exclude evidence." Means v. State, 120 Nev. 1001, 1008, 103 P.3d 25, 29 (2004).

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). Such an abuse only "occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law and reason." Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005). It is Appellant's burden to show the district court abused its discretion. Weber v. State, 121 Nev. 554, 575, 119 P.3d 107, 121 (2005); Floyd v. State, 118 Nev. 156, 164, 42 P.3d 249, 255 (2002).

As an initial matter, regarding Officer Sink, Appellant's objection now is disingenuous. Officer Sink was the officer who responded to "a radio call of abuse

and sexual abuse of a student . . . called in by a fourth grade teacher." 10 AA 896. Before the district court ruled on the admission of these statements, the State withdrew its proffer of Officer Sink. 10 AA 907. After the State withdrew Officer Sink, defense counsel requested that the State call him as a witness so that counsel could question him. Id. at 908. Appellant cannot now object to Officer Sink testifying after requesting he do so.

Moreover, there was no abuse of discretion as to the remaining witnesses because, as discussed supra, the court held extensive evidentiary hearings in considering the admission of these statements and found each statement trustworthy and admissible considering the factors in NRS 51.385. 16 AA 2391-93, 10 AA 862-80, 886-88, 19 AA 3105. Amanda Rand is a school teacher and a mandatory reporter. When Ms. Rand spoke to Z.F., she was inquiring about physical abuse by Z.F.'s mother and Z.F. also disclosed the sexual abuse by Appellant. There was no pending investigation into Appellant, and Ms. Rand was not questioning Z.F. regarding Appellant.[20] Detective VanGordon conducted a forensic interview of Z.F. Cheryl

[20] Defense counsel objected to allowing Ms. Rand to testify as to the sexual abuse without testifying about the physical abuse. Counsel stated that this "cause[] problems with the Court's previous ruling" limiting testimony pertaining to the physical abuse, as "it would be prejudicial. . .to not get the whole story in." 16 AA 2387, 2388. As the district court had previously ruled on the issue, limiting evidence pertaining to the physical abuse, see supra, this argument is without merit.

Barbian (M.S-B.'s mother) testified about her daughter's statements. Further, as to Ms. Barbian there was no prejudice as Appellant was acquitted of all charges relating to M.S-B.[21]

For these reasons, the court did not abuse its discretion in complying with NRS 51.385 and admitting these statements. Therefore, this claim fails.[22]

IV. APPELLANT HAD NOTICE OF COUNTS 1 AND 2.

Appellant contends there was improper notice in the Information and a lack of specificity as to Counts 1 and its alternative Count 2 because the State included three separate vaginal sexual assaults in Count 1.[23] AOB at 47-48. This was

[21] Appellant's entire argument seems to be, "although the district court found the statement trustworthy, the jury must not have." AOB at 45. This misstates the standard required for a Court to rule hearsay evidence admissible under NRS 51.385, and conflates it with the standard required for conviction by a jury.

[22] Appellant also alleges that the victims' statements to forensic interviewers were for the purpose of criminal investigation and were not spontaneous and thus constituted testimonial hearsay in violation of Crawford v. Washington, 541, U.S. 36, 124 S. Ct. 1354 (2004) and Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006). AOB at 46. The flaw in Appellant's reasoning is that NRS 51.385 is a constitutionally valid vehicle for the admission of a child-victim's testimonial hearsay if the child testifies and is subject to cross-examination. Pantano v. State, 122 Nev. 782, 789-90, 138 P.3d 477, 482-83 (2006) (cert denied, 549 U.S. 1126, 127 S. Ct. 957 (2007)). Here, all three victims whose statements were used testified at trial and were subject to cross-examination. Moreover, the court held extensive evidentiary hearings and, based on the testimony, found that these statements were spontaneous. Therefore, there was no issue under Crawford.

[23] As Count 2 is the alternative to Count 1, and is addressed infra in Section V, Respondent will only refer to Count 1 in this section of the argument.

extensively litigated pre-trial, and again after the State's opening statement. 4 AA 277-99, 312-30, 340-52; 13 AA 1710-15. The Court held that the State could plead a time-frame, and that the Information "sufficiently describe[d] the essential elements prescribed by Nevada law and indicates the means in which the defendant committed the acts of sexual assault and lewdness." 9 AA 855.

NRS 173.075 provides that a charging document must be a "plain, concise and definite written statement of the essential facts constituting the offense charged." The information "must [also] state for each count the official or customary citation of the statute, rule . . . which the defendant is alleged therein to have violated."

Here, the Information charged Appellant in Count 1:

> Defendant, on or between January, 2006 and January, 2011 . . .
> COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE
> did, then and there, willfully, unlawfully, and feloniously sexually assault and subject [A.P.], a child under fourteen years of age, to sexual penetration, to-wit: sexual intercourse, by said Defendant inserting his penis into the genital opening of the said [A.P.], against her will . . . .

I AA 73.

In Garnick v. First Judicial District Court, 81 Nev. 531, 407 P.2d 163 (1965), the defendant argued that the charging document was fatally ambiguous because it charged her with the issuance of a check against insufficient funds without specifying whether she drew the check for herself or as an officer of a corporation

and whose account had insufficient funds. This Court found that the Information was valid because it contained all the necessary elements and it is not required that the evidence proving the charge be stated in the charging document. Id. at 536.

In Simpson v. Eighth Judicial Dist. Court, 88 Nev. 654, 503 P.2d 1225 (1972) the defendant challenged the sufficiency of the charging document's murder count. This Court found that the murder count did not provide the means by which the murder was accomplished in violation of NRS 173.075(2). Id. at 655. The Court stated that the indictment "would allow the prosecutor absolute freedom to change theories at will" and "it affords no notice at all of what petitioner may ultimately be required to meet." Id. at 661.

Here, the charging document described the means by which Appellant committed the offenses. Moreover, as in Garnick, it contained the necessary elements of the crimes sufficient to detail how Appellant sexually assaulted A.P., to wit, by Appellant inserting his penis into A.P.'s genital opening. As such, Appellant had sufficient notice of the charges against him.

Further, Appellant's claim that he had no notice of any penile penetration of A.P. prior to trial (AOB at 47) is patently false.[24] Appellant had access to both A.P.'s

[24] Appellant alleges "defense counsel continuously complained that A.P. never testified to penile vaginal penetration during the preliminary hearing." AOB at 47. Again, Appellant quotes out of context. First, defense counsel claimed that the only mention of penile penetration at the preliminary hearing was for the 'fish tank incident.' 13 AA 1700. Then, and only as to the 'pizza incident,' defense counsel

voluntary statement and a transcript of the preliminary hearing, in which she reported and/or testified to all three instances of sexual assault the State mentioned in closing. In fact, in his February 2015 Motion to Dismiss, Appellant referred to all three penile penetrations, either from A.P.'s voluntary statement, or from the preliminary hearing. 4 AA 283-85. Appellant was clearly on notice of the penetrative incidents the State was charging. Moreover, the State could have charged Appellant with three counts of sexual assault through penile penetration, yet only charged one count. Appellant did not therefore suffer prejudice from the State arguing, and the jury agreeing that, at some point between January 2006 and January 2011, A.P. was subjected to penile penetration by Appellant at least once.[25]

Finally, Appellant alleges that under Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1980) "the State should, whenever possible, allege the exact date on which it believes a crime was committed, or as closely thereto as possible. Cunningham held that "unless time is an essential element of the offense charged, *there is no absolute requirement that the state allege the exact date*, and the state

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claimed "never once was there any sort of allegation. . .that there was penile to vagina penetration." 13 AA 1704.

[25] Appellant's argument that the jury was not unanimous regarding these incidents is without merit. AOB at 48, 50. The jury unanimously agreed that, at some point between 2006 and 2011, A.P. was subjected to penile penetration by Appellant. A.P. testified with particularity to three separate incidents within that timeframe. See LaPierre v. State, 836 P.2d 56, 58 (1992) (to uphold a conviction, a child victim should testify with some particularity as to the act charged).

may instead give the approximate date on which it believes the crime occurred." 100 Nev. at 400, 683 P.2d at 502 (emphasis added); Martinez v. State, 77 Nev. 184, 189, 360 P.2d 836, 838 (1961) (time is not an essential element of the offense of rape).

As here, the defendant in Cunningham was charged with sexual assault and lewdness with a minor, with the act having occurred "on or about the calendar year of 1981. . .[or] on or about the calendar years of 1981 and 1982." 100 Nev. at 400, 683 P.2d at 502. This Court explained that in cases involving child victims, "the child is often unable to indicate to the state with any precision the exact time of the commission of the offense. This problem is compounded in cases involving sexual abuse, since there are usually no witnesses to the offense other than the child." Id. Therefore, Appellant was on sufficient notice as to the acts charged in Count 1.

Appellant had sufficient notice in the Information as to Count 1, and sufficient notice as to the specific instances of penile penetration that the State would argue at trial.

V. APPELLANT'S SENTENCE FOR COUNTS TWO AND SIX SHOULD BE VACATED.

Appellant was convicted and sentenced to Counts 1, 2, 5, 6, 8, 10, 11, 12, 13, 15, 16, 17, and 18. The State, at closing, argued Count 2 (Lewdness with a Child under the Age of 14) in the alternative to Count 1 (Sexual Assault with a Minor under Fourteen Years of Age), and Count 6 (Lewdness with a Child under the Age of 14) in the alternative to Count 5 (Sexual Assault with a Minor under Fourteen

Years of Age). 23 AA 3934, 3940. At sentencing, Appellant was sentenced on all these counts, including both Counts 1 and 2, and 5 and 6. Both Counts 2 and 6 were sentenced to run concurrent to Count 1. As the State argued these counts in the alternative, Appellant should not have been adjudicated of or sentenced on Counts 2 and 6, and Appellant's sentences for Counts 2 and 6 should be vacated. The sentences on Counts 2 and 6 were concurrent to those on Counts 1, and thus added no additional time to Appellant's sentence. Accordingly, vacating counts 2 and 6 will not change Appellant's ultimate sentence.

VI. THE DISTRICT COURT DID NOT ERR REGARDING THE CIVIL SUIT AND SETTLEMENT.

When an appellant fails to raise an issue below and the asserted error is neither plain nor constitutional in magnitude, this Court need not consider it on appeal. Walch, 112 Nev. at 34, 909 P.2d at 1189. To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record. Patterson, 111 Nev. at 1530, 907 P.2d at 987. Garner, 116 Nev. at 783, 6 P.3d at 1022.

Here, Appellant's recounting of the admission of the civil settlement as evidence does not accurately reflect events at trial. Although Appellant implies that it was the State who initially sought admission of the evidence of the civil settlement, the State only brought it up in response to Appellant's argument that the civil settlement was evidence that State witnesses were biased:

> MS. RINETTI: One of the issues being bias, one of the pieces of evidence that has been marked, not admitted, but it has been marked by the defense is the order regarding the civil suit in this case.
>
> All the victims in this case sued the day care that was Kids R Kids where the defendant was employed at.
>
> THE COURT: In a civil action?
>
> MS. RINETTI: In a civil action. As settlement was reached in this case. The State understands its obligation that it cannot that the civil suit somehow infers any type of liability of culpability on the defendant's part merely because they settled that civil suit.
>
> However, the defense may use it as a means for bias. And that's why I didn't file a motion in limine because it is relevant to bias if he wants to go down that road. It's a double-edged sword for sure.
>
> THE COURT: I understand that.
>
> MS. RINETTI: For the defense, I just need clarification just to figure out if it's going to be used, because I do want to address it in opening statement if it's going to Cameron [sic] in because I don't want it to be a surprise, like the State was hiding the fact that these victims had a civil suit.
>
> If we're going to be introducing it, I want to own it now in opening statements rather than waiting for the defense to bring it up, which puts us in an unfair position in front of the jury, as though we were hiding the fact that these four victims filed a civil suit.

13 AA 1586-87. In fact, defense counsel explicitly said, before opening statements, "I will definitely ask the parties about hey, you guys filed a civil suit about this." 13 AA 1588.

Moreover, Appellant did not object when the district court ruled that the evidence would be admissible, nor did he object when the district court ruled that the State would be allowed to reference the civil suit during opening statements. 13 AA 1586-92. Appellant also did not object when the State did so nor when April was questioned about the settlement amount. 13 AA 1690-91, 15 AA 2303-04. Because Appellant initially sought to admit the evidence of the civil suit and did not object to either the district court's determination of its admissibility or the State's questions regarding the settlement, this Court should review the decision to admit evidence of the civil settlement for plain error.

Generally, the permissible extent of cross-examination is reserved to the sound discretion of the trial court. Bushnell v. State, 95 Nev. 570, 599 P.2d 1038 (1979). However, where the purpose of questioning is to expose bias, an examiner must be permitted to elicit any facts which might color a witness' testimony. Azbill v. State, 88 Nev. 240, 246, 495 P.2d 1064, 1068 (1972); see also NRS 50.075. Great latitude is given an accused during cross-examination as to a witness's bias. Eckert v. State, 96 Nev. 96, 101, 605 P.2d 617, 620 (1980).

Following argument by the parties, the district court ruled that the evidence of a civil suit and settlement could be introduced to show bias on the part of the witnesses. The part about "opening the door" referred to anything beyond the

establishment of bias. As the district court noted after ruling that the evidence could be admitted to show bias:

> THE COURT: I think that would address what he potentially is going to do. If he opens the door **more**, then you can, you know, answer that and then you can do that at closing.

13 AA 1591 (emphasis added).

Appellant sought admission of the civil suit to show bias of the victims. For the same reason that evidence of the civil suit was relevant to show bias, evidence of the settlement amount was also relevant. Contrary to Appellant's claim that he was prejudiced by disclosure of the settlement amount, Appellant's theory of the case regarding A.P. and Z.F. focused in part on the financial difficulties of their parents, and the resulting dispute with Appellant after he provided financial help. Indeed, although Appellant claims now that he did not mention the civil suit or settlement until multiple witnesses had testified, he raised the victims' financial difficulties repeatedly during opening statements:

> MR. MANN: Now, what is this case all about? This case is about revenge. It's about money. It is about manipulation, and it is about character.
> * * *
> We have [A.P.] and [Z.F.], who are sisters, and I indicated that I believe the evidence will show that they have a motivation to lie.
> * * *
> So April and Kay [A.P. and Z.F.'s parents], they were struggling financially. And in October of 2009 could not pay rent.

> * * *
> And Cameron and Jennifer [Appellant and his wife] discovered that the title loan that they got on the car that was so generous of them to give was not being paid by their long time family friend Kay.

13 AA 1722, 1726, 1729, 1730. Although Appellant claims that the State was the first to bring up the amount of the settlement, Appellant's theory of the case regarding the allegations made by A.P. and Z.F. was clearly that their parents were motivated to hurt Appellant because of their financial difficulties and the dispute that arose between them. Appellant argued at trial that A.P. and Z.F.'s parents were motivated by a potential financial settlement that would help them and cause him hurt, and thus had reason to fabricate charges against him.

Appellant cites United States v. Konovsky, 202 F.2d 721 (7th Cir. 1953) and United States v. Satuloff Bros., Inc., 79 F.2d 846 (2nd Cir. 1935) to support his argument that the district court committed plain error when it allowed admission of evidence related to the civil suit; however, these cases are inapposite. In Konovsky, for example, the Seventh Circuit held that "adjudication of a fact in a civil proceedings, in view of the difference of degree of proof in criminal and civil cases, can afford no basis for the doctrine of res judicata, when offered in a criminal cause[.]" Konovsky, 202 F.2d at 726-727. In contrast, the civil settlement in this case was not introduced for the purpose of barring re-litigation of a claim via res judicata. Rather, the civil suit was admitted to show bias.

Here, Appellant sought to introduce evidence of the civil suit and settlement not as proof of a fact that was adjudicated in the civil suit, but to show bias and financial motive for making false allegations on the part of State witnesses. Thus, evidence of the civil suit and the settlement, sought by the defense to show bias on the part of the State's witnesses, was admitted for a proper purpose. Appellant did not object to introduction of the amount of the settlement because he wanted the amount introduced at trial, as it supported his theory of the case that financial motivation underlay the allegations by A.P and Z.F. Appellant cannot now claim, then, that the district court committed plain error by allowing introduction of that same testimony that supported Appellant's theory of the case, particularly when the district court weighed the probative value and prejudicial effect of the evidence before allowing it.

For these reasons, it was not plain error to allow admission of this evidence showing bias of State witnesses. Therefore, this claim should be denied.

VII. THE DISTRICT COURT PRESERVED A RECORD FOR APPELLATE REVIEW.

A capital defendant has a right to have proceedings reported and transcribed. Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003). Not every sidebar conference needs to be recorded, but court and counsel should make a record of such conferences during breaks in the proceedings. Id. In 2014, this right to have proceedings reported and transcribed was extended to defendants in non-capital

criminal proceedings. Preciado v. State, 130 Nev. 40, 318 P.3d 176 (2014). However, Preciado declined to grant relief because the defendant did not demonstrate that the failure to make a record of unrecorded bench conferences prejudiced his appeal or that missing portions of the record were significant enough to preclude meaningful review. Id.

"Failure to make a record of an unrecorded sidebar warrants reversal only if the appellant shows that the record's missing portions are so significant that their absence precludes the court from conducting a meaningful review of the alleged errors that the appellant identified and the prejudicial effect of any error." Id. at 178 (citation omitted) (emphasis added).

Here, the district court and the parties knew the JAVS system did not record everything and, therefore, a record needed to be made of bench conferences:

> MR. MANN: When we had originally started this case, I asked you up at the bench about bench conferences –
>
> THE COURT: Bench conferences, right.
>
> MR. MANN: – and having them recorded.
>
> It was my understanding, at the time, you said that you didn't have the ability to record the conferences at the bench.
>
> THE COURT: No, we do. We have JAVS running. The problem is it's so – it's hard to get anything from it because with the white noise on.
>
> MR. MANN: Okay.

> THE COURT: So I tried to do that. It just didn't work. So what I usually do is I then try to say, okay, from the bench conferences, if you wanted a record of it, then at our first break, I'll go ahead and let you record it.
>
> MR. MANN: Okay.
>
> THE COURT: That's what I said.

18 AA 2665-66. This exchange occurred during jury selection. Thus, Appellant was aware before the jury was empaneled that a record should be made of bench conferences. Based on this, a record was made and, for those instances where a record was not made, the content of the bench conference is apparent from context and appellate review is not precluded.

Moreover, Appellant's examples of "confusion" regarding such conferences all involve equivocal statements made by defense counsel following a clear statement from the district court.[26] This is not the standard by which this Court determines whether an adequate record was made. Respondent has reviewed the record as to these bench conferences cited by Appellant. AOB at 55 n.11. These were all either objections apparent from the context and/or memorialized outside the presence of the jury, reviewing juror questions, scheduling witnesses, or voir dire discussion about juror organization.

[26] Appellant yet again provided incorrect citations to the record. AOB at 59. 18 AA 2852-55 does not refer to any exchange between the court and defense counsel.

The purpose of recording bench conferences at the first available opportunity is not to create a verbatim recounting of what each party said; the rule in Preciado exists to ensure that there is an adequate record so that this Court may make an informed ruling. For this reason, there is no error under Preciado where, as here, the record is sufficient to allow this Court to conduct a review. Therefore, this claim fails.

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO COMPEL PSYCHOLOGICAL EVALUATIONS OF THE FOUR CHILDREN VICTIMS.

Appellant claims that he was entitled to compel psychological examinations of the four child victims and the court abused its discretion in denying his motion. As an initial matter, Appellant has failed to provide a complete record for this Court's review because he has not included transcripts of the hearing on this motion. Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009).

Appellant has the "responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Under NRAP 30(d), the required appendix should include "[c]opies of relevant and necessary exhibits." Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quotation omitted). Appellant failed to include the transcripts where the

district court heard argument and set out its reasoning. As a result, this Court is faced with an incomplete record. This failure is fatal. "When evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision." M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987).

Moreover, the decision to compel an invasive psychological examination of a victim is within the sound discretion of the district court and will not be set aside absent an abuse of discretion. Koerschner v. State, 116 Nev. 1111, 1115, 13 P.3d 451, 454 (2000). In exercising that discretion, a district court must base its decision on the facts and circumstances of each case. Id. In Abbott, the Nevada Supreme Court restored its prior holding in Koerschner, regarding psychological interviews of child victims in sexual assault cases. Abbott, 122 Nev. at 727, 138 P.3d at 470. Under Koerschner, a defendant seeking to compel such an intrusive psychological evaluation of a child victim must demonstrate a "compelling need" for the exam which depends on: (1) whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry; (2) whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim; and (3) whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. Koerschner, 116 Nev. at 1116-17, 13 P.3d at 455. None of these factors were satisfied here.

First, the State had not hired such an expert. A witness only acts as an expert for this factor "when he does more than merely relate the facts and instead analyzes the facts and/or states whether there was evidence that the victim was coached or biased against the defendant." Abbott, 122 Nev. at 728, 138 P.3d at 471. Appellant baldly asserts that "the children met with psychologists or counselors, and there was reason to believe the state [sic] would (and did) use testimony of experts at trial." AOB at 63. As the only support for this claim, Appellant cites a forensic interviewer who testified that she conducted a forensic interview "to get the child to just tell us their story in their own words. We're not trying to elicit a disclosure. We're just trying to get as much information – truthful information from them as possible." 19 AA 3009-10. This does not satisfy the first Koerschner factor because the interviewer only obtained and relayed facts. The State did not hire an expert for the purpose of examining the four victims. Therefore, the State did not benefit from an expert and Appellant did not meet his burden for the first factor.

Second, although Appellant attempts to meet this factor by asserting that the victims' testimony was "highly improbable," that is not the analysis to be used. AOB at 64. Rather, "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; Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979). This Court has held that it is improper for a psychologist to testify as to

the veracity of a victim. Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 826 (1992); Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987). This is precisely what Appellant concedes he wanted his expert to do when he states that he was entitled to an independent psychological examination because the victims' stories were improbable and their "veracity was in question." AOB at 64. Any testimony that the expert could offer because of the lack of corroboration of the victim's testimony would go the veracity of the victim's testimony, and would consequently be inadmissible pursuant to Lickey. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) ("This court has repeatedly stated that the uncorroborated testimony of a victim, without more is sufficient to uphold a rape conviction."). Rather than satisfying the second prong of Koerschner by attempting to use the lack of corroborating evidence to challenge the victims' veracity, Appellant sought to supplant the role of the jury by relieving them of their duty to weigh the credibility of witnesses and evidence.

Third, there was no reason for believing that the victims' mental or emotional state may have affected their veracity. Koerschner, 116 Nev. at 1116-17, 13 P.3d at 455. There was no evidence that any of the victims suffered from any mental or emotional condition which would affect their ability to be truthful. Thus, the third

factor establishes that there was no "compelling need" for a psychological examination of the victims.[27]

Finally, the State notes that the clear intent of the legislature to protect victims from being forced to undergo psychological examinations and testing, demonstrated by the enactment of NRS 50.700, should also be considered in assessing this issue. The statute applies to court proceedings commenced on or after October 1, 2015, and reads "[i]n any criminal or juvenile delinquency action relating to the commission of a sexual offense, a court may not order the victim of or a witness to the sexual offense to take or submit to a psychological or psychiatric examination." NRS 50.700(1). Although the court did not consider this statute, the legislature's intent supports the district court's decision.

Appellant failed to satisfy the three elements of Koerschner, all of which must be established before a psychological examination of a child victim of sexual abuse

[27] Appellant's argument focuses on inconsistent statements made by the various witnesses. Appellant attempts to conflate the jury's finding that he was not guilty of the counts related to abuse of M.S.-B with the suggestion that the other three victims suffered psychological problems. AOB 65-66. He fails, however, to explain what one has to do with the other. AOB 65-66. However, this is not sufficient to satisfy Koerschner. Koerschner does not require showing that the victim made inconsistent statements, but rather that the victim suffered from a mental or emotional state that affected veracity. The fact that a witness may or may not have provided some inconsistent statements does not mean that the witness suffers from any mental or emotional condition. If the threshold was whether a witness made any inconsistent statements, then almost every witness in every criminal case would be subjected to an independent psychological examination.

is compelled. Accordingly, the district court did not abuse its discretion in denying the motion and this claim fails.

IX. THE COURT DID NOT ABUSE ITS DISCRETION REGARDING THE CROSS-EXAMINATION OF APPELLANT'S EXPERT.

Appellant claims the lower court abused its discretion in allowing the State to cross-examine Appellant's expert (Dr. O'Donohue) about whether he had met with the victims.[28]

Pre-trial, the court ruled the expert could testify as to the suggestibility of witnesses, but that the question of the credibility of the child witnesses in this case was to be left to the jury. 9 AA 821. The court held an evidentiary hearing on November 30, 2015, at which it found that comments regarding the victims allegedly making false statements would not be appropriate. 26 AA 4553-54.[29]

Appellant alleges the State's question whether Dr. O'Donohue had met the four victims was improper because the jury would wonder why the "lazy doctor" had not done so. AOB at 69. During direct, Dr. O'Donohue testified about the

[28] Part of Appellant's argument reiterates his complaint that the court denied his Motion for an Independent Psychological Evaluation addressed supra.

[29] Appellant again failed to include the transcript of the district court's consideration of this issue. "When evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision." M&R Investment Company, Inc., 103 Nev. at 718, 748 P.2d at 493.

suggestibility of child victims, and defense counsel asked "[i]s it possible a child can feel the effects of PTSD from a false memory?" 19 AA 2930-43, 2944.[30] This was in direct contravention of the court's decision limiting the expert's testimony. 26 AA 4553-54. Moreover, defense counsel's examination was aimed at undermining the victims' credibility and suggesting to the jury that the victims had been "prompted," "tainted," or presented "false memor[ies]." 19 AA 2892-99, 2910-93, 2912. The State's questions counter this by trying to show this testimony was theoretical.[31]

The court did not abuse its discretion regarding the cross-examination of Dr. O'Donohue. As such, this claim should be denied.

X. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO SEVER.

A district court's decision to sever is reviewed for abuse of discretion. "The decision to sever is within the discretion of the district court, and an appellant has the 'heavy burden' of showing that the court abused its discretion." Floyd, 118 Nev. at 164, 42 P.3d at 255; Weber, 121 Nev. at 570, 119 P.3d at 119

[30] Appellant again provides incorrect cites to the record.

[31] Appellant's argument regarding the memorialized bench conference is nonsensical. AOB at 67-69. The record is clear. The court expressed no confusion, but explained it had overruled defense's objection since the State's questions were proper cross-examination as to the foundation of his testimony and opinion of suggestibility. 19 AA 2983.

This Court reviews the exercise of this discretion by determining first whether a proper basis for the joinder existed and, if so, whether unfair prejudice nonetheless mandated separate trials. Weber, 121 Nev. at 571, 119 P.3d at 119. The Court bases its review on the facts as they appeared at the time of the district court's decision. Rimer, 351 P.3d at 707-708. If the Court concludes that the charges were improperly joined, it reviews for harmless error and reverses only if "the error had a substantial and injurious effect or influence in determining the jury's verdict." Id. (citation omitted).

Appellant once again failed to include the transcript of the district court's decision in his Appendix. Fields, 125 Nev. 785, 220 P.3d 709; Jacobs, 91 Nev. at 158, 532 P.2d at 1036; Thomas, 120 Nev. at 43 & n.4, 83 P.3d at 822 & n.4. "When evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision." M&R Investment Company, Inc., 103 Nev. at 718, 748 P.2d at 493. Accordingly, in reviewing Appellant's claims, this Court should assume that the record supports the district court's decision.

Even assuming arguendo that this claim is considered, it fails. Severance is not required where the charges against a defendant are based on two or more acts connected together as part of a common scheme or plan. NRS 173.115 provides that:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
> 1. Based on the same act or transaction; or
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(Emphasis added). Two crimes are "connected together" under NRS 173.115(2) where evidence of either crime would be admissible in a separate trial regarding the other crime. Weber, 121 Nev. at 573, 119 P.3d at 120.

"Nothing in this section be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense." NRS 48.045(3).

In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), this Court considered joinder of child abuse and murder. The Court held that, "if. . .evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Id. at 619, 798 P.2d at 563 (quotation omitted).

In Griego v. State, 111 Nev. 444, 893 P.2d 995 (1995), this Court permitted the joinder of numerous counts of Sexual Assault with a Minor and Lewdness with a Minor involving three (3) separate victims over a period of time. The Court approved joinder under "common scheme and plan" and the rule of "cross-admissibility" under 48.045(2). The Court reasoned that the offenses all occurred

during the same time period, all of the victims were young boys and friends of the defendant's children, and all of the assaults occurred in the defendant's home.

Here, as in Griego, there was a common plan or scheme. The charges arose from a continuing course of conduct that began with Z.F. and A.P. beginning in 2006, continued with M.S-B. in 2007, and with M.S. in September 2008. All of the victims were accessible to Appellant based upon friendships with the victims and their families; and Appellant interacted with the victims at the daycare centers that all of the victims attended. All of the victims were between 5 and 8 years of age when Appellant began sexually abusing them, and Appellant gained access to the children because of his professional responsibility as the director of the daycare centers the victims attended. As such, the district court did not abuse its discretion in denying the motion to sever.

Moreover, the State would be prejudiced by severance. When deciding whether or not to sever counts, a court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from multiple time-consuming, expensive and duplicitous trials. Lisle v. State, 941 P.2d 459, 466 (1997). "[J]oinder is within the discretion of the trial court and its actions will not be reversed absent an abuse of discretion." Lovell v. State, 92 Nev. 128, 546 P.2d 1301 (1976).

Appellant claims he was unfairly prejudiced, as "it [was] highly likely that the

jury found Mr. Thomas guilty simply because he had been charged with numerous counts and therefore must be a bad person" citing Tabish and Murphy, 119 Nev. 293, 72 P.3d 584 (2003). However, this reliance is misplaced. In Tabish, both defendants were both convicted of first-degree murder, conspiracy to commit murder and/or robbery, and robbery of Ted Binion; and Tabish was additionally convicted of four additional counts pertaining to acts with Leo Casey ("the Casey Counts") a couple months earlier. This Court held that the district court improperly denied the motion to sever the Casey counts from the other counts, and that the error was not harmless, as money and greed were insufficient to show a common scheme or plan for crimes fifty days apart. 119 Nev. at 301-04, 72 P.3d at 589-91. This is nothing like the common plan or scheme in this case, as discussed supra. The jury found Appellant not guilty on all charges pertaining to M.S-B., demonstrating that it was able to consider each victim's testimony independently and did not convict Appellant without considering the facts.

Accordingly, the court did not abuse its discretion in denying Appellant's motion to sever. Therefore, the claim should be denied.

XI. THE DISTRICT COURT DID NOT ERR REGARDING JURY SELECTION.

Appellant argues that the district court erred when it did not grant an entirely new jury pool after a juror stated during voir dire that she was biased towards children.[32]

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. This "means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940 (1982).

"'Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.'" Morgan v. Illinois, 504 U.S. 719, 729, 112 S. Ct. 2222 (1992) (alteration omitted) (quotation omitted). Voir dire allows the court "'to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence.'" Id. at 730 (quotation omitted).

Here, one juror admitted during voir dire that she was biased because of her work as a kindergarten teacher:

> THE COURT: Can you wait in forming your opinion as to the guilt or innocence of the defendant until all the

[32] Appellant claims that the juror stated that "in her experience children do not lie." AOB at 76. However, Appellant did not cite directly to the disputed juror testimony and the State did not find such a statement by Juror #172 at any point. Appellant instead quoted defense counsel and the court paraphrasing statements that Juror #172 made during voir dire the next day. Upon information and belief, counsel and the district court misquoted this juror when Appellant moved to dismiss the entire panel.

> evidence is in and you consider the jury instructions about the law that I will give you?
>
> BADGE NO. 11-0172: I feel like opinions have kind of already formed for me.
>
> THE COURT: Okay. An opinion on guilt or innocence?
>
> BADGE NO. 11-0172: Yeah.
>
> THE COURT: Because you haven't heard any evidence, you haven't heard any facts about the case?
>
> BADGE NO. 11-0172: I know. It's the kids, the child. It's because it's kids, you know.
>
> THE COURT: Because of your – teacher as a kindergarten teacher, you're concerned that you're biased for children because you spend every day with them, correct?
>
> BADGE NO. 11-0172: Um-hum.
>
> THE COURT: Is that a yes?
>
> BADGE NO. 11-0172: Yes.
>
> THE COURT: And that's basically what you're speaking of?
>
> BADGE NO. 11-0172: Yes.

12 AA 1555-57.

This statement was not so prejudicial as to infect the entire venire. Juror #172 did not state that she believed, based on her expertise with children, that children never lie. Instead, she stated that she had formed an opinion on guilt because she was biased for children because spent every day with them.

Moreover, several potential jurors stated that they interacted with children and had personal experience of children lying. For example, Juror #124 described a lawsuit in which a child was induced to lie about being molested:

> Going back to your original question about kids don't lie, I have actually been – witnessed a circumstance where it – it could be just as easy to take a defendant who's being accused of doing something to a child and, you know, a child saying well, this person did this to me.
>
> I also believe that someone who has something against the defendant or has personal vendetta or a personal schedule could convince – could easily convince a child to lie on their behalf, which is part of the reason we're here. There could be a reason why he's been accused of this, falsely accused of this because someone convinced a 12 year old or 11 year old to lie for them because I want to get even. He's my ex-husband, I want – in a case that I know of personally, there was a lawsuit that would have – was that they were hoping for by getting this child to lie and say that they had been molested.

25 AA 4422-23. Another venire member stated that her younger sister made false allegations of abuse against their stepfather. The venire member knew the allegations were false because the stepfather was later cleared of wrongdoing by Child Protective Services:

> Yes. My sister's a troublemaker and she was doing some wrong things and my stepdad talked to her about it because he found out and addressed certain issues about it and my sister retaliated with the wrongful charge of sexual assault by my stepdad. So CPS got involved and they started the whole investigation, but evidence turned up from what my sister was doing and the charges were dropped.

25 AA 4342.

The record does not support Appellant's assertion that Juror #172 stated that "children don't lie." Even assuming arguendo that Juror #172 said this, it is absurd to suggest that one remark by a juror who was dismissed was so prejudicial that it would justify dismissing the entire venire, especially when many veniremen had personal experience with children themselves and several described examples of children lying. Moreover, Appellant has presented no evidence whatsoever that any member of the empaneled jury was not impartial.

Appellant also claims that the court erred in not striking Juror #151 for cause. A trial court has broad discretion in its rulings on challenges for cause. Wainwright v. Witt, 469 U.S. 412, 428-29, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985). A prospective juror may be removed "for any cause or favor which would prevent the juror from adjudicating the facts fairly." NRS 175.036(1); NRS 16.050(1)(f); Leonard, 117 Nev. at 65, 17 P.3d at 405.

In this case, Juror #151 initially stated that she thought Appellant was guilty. However, upon further questioning by the district court, she developed her answers, stating she could give Appellant fair consideration. The district court correctly determined that the juror was rehabilitated, and there was no basis to strike her for

cause.[33] Importantly, however, Juror #151 was not empaneled on the final jury. 18 AA 2875-76.

Nothing in Appellant's claim indicates that jurors on the panel did not consider the facts and appropriately apply the law. Appellant fails to show that the jury pool was "contaminated" by a statement during voir dire, particularly when he was given the opportunity to rehabilitate the venire; moreover, the juror he sought to dismiss for cause did not serve on the jury. Appellant fails to show prejudice. Thus, there was no error in jury selection.

XII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION REGARDING APPELLANT'S PROPOSED REASONABLE DOUBT INSTRUCTION.

Appellant claims the district court abused its discretion in not giving his proposed instruction:

> If the evidence is susceptible of two reasonable interpretations, one which points to the defendant's guilt and the other to his innocence, it is your duty to adopt the interpretation which points to the defendant's innocence and reject the other which points to his guilt.

[33] In contrast, another juror who gave answers similar to the initial answers given by Juror #151, was not so rehabilitated. That other juror maintained, over the course of questioning by the district court, that he believed Appellant was guilty by virtue of his arrest. The district court properly struck him for cause because he could not be impartial and was not rehabilitated during the district court's questioning.

23 AA 3750; Bails v. State, 92 Nev. 95, 96, 545 P.2d 1155, 1155-56 (1976). The court declined to give this instruction, stating that the reasonable doubt instruction required by NRS 175.211 was already in the jury instructions. 23 AA 3752-53

A district court has broad discretion to settle jury instructions, and this Court reviews the lower court's decision for abuse of discretion. "A defendant in a criminal case is entitled to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." E.g., Hooper v. State, 95 Nev. 924, 926, 604 P.2d 115, 116 (1979). There is no error if the court refuses to give an instruction when the law encompassed in the proposed instruction is substantially covered by other instructions given to the jury. Hooper, 95 Nev. at 926, 604 P.2d at 116; Ward v. State, 95 Nev. 431, 433, 596 P.2d 219, 220 (1979).

In Bails, this Court considered this very instruction and held that it is not error to refuse to give this proposed instruction if the jury is properly instructed regarding reasonable doubt. 92 Nev. at 97, 545 P.2d at 1156. "[I]n Nevada, the definition of reasonable doubt is specified by statute and, under NRS 175.211(2), no other jury instruction on reasonable doubt is permitted." Garcia v. State, 121 Nev. 327, 340, 113 P.3d 836, 844 (2005).

Here, the Court gave the instruction on reasonable doubt required by NRS 175.211. As such, it did not abuse its discretion in denying Appellant's proposed instruction. Accordingly, this claim fails.

XIII. THERE WAS NO CUMULATIVE ERROR.

The cumulative error doctrine applies where the Court finds multiple errors that, although harmless individually, cumulate to violate a defendant's constitutional right to a fair trial. Byford v. State, 116 Nev. 215, 241 (2000). By definition, a finding of cumulative error requires that there be more than one error in a given case. McConnell v. State, 125 Nev. 243, 259 (2009). When evaluating a claim of cumulative error, this Court considers "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (citation omitted). As discussed supra, Appellant has not asserted even one meritorious claim of error, much less multiple claims, and, as such, there is "nothing to cumulate." Id.[34]

CONCLUSION

Based on the foregoing, the State respectfully requests that the Judgment of Conviction be AFFIRMED.

[34] Appellant will likely claim that his sentence for Counts 2 and 6 is error. However, this is not a trial error and does not support the Valdez factors. As such, any alleged error in the sentencing structure would not change the analysis as to whether or not Appellant received a fair trial for purposes of cumulative error.

Dated this 13th day of November, 2017.

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief is proportionately spaced, has a typeface of 14 points and contains 17,191 words and 1,608 lines of text pursuant to accompanying Motion for Leave to File Respondent's Answering Brief in Excess of Type-Volume Limitations.
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 13th day of November, 2017.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 13, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

CAMERON THOMAS, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 71044

APPEAL FROM JUDGMENT OF CONVICTION (JURY TRIAL)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE KERRY EARLEY PRESIDING

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APPELLANT'S REPLY BRIEF

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ARGUMENT

I. MR. THOMAS WAS DENIED HIS FUNDAMENTAL RIGHT TO PRESENT A THEORY OF DEFENSE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Thomas was prohibited from presenting his theory of the case based upon the district court's abuse of discretion. In fact, Mr. Thomas' theory of the case was simply to let the truth unfold in front of the jury and argue that the truth proved the necessary bias to explain the non-spontaneous allegations by Z.F.

There is uncontradicted evidence that the following events took place surrounding Z.F.'s non-spontaneous statements to the school official. The authorities had become aware that April was committing acts of child abuse upon Z.F. Z.F. was called to the school official's office so that law enforcement could question her regarding April's child abuse. Upon information and belief, the child abuse was serious and it is uncontradicted that the child abuse was substantiated.[1]

During the investigation, Z.F. revealed the allegations. All of this

[1] The State opposed Mr. Thomas' Motion to Unseal the Records for this Court's Review. Mr. Thomas believed that this Court should be aware of the serious nature of the child abuse the authorities were investigating.

information is uncontradicted. Mr. Thomas intended to argue that Z.F. deflected attention away from her mother's potential criminal liability and offered authorities another direction. Z.F. deflected in order to spare her mother. **Maybe the State and the Court would not believe this is in fact Z.F.'s motive. This is not the point, this was the defendant's theory of defense.** To a person of average intelligence, the defense could make a compelling argument that this is the motivation for Z.F.'s accusations. More importantly, it is simply the truth that the investigation was occurring when Z.F. made the revelation.

The fact that April was abusing Z.F. was admissible because "extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy..." See, Lobato v. State, 120 Nev. 512, 96 P. 3d 765 (2004). See also, Nevada v. Jackson, 569 U.S. 505, 133 S. Ct. 1990, 186 L. Ed. 2d 62 (2013).

The State argues that the district court's pretrial ruling reasoned that defense counsel's allegations of possible motives to fabricate were mere speculation (State's Answering Brief p. 18). Motive is often purely speculative. As prosecutors consistently point out in closing arguments, they are unable to crawl into the head of the defendant to determine exactly what he or she was thinking. That is why evidence is presented to the jury so that they can make logical inferences. Here,

this is exactly what Mr. Thomas intended to do – argue that Z.F. was deflecting an abuse investigation away from her mother and squarely onto Mr. Thomas. This is called theory of the case. Defense counsel is often asking juries to find reasonable doubt based upon theories of the case that a court and the prosecutor disagree with. That is not the issue. The issue is whether Mr. Thomas was denied his constitutional right to present a viable theory.

The State argues that Mr. Thomas was permitted a valid theory of defense because he was able to introduce evidence of the alleged victim's civil lawsuit. This is true. However, all this establishes is that Mr. Thomas was able to muster up some potential motivation for fabrication because he was precluded from introducing the theory he wished to present. The counter to the State's contention, would require an inquiry that if a defendant is prohibited from placing his theory of defense squarely in front of the jury, should the defense remain silent to preserve the issue for appeal. The resounding answer is no. The defendant still has to defend and that is what Mr. Thomas did. Therefore, the State's argument is that Mr. Thomas did not get to place his theory of defense forward, but he presented another weaker form of defense. In fact, Mr. Thomas should have been able to present the civil lawsuit in conjunction with Z.F.'s motive to lie (to deflect attention away from her mother's child abuse investigation).

The State also presents a false argument to this Court. In an act of pure desperation, the State claims "appellant also claims that he was unable to present evidence that Z.F. and A.P were afraid of their mother. This is belied by the record." (State's Answering Brief p. 18-19). The State then cites to testimony where the defense was able to elicit that Z.F. and A.P. were afraid of their mother. Unfortunately, the argument is false because the State has claimed that Mr. Thomas' claim was belied by the record. The State should read Mr. Thomas' brief more carefully before they make such false claims. Mr. Thomas freely informed this Court "both Z.F. and A.P. admitted that they were frightened of their mother." (this was the only fact that the defense was permitted to present) (Opening Brief p. 19). Why the State chooses to cite to a passage proving what Mr. Thomas has already admitted is bizarre. However, when the State claims that Mr. Thomas is arguing that he was not able to present this information, that is bordering on misconduct.

The most alarming point of the State's Answering Brief is not what they have analyzed, but what they have wilfully ignored. Mr. Thomas devoted a subsection of this argument entitled "comments from closing argument that demonstrate the unfairness" (Opening Brief p. 23). Under this section, Mr. Thomas carefully scrutinized twelve arguments made by the prosecutor directly

proving the travesty of justice that has occurred (Opening Brief p. 23-26). Mr. Thomas utilized approximately six pages of the brief to illustrate the point. The State requested approximately six months to draft the Answering Brief. Then, the State wilfully ignores all twelve of Mr. Thomas' cites to the closing argument. In the State's Answering Brief, footnote seven, the State does comment, "as to the State's closing argument, appellant's assertions are belied by the record" – this response is woeful and fails to respond to Mr. Thomas's arguments (Answering Brief p. 20).

Perhaps, the State hopes that if they ignore Mr. Thomas' bitter complaints that occurred during closing arguments, perhaps no one will notice. Unfortuantely for the State, there intentional failure to address these grossly unfair comments has been exposed. The reason the State does not address the issues is because it is indefensible.

The jury was hopelessly misled by the prosecutor's comments in closing argument (See Opening Brief p. 23-26). The prosecutor's seized on their opportunity and must have recognized that the district court would do nothing about it. In fact, this next brief section illustrates more egregious abuse of discretion on behalf of the district court.

In the Opening Brief, Mr. Thomas complained that the Court's abuse of

discretion arose to the level of blatant hypocrisy and inconsistent treatment of the parties. As has already been illustrated, the court was extraordinarily concerned about April's reputation in front of the jury. The district court actually stated that the court did not want the State to have to defend April against a child abuse case (A.A. Vol. 22 p. 3585). However, this did not stop the district court from permitting the State to cause Mr. Thomas to defend against unnoticed, unsubstantiated corporal punishment. Unbelievably, the prosecution questioned Mr. Thomas' wife about whether punishment in her home ever included corporal punishment (AA. Vol. 22 P. 3712-3713).

Here, the district court openly states that it is concerned that April and the State would have to defend against a child abuse claim but then lets the unsubstantiated corporal punishment of Mr. Thomas proceed. This ruling is unfair and a blatant abuse of discretion. Abuse of discretion is synonymous with the "failure to exercise a sound, reasonable, and legal discretion." (BLACK'S LAW DICTIONARY 1610 (6th ed. 1990). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005) (citing, Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

In footnote seven, the State concludes that the questioning of Mr. Thomas'

wife is appropriate. Of course the State believes that. The State should be able to question Mr. Thomas' wife on unsubstantiated claims of corporal punishment; but Mr. Thomas should not be allowed to introduce the truth of Z.F.'s revelation regarding the substantiated child abuse by April. This clearly demonstrates the disparate treatment between the parties.

The State was required to address the carefully considered complaints outlined by Mr. Thomas. Instead, the State has entered into the realm of wilfully ignoring the arguments in the hope that no one will notice. The State cannot defend the district court's rulings and the prosecutor's comments.

In California v. Trombetta, 467 U.S. 479 (1984), the United States Supreme Court explained, "under the due process clause of the fourteenth amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." See also, United States v. Vamezuela-Bernal, 458 U.S. 858, 867 (1982).

In Nevada v. Jackson, 569 U.S. 505, 133 S. Ct. 1990, 186 L. Ed. 2d 62 (2013), the United States Supreme Court noted that the trial court gave the defense

wide latitude in cross examination of the ex-girlfriend regarding the prior reports but refused to admit the reports themselves. Whereas here, defense counsel was not even allowed to question the witnesses concerning the reports.

Here, the district court gave no latitude to the defense to introduce the theory of defense and the truth. The decisions of the district court placed the litigants in a difficult situation because the truth was being altered. The district court could not figure out how to convey the evidence to the jury that Z.F. was in the principal's office. The district court stated, "you know what, I don't know how to get out of the context where you get called to the principal's office." (A.A. Vol. 16, p. 2397). The answer to this question is simple. Let the truth be told and do not alter the entire picture. Mr. Thomas is entitled to a new trial.

II. THE DISTRICT COURT IMPROPERLY PERMITTED THE STATE TO INTRODUCE BAD ACT TESTIMONY AND QUESTION THE DEFENDANT REGARDING SPECULATIVE BAD ACTS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. BAD ACTS ELICITED DURING MR. THOMAS' TESTIMONY

Prior to Mr. Thomas' testimony, the court advised Mr. Thomas of his constitutional right to testify. The State indicated that Mr. Thomas had no prior felony convictions but they were going to cross-examine him with prior bad acts. Defense counsel complained he was not on notice of any of the prior bad act

information the State intended to utilize in cross-examination. The prosecutor cavalierly stated, "its impeachment. Don't need it." (A.A. Vol. 23 p. 3632). Perhaps, defense counsel should have taken the same approach with the cross-examination of April, by telling the court that counsel intended to impeach her with substantiated allegations of child abuse and that counsel did not put the State on notice because "its impeachment, don't need to". This type of cavalier attitude was acceptable to the district court when uttered by the prosecutor.

Then, the prosecution questions Mr. Thomas regarding S.K. spending the night at his house. Something occurred when Mr. Thomas took S.K. upstairs and the prosecutor asked Mr. Thomas if he was then terminated. In the State's Answering Brief, the State curiously claims that Mr. Thomas stated there was an objection to this bad act (State's Answering Brief p. 21, n. 9). A review of Mr. Thomas' Opening Brief reveals no such suggestion regarding this bad act (Opening Brief p. 32-34).

The State claims that the cross-examination was appropriate because of Mr. Thomas' testimony that he had no difficulties while working at Kids r Kids (State's Answering Brief p. 24). Mr. Thomas was able to cite the prosecutors intent prior to his cross-examination. The State specifically stated that they intended to use unnoticed bad act evidence in a form of impeachment. Now, on

appeal, the State inconsistently claims that they utilized the information in response to the defendant's answers on direct examination. The question then becomes, which position is true? Did the State already intend to use the bad act testimony and did not need to place the defendant on notice, or did they only decide to utilize it after the defendant's testimony. This appears inconsistent.

Again, a rational individual would have to wonder how the State is permitted to cross examine the defendant regarding innocuous activities that suggest a sinister intent; versus, the defense being precluded from questioning April regarding substantiated child abuse. There was no equal playing filed and the judge was continuously abusive of her discretion.

Next, the State claims that the incident does not amount to a prior bad act because there was nothing inherently criminal about the conduct. (State's Answering Brief p. 25). The State's examination of Mr. Thomas implicitly suggested a sinister intent. The State essentially implied that some event occurred with a minor child, causing termination.

B. BAD ACTS ELICITED FROM THE DEFENDANT'S WIFE

The State was permitted to examine Mr. Thomas' wife regarding the defendant's use of corporal punishment on his own child. Although this was a completely unsubstantiated line of questioning, that caused the district court no

concern. The district court was not concerned that Mr. Thomas would have to defend against unsubstantiated speculative questions regarding excessive corporal abuse. This was fair cross-examination. The court was worried about April and the State having to defend against substantiated claims of child abuse by April. Again, the district court's rulings are grossly unfair.

In the State's Answering Brief, the State can barely muster a argument to justify the examination of the defendant's wife. The State boldly claims that "Appellant's wife opened the door because she testified that the defendant would not hurt a child." (State's Answering Brief p. 27). This is the State's entire argument. The hypocrisy of this type of contention cannot go without notice. In argument one, the State wilfully ignored the defense's twelve accounts where the State repeatedly suggested that the children had no motive for fabrication and that April had been a good mother. The State went to far as to refer to April as a "vile" person, mocking the defense for failing to prove that she was anything other than fine mother. Now, the State claims that the defendant's wife opened the door to unsubstantiated and speculative corporal punishment? The travesty of justice in this case is difficult to comprehend.

If the State believed that Mr. Thomas' wife had testified in an objectionable manner, the state was required to object. The State does not get to ignore

objections and then retaliate in an unconstitutionally hypocritical manner.

Mr. Thomas is at a complete loss to determine the legal authority which would permit the prosecutor to question the defendant and his wife in such a manner.

Both Mr. Thomas and the State cited case law establishing the standard for the introduction of prior bad act testimony. With regards to subsections A and B, the State does not contend that the State or the district court followed any of the required procedures pursuant to NRS 48.045(b). See Tinch v. Nevada, 113 Nev. 1170, 946 P.2d 1061 (1997).

C. BAD ACTS ELICITED FROM THE STATE'S WITNESSES

Prior to trial, the State motioned the court for permission to introduce bad act evidence. The district court granted the State's request. The State was permitted to bring out the following evidence: 1) An incident in the changing room at a Walmart; 2) Mr. Thomas being in an attic area of Kids r Kids with children; 3). Mr. Thomas' son acting out in a sexual manner; 4) One of the alleged victim's mother blurted out that Mr. Thomas had placed his hands down her pants; and 5) During closing argument, the prosecutor implied that there may be other victims.

It must be noted that the State at least motioned the court and placed the

defense on notice of their intent to introduce most of these bad acts. Whereas, with the previous two subsections, they were a complete surprise to the defense. Nevertheless, the bad acts introduced by the State, with the permission of the court, were of limited relevance to the crimes charged, there was a lack of clear and convincing evidence, and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Again, Mr. Thomas would urge this Court to consider the district court's preclusion of Mr. Thomas' presentation of the theory of the case (substantiated child abuse by April); versus, the unsubstantiated and speculative nature of all of these bad acts. In essence, the district court gave carte blanche permission for the State to utilize anything they wanted to disparage Mr. Thomas. Yet, Mr. Thomas was completely shackled when he attempted to present an obvious defense.

Additionally, the State claims that the first two incidents (the fitting room and the attic) were offered to refute allegations raised by appellant during the cross-examination of A.P. (State's Answering Brief p. 28). The State's argument is inconsistent. On the one hand, the State argues that the information was relevant under the factors to be considered pursuant to NRS 48.045(2), versus, the bad acts were relevant to refute tactics made by Mr. Thomas at trial. Which is correct? The court permitted the State to present substantially prejudicial information against

Mr. Thomas. What was the real relevance of the attic and changing room incidents? Whereas, Mr. Thomas can clearly articulate the relevance of his proposed introduction of the child abuse by April. The information was used for propensity purposes.

Another way to analyze this issue is to recognize that every concerned care taker or parent who accompanies their child into a dressing room has availed themselves to bad act evidence that will be utilized against them in the event of an allegation of child sexual abuse. Every individual who goes into an attic with a small child also avails themselves to this type of bad act evidence. Whereas, if you beat your child with an electrical cord and then your child deflects, this is not relevant to the trial. This is hypocrisy.

NRS 48.045(2)'s list of permissible nonpropensity uses for prior-bad-act evidence is not exhaustive. Bigpond v. State, 128 Nev. _, 270 P.3d 1244, 1249 (2012). Nonetheless, while "evidence of 'other crimes, wrongs or acts' may be admitted ... for a relevant nonpropensity purpose," Id. (quoting NRS 48.045(2)), "'[t]he use of uncharged bad act evidence to convict a defendant [remains] heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.'" Id. (quoting Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131

(2001)). Here, the statute and case law specifically preclude this type of propensity evidence and mandate reversal.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REPEATEDLY PERMITTED HEARSAY STATEMENT PURSUANT TO NRS 51.385 IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During trial, through seven different witnesses, the district court permitted hearsay statements pursuant to NRS 51.385. On every single occasion, the district court found there was sufficient trustworthiness surrounding the hearsay statement rendering it admissible.

In Mr. Thomas' Opening Brief, he outlined the seven instances of hearsay the court permitted into evidence. Each and every time the court found that the statement were trustworthy. Ms. Amanda Rand, officer Van Gordon and Officer Sink were all permitted to testify to testify to the hearsay statement of Z.F. At the time court made the finding that the statements were trustworthy, the court was fully aware that Z.F. was an admitted liar and thief. The district court had limited opportunity to view Z.F., yet made a finding completely inconsistent with the known truth.

A better inquiry would involve pondering what defense counsel would have to show to demonstrate that the statements were untrustworthy. Here, defense

counsel was able to show that a relatively young child was an admitted liar and a thief. The defense is not going to be able to show perjury convictions for a child that age. Nevertheless, the court finds an admitted liar and thief to be giving trustworthy statements. Again, blatant abuse of discretion.

Under the standard given by the district court, every standard child statement would be considered trustworthy.

In Jefferson v. Nevada, 2014 Nev. Unpub. LEXIS 1222, (62120) (2014), this Court considered the factors enunciated by NRS 51.385(1)(a)-(b), that the district court must consider. This Court explained,

> In determining the trustworthiness of the statement, the court shall consider, without limitation, whether: a) the statement was spontaneous; b) the child was subjected to repeated questioning; c) the motive to fabricate; d) the child used terminology unexpected of the child of similar age; e) the child was in stable mental state.

Z.F.'s statement was not spontaneous because it was in an effort to deflect attention away from her mother's abuse investigation. Clearly, the child had a motive to fabricate. Lastly, the child's mental state must have been affected because she was being brutally abused by her mother. As noted above, Z.F. was an admitted liar and thief. This amounts to trustworthiness?

Ms. Cheryl Barbin was permitted to address conversations M.A.S. had with people days before she disclosed the allegations. The jury acquitted Mr. Thomas

of the charges related to M.A.S. The district court found the statements trustworthy, yet the jury found Mr. Thomas not guilty.

Lastly, the frustration of defense counsel was best illustrated when the hearing occurred surrounding Ms. Martha Mendoza. At that point, defense counsel recognized that the district court find any comment trustworthy if the State desired to introduce the evidence. The defense then stated, "your honor, considering your other rulings, ill submit it." There was not much point in argument when you cannot convince a district court that an admitted liar and thief may have questionable credibility, abuse of discretion is then obvious.

This was testimonial hearsay in violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 2354 (2004) and Davis v. Washington, 547 U.S. 813, 120 S. Ct. 2256 (2006).

IV. MR. THOMAS IS ENTITLED TO A REVERSAL OF COUNTS ONE AND TWO BASED UPON THE INSUFFICIENT NOTICE TO THE DEFENDANT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The defense filed a pretrial motion arguing improper notice in the Information (A.A. Vol. 4 p. 277-299). Defense counsel also argued there was a lack of specificity (AA. Vol. 13 P. 1696-1697). The defense complained that the State was arguing three separate and distinct incidents where A.P. complained of

penile-vaginal penetration in a single count. Defense counsel objected pretrial and again prior to closing argument. Defense counsel continuously complained of lack of notice and confusion (AA. Vol. 13 P. 1702). Importantly, defense counsel complained that A.P. never testified to penile vaginal penetration during the preliminary hearing (AA. Vol. 13 P. 1704). In sum, defense counsel complained that there was a complete lack of notice and requested a mistrial (AA. Vol. 13 P. 1716).

During closing argument, the prosecutor argued that the defendant was guilty of count one and then described three incidents. The incidents are as follows: 1) that the defendant placed his penis in the vagina of A.P. while watching Saturday cartoons on the bed (watching Tom and Jerry); 2) The defendant committed the sexual assault in a completely separate and distinct time while cleaning the fish tank; and 3) The defendant sexually assaulted A.P. when the defendant was left alone with her and Kay had left to purchase pizza. Three separate and distinct incidents, which the prosecutor stated could be utilized to conviction the defendant of counts one and two.

In the State's Answering Brief, they cite to Simpson v. Eighth Judicial District Court, 88 Nev. 654, 503 P.2d 1225 (1972), where this Court considered the sufficiency of a charging document on a murder count. In that case, this Court

noted that the prosecutor was free to change theories of liability. The State also cited to Garnick v. First Judicial District Court, 81 Nev. 531, 407 P.2d 163 (1965), wherein the defendant complained of a fatally charged document based upon the issuance of checks for insufficient funds. The State has relied upon a 1965 case involving insufficient funds and a 1972 case regarding a charging document in a murder case. These cases are miserably misplaced.

In Simpson, there was one murder. The appropriate analogy would be the state charges count one for murder based upon the defendant committing a murder while watching cartoons on a Saturday; then for a second and district murder when the defendant was cleaning the fish tank; and then allege a distinct murder when left alone with a victim and someone had gone to get pizza. That would be analogous to this case.

The distinct difficulty with the notice requirement of the Fifth and Fourteenth Amendments is that the charging document permitted the jury to be without unanimity regarding the event (four jurors believe the defendant is guilty in the fish tank incident, four jurors believe he is guilty of the pizza incident, and four believe he is guilty of the cartoon incident – yet there is no unanimity). The State claims they could have charged three counts of sexual assault. The State should have charged three counts to determine if the jury had unanimity regarding

any of the allegations. This case should be contrasted with a case where a small child can articulate being sexually assaulted but cannot give dates and times. Whereas here, there were specific dates and times of each incident all packaged into one charge.

This Court has held the information should be "sufficiently definite to prevent the prosecutor from changing the theory of the case." State v. Jones, 96 Nev. 71, 74, 605 P.2d 202, 204 (1980). The information "must include such a description of the acts alleged to have been committed as will enable the accused to defend against the accusation." Lane v. Torvinen, 97 Nev. 121, 123, 624 p.2d 1385, 1386 (1981). In Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1980), the Court stated that "the state should, whenever possible, allege the exact date on which it believes a crime was committed, or as closely thereto as possible."

The State did not allege an exact date nor an exact incident. Based on the argument of the prosecutor, it is clear there is no indication the jury had unanimity. Mr. Thomas is entitled to a reversal of this count.

V. MR. THOMAS IS ENTITLED TO A DISMISSAL OF COUNT TWO, LEWDNESS OF A MINOR ON A.P.

The State concedes that Mr. Thomas should not have been adjudicated or

sentenced on counts two or six. The State agrees that the convictions and sentences for Counts two and six must be vacated (State's Answering Brief p. 45).

This issue also helps establish the flavor and unfairness of this case. This Court should inquire of the State why it took Mr. Thomas to raise this issue before the State was willing to concede improper sentences and conviction against Mr. Thomas. Surely, the State and the court below recognized the error that was occurring. It was patently obvious, yet, no remedy was suggested.

VI. THE DISTRICT COURT ERRED BY PERMITTING THE STATE TO REPEATEDLY INTRODUCE EVIDENCE THAT A CIVIL SUIT HAD RESULTED IN A SETTLEMENT FROM FACTS DIRECTLY ASSOCIATED WITH THE CRIMINAL ACTION.

Just prior to opening statements, the State requested permission to introduce evidence of the civil lawsuit and the resulting settlement (A.A. Vol. 13 p. 1589-1587). Defense counsel informed the court that he was unsure whether he wished to introduce any of the evidence surrounding the civil lawsuit (A.A. Vol. 13 p. 1588). However, defense counsel did state that he may wish to question witnesses regarding the filing of a civil lawsuit but did not intend to discuss any financial settlement (A.A. Vol. 13 p. 1588). Thereafter, in opening argument, the prosecutor told the jury that there had been a civil lawsuit and settlement. The prosecutor also questioned numerous witnesses about the amount of the settlements. As noted in

the Opening Brief, defense counsel had not made mention of the lawsuit during times that the State was questioning witnesses regarding the amount of the settlement. The State acknowledges that defense counsel informed the court that he may question witnesses regarding the filing of the lawsuit (State's Answering Brief p. 46). On appeal Mr. Thomas made it crystal clear that his complaint and cited authority precluded the jury from learning that there had been a civil judgment. See United States v. Konovsky, 202 F.2d 721 (7th Cir. 1953) and United States v. Satuloff Brothers, Inc., 79 F.2d 846 (2nd Cir. 1935).

Unbelievably, the State informs this Court "[h]ere, appellant sought to introduce evidence of the civil suit and settlement not as proof of a fact that was adjudicated in a civil suit, but to show bias and financial motive for making false allegations on the part of the State's witnesses." (State's Answering Brief p. 50). The State further explained, "thus, evidence of the civil settlement sought by the defense to show bias on the part of the State's witness was admitted for a proper purpose." (State's Answering Brief p. 50). This statement borders on prosecutorial misconduct. It is imperative that the State made no attempt to deceive a Court in appellate briefs. The defense did not desire to introduce the settlement. It was the prosecutor in opening argument and throughout the State's witnesses. For the State to now inform the court that it was the defense that sought to introduce the

settlement is either grossly negligent or deceitful.

Interestingly enough, the State makes these assertions and gives no citation for the fact. The defense bitterly complained that the State should not have been permitted to mention the settlements and now the State argues it was the defense that wanted to introduce the settlements. These type of arguments illustrate the desperate nature of the State's brief. Six months to respond and this is what they have conceived.

Mr. Thomas is entitled to a new trial because nothing could be more prejudicial to a fair trial than the introduction of a settlement.

VII. THE DISTRICT COURT ERRED BY FAILING TO ENSURE THAT A PROPER RECORD WAS PRESERVED FOR APPELLATE REVIEW.

In this case, the district court held numerous unrecorded bench conferences. In Preciado v. State, 130 Nev. Adv. Op 6, 318 P.3d 176 (2014), this Court stressed that bench conferences should be recorded and/or memorialized either contemporaneously or by allowing counsel to make a record afterward in all cases, not just capital cases.

The State argues that the defense was aware that the bench conferences were not being recorded. The State also argues that there was no real confusion trying to recreate the bench conferences (State's Answering Brief p. 52). In the

Opening Brief, Mr. Thomas specifically cited excerpts from the record demonstrating confusion on the part of the parties in recreating the record.

During the recreation of the bench conferences, the judge appears to reprimand defense counsel for his rendition of facts. This exactly why these bench conferences should be recorded. There should be no reason for the court to clash with defense counsel over the accuracy of the recreation of the bench conferences. It was incumbent upon the district court to properly preserved the record and not be in a position to admonish defense counsel regarding his attempt at recreation. Even the prosecutor admitted to making an inaccurate record at one point. (A.A. Vol. 15, p. 2353-2355). Mr. Thomas is entitled to a reversal.

VIII. THE DISTRICT COURT ERRED IN DENYING MR. THOMAS' MOTION FOR AN INDEPENDENT PSYCHOLOGICAL EVALUATION OF THE CHILDREN.

Pretrial, Mr. Thomas filed a motion requesting an independent psychological evaluation of the children (A.A. Vol. 2 p. 81-118). The district court denied this request (A.A. Vol. 2 p.143-165).

In Abbott v. Nevada, 122 Nev. 715, 138 p.3d 462 (2006), this Court determined that it is within the sound discretion of the district court whether to grant or deny a defendant's request for a psychological examination.

In the State's Answering Brief, they provide a great deal of relevant case

law with almost no factual analysis from this case. Again, the State has completely ignored the detailed factual analysis outlined in Mr. Thomas' Opening Brief.

Mr. Thomas can meet all three factors. The State utilized witnesses that are tantamount to experts as addressed in this Court 's decision in Abbot. The State introduced Z.F.'s testimony through a school teacher, Amanda Rand. The State was permitted to utilize the testimony of Officer Van Gordon who conducted a forensic interview of Z.F. Utilizing a forensic examiner and a school teacher is equivalent to the type of testimony that would constitute an expert. The State introduced this type of testimony with the premise that this individuals knew how to properly question a child victim of sexual abuse.

The State claims they did not utilize an expert. The State also claims that the forensic interviewer does not meet the factors enunciated in Koerschner (State's Answering Brief p. 55). However, in Abbott, this Court stated,

> A person need not be a licensed psychologist or psychiatrist in order for their testimony to constitute that of an expert. Where a State's expert testifies concerning behavioral patterns and responses associated with victims of child sexual abuse, courts have recognized that this type of testimony puts the child's behavioral and psychological characteristics at issue. Id. at 470.

Second, there is no corroboration of the alleged victims. Their testimony was filled with inconsistences and some peculiar statements. There was absolutely

no forensic corroboration. Additionally, Z.F. admitted to being a liar and a thief. The State argues that these inconsistences and highly improbable testimony were a function for the Jury's consideration and not the court. On the contrary, the analysis requires consideration of whether there is corroboration. Here, there was none. Mr. Thomas met the second requirement.

Lastly, there was reason to believe that the mental or emotional state of the alleged victims affected their veracity. Koerschner, 116 Nev. at 1116-1117. Without any factual analysis, the State concludes that there was no evidence that the victim suffered from emotional or mental abuse (State's Answering Brief p. 56). Interesting enough, the State has effectively litigated to preclude the defense from viewing the CPS records associated with Z.F.'s abuse at the hand of April. Even in this Court the State has objected. However, the State has admitted that the child abuse by April was substantiated. The State admits that Z.F. was taken to school employee's office to continue the investigation of the child abuse at the hands of her mother. Z.F. is an admitted liar and thief. Now, the State claims that there is no basis to believe Z.F.'s mental and emotional state affected her veracity.

Additionally, veracity was in question as Z.F. admitted that she was getting in trouble a lot during that time period, for lying and stealing (AA. Vol. 15 p. 2211). In fact, Z.F. described her conduct as "lying all the time " (AA. Vol. 15 p

.2221).

More importantly, Mr. Thomas extensively cited facts from the trial which called into question the veracity and mental state of the accusers. It is very difficult to adequately reply to several of the issues in the brief based upon the State's refusal to address the factual analysis in Mr. Thomas' Opening Brief. Much of the State's argument relies upon bared and naked conclusions.

Here, a psychological interview was requested by way of a pre-trial motion. Mr. Thomas had met all the factors for a psychological examination to be conducted. Not only was the request denied, but then the district court permitted the State to blatantly humiliate the doctor on the stand because he had not even interviewed the accusers. Mr. Thomas is entitled to a new trial.

IX. THE DISTRICT COURT ABUSED THE COURTS DISCRETION WHEN IT PERMITTED HIGHLY IMPROPER AND BLATANT CROSS-EXAMINATION OF THE DEFENDANT'S EXPERT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The defense called Dr. William O'Donohue, a clinical psychologist at the University of Nevada, Reno. The district court concluded the expert would be permitted to testify regarding the suggestibility of witnesses.

On cross-examination, the State was permitted to ask whether the doctor had questioned A.P, Z.F, or M.S. (A.A. Vol. 19 p. 2946-2947). Dr. O' Donohue

replied in the negative (A.A. Vol. 19 p. 2946-2947). A bench conference was held wherein the defense objected (A.A. Vol. 19 p. 2946). Defense counsel complained that the judge had denied the defendant's motion for an independent psychological evaluation of the four children and thus, the expert could not have interviewed the children (A.A. Vol. 19 p. 2981). Not surprisingly, the district court found the cross-examination proper and overruled the objection.[2]

It is clear in the Opening Brief that Mr. Thomas specifically complained that it was an abuse of discretion for the district court to permit impeachment of the doctor with his failure to interview the witnesses given the district court's denial of the request for an independent psychological analysis of the alleged victims.

Unbelievably, after requesting six months to file a response, the entire

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[2] In a footnote, the State complains that Mr. Thomas failed to include the transcript from a hearing which concerns this issue (State's Answering Brief p. 58). Mr. Thomas provided a voluminous appendix spanning 26 volumes and over 4,600 pages. The appendix contained all documents required under NRAP 30, which specifically included ample support for his argument. Moreover, the State has the ability to, and often does, file a Respondent's Appendix under NRAP 30(b)(4) and has failed to do so with the Answering Brief. Mr. Thomas has filed an Appendix to this Reply Brief containing the transcript the State mentions.

analysis of this issue is encompassed in one sentence. The State explained, "the State's questions counter this by trying to show this testimony was theoretical." (State's Answering Brief p. 59). Here, the State cannot even attempt to justify the judges's abuse of discretion. Again, it is obvious how disturbingly unfair the court's ruling is. Excluding Dr. O'Donohue from talking to the witnesses, and then making him appear inadequate for his failure to talk to the witnesses is a blatant abuse of discretion.

"An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005).

X. MR. THOMAS WAS ENTITLED TO SEVERANCE OF COUNTS AS THE COUNTS ARE NOT BASED ON THE SAME ACT OR TRANSACTION AND DO NOT CONSTITUTE A COMMON SCHEME OR PLAN.

This argument stands as enunciated in the Opening Brief.

XI. THE DISTRICT COURT ERRED IN SENTENCING MR. THOMAS AS TO COUNT SIX IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in the Opening Brief.

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XII. THE DISTRICT COURT ERRED IN FAILING TO GRANT THE DEFENSE MOTION FOR A NEW JURY PANEL BASED UPON CONTAMINATION AND FOR FAILING TO GRANT A VALID CHALLENGE FOR CAUSE.

This argument stands as enunciated in the Opening Brief.

XIII. THE DISTRICT COURT ERRED BY REFUSING TO INCLUDE THE DEFENDANT'S PROPOSED JURY INSTRUCTION.

This argument stands as enunciated in the Opening Brief.

XIV. MR. THOMAS' CONVICTIONS MUST BE REVERSED BASED UPON CUMULATIVE ERROR.

This argument stands as enunciated in the Opening Brief.

CONCLUSION

Mr. Thomas respectfully requests that this Court grant find Mr. Thomas is entitled to a new trial.

DATED this 12th day of February, 2018.

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 pursuant NRAP 32(7)(b) that this brief does comply with the type-volume limitation of NRAP 32(A)(7)(d) as it does not contain more than 7,000 words, to wit, 6,686 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 12th day of February, 2018.

Respectfully submitted by,

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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 12th day of February, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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BY:

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