IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMEL ORTIZ

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 78996

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Michelle Leavitt, District Judge
District Court No. C-17-322507-1

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

Appeal from judgment of conviction after jury trial; one count burglary; one count of first degree kidnapping; one count of second degree kidnapping; six counts of sexual assault; one count of robbery; one count of assault; and three counts of open or gross lewdness. Judgment filed May 21, 2019. Vol. 9, 1782-85. Notice of appeal filed on June 11, 2019. Vol. 9, 1790-91. This Court has jurisdiction. NRS 177.015.

II. ROUTING STATEMENT

Appeal from judgment of conviction for a Category A felony is assigned to the Nevada Supreme Court. NRAP 17(a)(1).

III. STATEMENT OF THE ISSUES

The convictions for burglary, first degree kidnapping, second degree kidnapping, sexual assault, robbery, assault and open or gross lewdness must be reversed due to numerous errors by the District Court. The District Court erred in denying Ramel Ortiz's fair cross section challenge as there was only one African American on the venire of over 60 potential jurors. Further, the District Court erred in allowing the State to make a tailoring argument during cross examination and closing thereby violating Ramel Ortiz's right to appear at trial guaranteed by the Nevada Constitution.

The District Court erred in denying Ramel Ortiz's objections to jury instructions and in refusing to give certain jury instructions proposed by the Defense. Specifically, the District Court improperly added to the reasonable doubt instruction, jury instruction number thirty-six misstated the law relating to the number of sexual assaults derived from a single encounter, and the District Court erred in refusing to instruct the jury regarding the witness testifying with particularity, especially given her inability to recall certain instances of sexual assault during her initial testimony.

In addition, the District Court erred in refusing to grant the defense's motion for mistrial when the witness had an emotional outburst on the stand. All these errors are cumulative and should result in reversal of Mr. Ortiz's convictions.

IV. STATEMENT OF THE CASE

On April 5, 2017, the Grand Jury returned an Indictment charging Ramel Ortiz with one count of burglary while in possession of a deadly weapon, one count of first degree kidnapping with use of a deadly weapon, two counts of second degree kidnapping with use of a deadly weapon, eight counts of sexual assault with use of a deadly weapon, three counts of attempt sexual assault with use of a deadly weapon, one count of robbery with use of a deadly weapon, one count of assault with a deadly weapon, two counts of coercion sexually motivated with use of a deadly weapon and

three counts of open or gross lewdness. Vol. 1, 78-85. On April 13, 2017, Mr. Ortiz entered a not guilty plea to all charges. Vol. 1, 91-94.

Mr Ortiz was originally represented by the Public Defender, however, at calendar call on May 30, 2017, the Public Defender moved to withdraw. Vol. 1, 184-86. Thereafter, on June 1, 2017, the Office of the Special Public Defender took over the case. Vol. 1, 187-93. Mr. Ortiz invoked his right to a speedy trial and trial was re-set to August 1, 2017. Vol. 1, 194-98. However, because defense counsel was not ready and the fact the State had witness problems, trial was re-scheduled to November 7, 2017, despite Mr. Ortiz's invoking his right to a trial within 60 days. Vol. 1, 201-09. At calendar call on October 31, 2017, both counsel for the defense and counsel for the State were already in trial and, as a result, Mr. Ortiz's trial was continued to January 2, 2018. Vol. 1, 210-13.

On December 6, 2017, Mr Ortiz filed a motion to dismiss for failure to provide constitutionally adequate notice of charges against defendant or, in the alternative, motion for a bill of particulars. Vol. 1, 226-234. The State filed their opposition to the motion to dismiss on December 11, 2017. Vol. 2, 281-92. While this motion was pending, trial was once again continued, however, Mr. Ortiz waived his right to a trial within sixty days at this point and it was re-scheduled to July 24, 2018. Vol. 2, 299-303. The motion to dismiss was denied on January 2, 2018. Vol. 2, 309-20.

On July 24, 2018, trial was continued due to defense counsel being in another trial. Trial was then continued to March 11, 2019. Vol. 2, 321-23. Trial commenced on that date. Vol. 3, 393. On March 18, 2019, an Amended Indictment was filed charging Mr. Ortiz with one count of burglary while in possession of a deadly weapon, one count of first degree kidnapping with use of a deadly weapon, one count of second degree kidnapping with use of a deadly weapon, seven counts of sexual assault with use of a deadly weapon, one count of robbery with use of a deadly weapon, one count of assault with a deadly weapon and three counts of open or gross lewdness. Vol. 7, 1300-1304. Trial was completed on March 20, 2019. Vol. 9, 1765. The jury returned a verdict on March 20, 2019, Vol. 9, 1761-64, finding Mr. Ortiz guilty of all charges except one count of sexual assault and all deadly weapon enhancements. Vol. 9, 1761-64.

Mr. Ortiz was sentenced on May 17, 2019, to an aggregate of twenty five years to life. Vol. 9, 1765-89. The judgment of conviction was filed on May 21, 2019, and an amended judgment of conviction was filed on May 29, 2019. Vol. 9, 1782-89. A notice of appeal was filed on June 11, 2019. Vol. 9, 1790, 91.

V. STATEMENT OF THE FACTS

Prior to the start of the trial, there was one African American on the sixty member jury venire. This resulted in a comparative disparity of well over eighty

percent. Vol. 3, 407. In support of his argument, Mr. Ortiz relied upon documents provided by the jury commissioner, including the Race Report, the Ethnicity Report and United States Census data showing the percentage of African Americans in Clark County, Nevada. Vol. 9, 1714-1719.

Mr. Ortiz alleged that the jury commissioner is required to pull potential jurors from four different sources and, according to prior testimony from the jury commissioner, no potential jurors were being pulled from the Employment Security Division of the Department of Employment, Training and Rehabilitation. Vol. 9, 1720-45. Mr. Ortiz then requested an evidentiary hearing on the issue in order to establish systematic exclusion, which request was denied. Vol. 3, 407-417.

The accuser, Mirsa Pineda, alleged that she was home sleeping at approximately 5:30 A.M. on March 9, 2017, when she heard a knock on her bedroom door. Vol. 6, 997. She thought it was her son who leaves for work during the early morning hours so she got out of bed, wrapped a sheet around herself as she was only wearing panties, and answered the bedroom door.[1] Vol. 6, 997. When she discovered that no one was there, she ventured out of the bedroom and ran into the Defendant, Ramel Ortiz, in the hallway. Vol. 6, 997-98. According to the accuser, Mr. Ortiz had

[1]The accuser admitted that there was no sign of forced entry into the home. Vol. 6, 1058.

a gun and pointed it at her, but she thought the gun was fake. Vol. 6, 998-99, 1082. Despite allegedly having a gun in his hand, Mr. Ortiz then indicated his desire to be allowed to stay in the home for about five minutes then he *asked* to use a telephone. Vol. 6, 999-1000.

When the accuser indicated she did not have a phone, the two went from room to room looking for one, during which search the accuser managed to conceal her telephone on her person. Vol. 6, 1000-01. While they were in the daughter, Eylin Castro's room, Mr. Ortiz allegedly told the accuser he wanted to have sex, to which she responded no. Vol. 6, 1001-02. The accuser allegedly told Mr. Ortiz to leave because Eylin Castro was about to arrive home – Eylin has mental issues – and Mr. Ortiz allegedly told the accuser that if she did what he said, Eylin would be okay. Vol. 6, 1002. According to the accuser, Mr. Ortiz then suggested having sex in Eylin's room, however, the accuser refused to have sex on her daughter's bed. Vol. 6, 1002. Despite allegedly having a gun, Mr. Ortiz agreed. Vol. 6, 1002.

They left Eylin's bedroom and the accuser indicated a need to use the bathroom and, when she went into the bathroom, she was allowed to put on clothes. Vol. 6, 1003. When she came out of the bathroom, after having just been allowed to put on clothes, she walked into her bedroom and Mr. Ortiz told her to take off her clothes. Vol. 6, 1003. Mr. Ortiz then shed his clothes, laid on the bed and told the accuser to

get on top of him. Vol. 6, 1004. After having sex with her on top, she recalled changing position and being face down at the foot of the bed and having sex again.[2] Vol. 6, 1005. The accuser admitted telling Mr. Ortiz she liked having sex with him and told him to come back tomorrow. Vol. 1006. When asked if they had sex in any other positions, the accuser could not remember. Vol. 6, 1006. The accuser did recall that Mr. Ortiz *asked* her to perform oral sex but she refused and he took no for an answer. Vol. 6, 1007. She also indicated he *asked* her for anal sex but she refused and he took no for an answer. Vol. 6, 1007.

After having sex on the bed, the accuser indicated that she and Mr. Ortiz got in the shower where he penetrated her with his fingers and his tongue and kissed her neck and breast. Vol. 6, 1010-13. Once the shower was over, they returned to the bedroom and the accuser then described using lubricant to masturbate Mr. Ortiz while they watched a pornographic movie on her tablet. Vol. 6, 1008, 1014-15; Vol. 8, 1504. Mr. Ortiz did not take the tablet and the accuser never saw him take anything from the residence. Vol. 6, 1028, 1070, 1072. Afterwards they got dressed, although Mr. Ortiz had his orange boxer shorts in his hand, and left the room. Mr. Ortiz

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[2]Later in her testimony, after having her recollection refreshed with regard to the number of positions she and Mr. Ortiz had sex in, the accuser testified that they had sex twice with her on top, once with her on her stomach and once with her on her side. Vol. 6, 1030-38.

allegedly went into her son, Marvin Pineda's room to see if there was marijuana. Vol. 6, 1015-16. After leaving Marvin's room, the two walked into the living room and discovered that Eylin had come home and was calmly sitting on the couch eating breakfast. Vol. 6, 1016, 1018. Eylin had heard the accuser in her bedroom speaking calmly in English for approximately fifteen to twenty minutes prior and had assumed that the accuser was on the telephone. Vol. 6, 1109.

Eylin noted that the accuser was wearing her pajamas. Vol. 8, 1397. The accuser told Eylin Castro, in Spanish because Eylin doesn't speak English and the accuser had to translate for Mr. Ortiz, not to do anything and just do what Mr. Ortiz said. Vol. 6, 1018. Mr. Ortiz *asked* to use Eylin's phone to call a friend and she gave him her telephone. Vol. 6, 1019, 1074-76. He dialed the phone but didn't say anything and then he handed the phone back to Eylin, asking if the photo on the screen was of her boyfriend. Vol. 6, 1019, 1028, 1070.

The accuser told Mr. Ortiz that Eylin had a car and then offered Mr. Ortiz the keys and told him to take the vehicle. Vol. 6, 1020, 1076. Mr. Ortiz declined to take the vehicle and *asked* for a ride instead, as well as *asked* for a pair of socks. Vol. 6, 1020-21, 1074-76. Eylin Castro went into her bedroom, carrying her telephone, and retrieved a pair of socks which she gave to Mr. Ortiz. Vol. 8, 1508. She did not use her telephone to call police. Vol. 8, 1508.

The three began to leave the residence and Eylin Castro got to her car, still carrying her telephone, when she realized that neither the accuser nor Mr. Ortiz were behind her. Vol. 8, 1384-86, 1398. Shortly thereafter, the accuser walked out of the house – after stopping to retrieve a hoodie out of the hall closet. Vol. 8, 1399. The accuser and Eylin Castro then leave the area, leaving Mr. Ortiz behind inside the home. Vol. 8, 1400. Eylin drove them to her father's place of business and he subsequently called the police, meeting police at the residence. Vol. 7, 1182-83, 1186-87.

When police arrived, there was no sign of forced entry into the residence. Vol. 6, 1058; Vol. 7, 1269-70. There were no latent fingerprints belonging to Mr. Ortiz discovered. Vol. 7, 1269-70. There was a jar of money, a laptop, a PS4 Game Station Console, television sets, purses and unopened boxes of jewelry photographed by police still located in the residence. Vol. 7, 1287, 1290-92. The residence was not ransacked. Vol. 7, 1287, 1290-92. In giving her statement to police, Eylin Castro never mentioned a gun being used and, in fact, she "forgot" about the gun. Vol. 8, 1401.

Police confiscated the bed sheets from the accuser's bedroom and conducted DNA tests on them. Vol. 8, 1429-34. Although there were three sets of DNA found on the sheets, only the accuser's DNA was able to be identified. Vol. 8, 1429-34.

Police also discovered Mr. Ortiz's orange boxer shorts at the residence and ran DNA tests on them as well. Vol. 8, 1434-41. The only place Mr. Ortiz's DNA was conclusively found was on these boxer shorts. Vol. 8, 1434-41. Despite a lack of evidence that the accuser had ever touched Mr. Ortiz's boxer shorts, her DNA was located on the shorts as well. Vol. 8, 1434-41.

Ramel Ortiz testified that, on March 9, 2017, he was in the neighborhood to visit the accuser, who he had known for three months. Vol. 8, 1498. He had met her at her job at the Hard Rock Hotel. Vol. 8, 1498-99. Shortly after meeting, the accuser and Mr. Ortiz became involved in a sexual relationship. Vol. 8, 1499. Mr. Ortiz was aware that the accuser was married, so it was not an involved relationship and they tried to keep the relationship a secret. Vol. 8, 1499, 1501. The relationship lasted from December, 2016 to March of 2017 and Mr. Ortiz had previously been to the accuser's home and had sexual relations with her there. Vol. 8, 1499-1500, 1513-15.

On the morning of March 9, 2017, Mr. Ortiz had called the accuser and she told him to come over to her home. Vol. 8, 1517-18. When he arrived, she let him into the home. Vol. 8, 1500. After sitting on the couch and speaking for some time about life in general, they proceeded to the bedroom where they had sex. Vol. 8, 1500-01.

They also showered together. Vol. 8, 1502-03. The sex was consensual. Vol. 8, 1501. Mr. Ortiz did not have a gun. Vol. 8, 1502

Mr. Ortiz was at the residence a little over an hour and, while he was there he went into Eylin's room to look out the window because he was afraid they would be caught – he was familiar with the work schedules of everyone in the family. Vol. 8, 1502-04, 1516. Once the encounter was over, Mr. Ortiz walked out of Marvin's room – he had been there looking for some shorts – and saw Eylin. Vol. 8, 1505-06. He did not expect to see Eylin sitting there. Vol. 8, 1506. After asking to and using Eylin's phone, Mr. Ortiz asked for a ride to a friend's home. Vol. 8, 1506-07. He then asked Eylin for some socks. Vol. 8, 1507. When Eylin went to get the socks, he remained in the living room, sitting on the couch, and talking to the accuser. Vol. 8, 1508.

As they all stood up to leave, Mr. Ortiz realized he left his beanie in the bedroom so he went back to get it. Vol. 8, 1508. When he came back out, he saw Eylin and the accuser leaving in Eylin's vehicle. Vol. 8, 1508. He took nothing from the house when he left. Vol. 8, 1508.

During cross examination, the State asked Mr. Ortiz several questions regarding his being present at the trial and hearing the testimony of the witness prior

to giving his own testimony.[3] Vol. 8, 1512-13, 1519-20. The State also questioned Mr. Ortiz about the discovery he reviewed and his meetings with his attorneys. Vol. 8, 1519-21. And although he lied to police about having sex with the accuser, he did so because he was having an affair with a married woman. Vol. 8, 1529. Mr. Ortiz, however, consistently told police that he did not sexually assault anyone. Vol. 8, 1530.

After the defense rested, jury instructions were settled. Mr. Ortiz made several objections to the jury instructions and submitted his own proposed instructions. Specifically, Mr. Ortiz objected to an addition to the reasonable doubt instruction. Vol. 7, 1314. Mr. Ortiz alleged that the State's proposed instructions (given as Instruction 36), misstated the law regarding the number of sexual assaults which may be derived from a single sexual encounter. Vol. 7, 1335-36. Mr. Ortiz also requested that the District Court give an instruction regarding witnesses testifying with particularity, which the District Court declined to give. Vol. 7, 1334.

In addition, the Defense moved for a mistrial, which was denied. Vol. 7, 1121-64. Specifically, the witness Eylin Castro had an emotional breakdown on the stand

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[3]Details regarding the State's tailoring argument will be set forth in more detail below. Mr. Ortiz thoroughly objected to the State's tailoring argument during trial. Vol. 9, 1590-95. As the State was making the tailoring arguments during closing, Mr. Ortiz objected as well. Vol. 9, 1663, 1664, 1667.

during her first day of testimony.[4] Vol. 6, 1112-15; Vol. 7, 1121-64. During a bench conference, Ms. Castro began to cry and, as the bench conference concluded, her behaviors escalated to include hyperventilating, bouncing up and down, hitting her chest, screaming and retching into a trash can. JAVS at 11:54 - 12:45. Although the Court excused the jury during the outburst, the jury was witness to a major portion of the episode. JAVS at 11:54-12:45. Thereafter, some jurors loitered in the hallway outside the courtroom and all but two jurors personally observed paramedics who had been called to treat Ms. Castro. Vol. 7, 1121-64. Further, evidence was adduced that the jurors had discussed amongst themselves the fact that paramedics had been called into the courtroom. Vol. 7, 1141. Although the District Court polled the jurors individually and, as a result, dismissed one juror, Vol. 7, 1121-64, the jury was not admonished to disregard the behavior and the State was allowed to comment upon it during closing, even using it to counter Mr. Ortiz's defense. Vol. 7, 1128-33; Vol. 9, 1642, 1656-57, 1668.

The jury thereafter returned guilty verdicts on all counts except one count of sexual assault. Vol. 9, 1761-64. The jury did not find that a weapon had been used

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[4]Mr. Ortiz had the JAVS video of this disruption entered as Court's Exhibit 14. Vol. 9, 1698. Mr. Ortiz has filed a motion for this exhibit to be transmitted to this Court prior to filing the instant brief. Ms. Castro's disruption will be discussed in more detail below.

during the alleged crimes. Vol. 9, 1761-64. Mr. Ortiz was subsequently sentenced to twenty five years to life in the aggregate. Vol. 9, 1786-89. He timely filed his Notice of Appeal and herein files the Appellant's Opening Brief.

VI. SUMMARY OF THE ARGUMENT

Here, the District Court erred in denying Mr. Ortiz's challenge to the jury as there was only one African American on the entire sixty member venire, which resulted in a comparative disparity of well over fifty percent. Further, Mr. Ortiz provided the District Court with evidence that the jury commissioner was not drawing the potential jurors from the four sources required by statute. Specifically, the jury commissioner was not drawing jurors from lists provided by Employment Security Division of the Department of Employment, Training and Rehabilitation. This State entity is required to keep demographic information, including race, and report it on a quarterly basis pursuant to statute. Had an evidentiary hearing been granted, it is submitted that evidence of systematic exclusion could have been presented. Accordingly, the District Court erred in refusing the request for a new jury venire.

In addition, the State made tailoring arguments to the jury during rebuttal closing argument as well as in their power point presentation. Despite Mr. Ortiz's detailed objection prior to closing arguments, his request for a cautionary instruction

and his continuing objections throughout closing arguments, the District Court overruled the objections. There was no specific evidence that Mr. Ortiz had tailored his testimony, the State made generic tailoring arguments and failed to tie those allegations of tailoring to any evidence. Since Article 1, Section 8 of the Nevada Constitution is more specific than the Sixth Amendment to the United States Constitution in that it specifically provides a defendant the right to "appear and defend" in person, it provides defendants more protection and the State's generic tailoring argument violated Mr. Ortiz's rights under the Nevada Constitution.

Although the United States Supreme Court has found that tailoring arguments based solely on the defendant's presence at trial are not unconstitutional under the United States Constitution, the Court specifically left it to the States to determine whether the arguments would be allowed. This Court has previously expressed concern regarding generic tailoring arguments but declined to address the issue because the defendant failed to object at trial. Here, Mr. Ortiz made specific and repeated objections to this behavior and, therefore, his conviction should be overturned due to the violation of his rights.

The District Court erred by adding language to the reasonable doubt instruction which language presumed the guilt of the defendant unless reasonable doubt arose. Although Mr. Ortiz timely objected to this language, the objection was overruled.

Mr. Ortiz also requested jury instructions relating to the number of sexual assaults which could be derived from a single sexual encounter. The instruction given indicated that, in order to be considered a single sexual encounter, the activities must have been continuous. Case law, however, indicates that an incidental interruption of a sexual assault is not sufficient to turn one sexual assault into two and hyper-technical divisions are not allowed. This was a question of fact for the jury and Instruction 36, as given to the jury, mis-stated the law.

The accuser, during her testimony, was having problems remembering the exact number of sexual positions she and Mr. Ortiz engaged in during the alleged assault. The State had charged one sexual assault for every time they changed sexual positions so this testimony was crucial. Even after the accuser's recollection was refreshed, however, she still had problems recalling the number of alleged sexual assaults. As a result, Mr. Ortiz requested a jury instruction which informed the jury that the witness had to testify with some particularity regarding the sexual assaults. Despite the evidence which would support the giving of such instruction, the instruction was improperly denied.

During the testimony of Eylin Castro, all counsel were called to the bench for a bench conference based upon a defense objection. During the conference, and not in response to any question, the witness began to cry. As the bench conference broke

up, the District Court asked the witness if she was okay. At that point, the witness started crying hysterically, bouncing up and down in her chair, hitting her chest, screaming and retching into a trash can. Once this behavior started, the District Court took a break and began admonishing the jury with the standard admonishments. During the admonishments, the witness's behavior escalated to the point that the Court stopped the admonishments and told the jurors to "just go'. The behavior continued to escalate as the jury was leaving the courtroom. After the jurors had left the courtroom, the retching started. There was evidence that several jurors loitered outside the courtroom after being excused. All but two of the jurors saw the paramedics who were called to the courtroom to treat the witness.

Mr. Ortiz thereafter moved for a mistrial due to the witness's actions, which took place while no questions were pending. The District Court polled all the jurors about their ability to decide the case and whether they saw paramedics. One juror was dismissed and replaced by an alternate as a result of this questioning. Only one juror admitted discussing the paramedics with the other jurors. Mr. Ortiz renewed his request for a mistrial, however, this request was denied. The District Court failed to admonish the jury to disregard the outburst, found that the jury could consider the outburst in their deliberations and allowed the State to comment on the outburst and to use it to counter the defense. The denial of the Motion for Mistrial was error.

Further, due to the cumulative nature of these errors, Mr. Ortiz's convictions must be reversed.

VII. ARGUMENT

A. The District Court Erred in Denying Ramel Ortiz's Fair Cross Section Challenge as African Americans were Under Represented on the Jury Venire

There was one African American on the sixty member jury venire which constituted an under representation of African Americans and denied Mr. Ortiz a jury that was a representative fair cross section of the community. Vol. 3, 406. The trial court denied the Defense motion to strike the venire as well as the request for an evidentiary hearing. Vol. 3, 406-417. Here, Mr. Ortiz's conviction should be reversed because his state and federal constitutional rights to due process, equal protection, a fair trial, a fair and impartial jury, and right to a jury representing a fair-cross section were violated by the district court's denial of the challenge to the jury panel. U.S. Const. Amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; and NRS 6.010, NRS 6.045(3).

Specifically, in Morgan v. State, 416 P.3d 212, 221 (Nev. 2018), this Court set forth the three prong test that trial courts must follow in order to address the question of whether the venire is a representative cross section of the community:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to the systematic exclusion of the group in the jury-selection process.

Id. Citing Williams v. State, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005).

While Mr. Ortiz is not guaranteed a "perfect" cross section of the community for his venire, this Court has held that "[a]lthough the Sixth Amendment does not guarantee a jury or even a venire that is a *perfect* cross section of the community, a criminal defendant is entitled to a jury venire selected from a *fair* cross section of the community." Buchanan v. State, 130 Nev. 829, 833, 335 P.3d 207, 208 (2014) (emphasis added). And, regardless of the final makeup of the jury, as long as the process is fair and complies with the Constitution and relevant case law, the actual makeup is irrelevant for the purpose of a fair cross section challenge, however, once this challenge is made, the three prong analysis must be followed. Morgan, 416 P.3d at 217.

This Court "applies a de novo standard of review to constitutional challenges." Grey v. State, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008). When a fair-cross section challenge is raised, if "the district court determines that an evidentiary hearing is warranted, it is structural error for the district court to deny the defendant's

challenge before holding that hearing to determine the merits of the motion." Id. (quoting Buchanan v. State, 130 Nev. 829, 833, 335 P.3d 207, 210 (2014)). The District Court's denial of a request for an evidentiary hearing is reviewed for an abuse of discretion. *See* Valentine v. State, 135 Nev. Adv. Op. 62, 454 P.3d 709 (2019).

The United States Supreme Court addressed the issue of systematic exclusion in Duren v. Missouri, 439 U.S. 357, 358, 579, 583 (1979). Specifically, it reviewed whether the State of Missouri's practice of allowing female jurors to opt out of serving for jury duty violated the United States Constitution's fair cross-section requirement. Id. Once the defendant has established a prima facie case of systematic exclusion, the burden shifts to the State to justify this "[i]nfringement by showing attainment of a fair cross-section to be incompatible with a significant state interest." Id. Ultimately, the Court did not accept the justification for the State's policy of allowing female jurors as a distinct group to opt out and reversed. The Nevada Supreme Court first addressed this issue in Evans v. Nev., 112 Nev. 1172, 1187, 926 P.2d 265, 275 (1996) and has subsequently addressed it in other cases, including Williams v. State, 121 Nev. 934, 939-940, 125 P.3d 627, 631 (2005); Morgan v. State, 416 P.3d 212, 221 (Nev. 2018); and most recently in Valentine v. State, 135 Nev. Adv. Op. 62, 454 P.3d 709 (2019).

In Valentine v. State, 135 Nev. Adv. Op. 62, 454 P.3d 709 (2019), this Court found that the defendant was wrongly denied an evidentiary hearing on the issue relating to the fair cross section challenge. In making this finding, this Court indicated that a defendant must make specific factual allegations, which are not belied by the record, that, if true, would entitle him to relief. Id. General allegations are not sufficient to meet this prong. Id. Further, it may be error for the District Court to rely upon the jury commissioner's prior testimony in denying a fair cross section challenge. Id.

In the instant matter, only one juror of African American descent was on the venire panel of sixty potential jurors. Vol. 3, 407-417. African Americans are a distinctive group. Valentine v. State, 135 Nev. Adv. Op. 62, 454 P.3d 709 (2019). This resulted in a comparative disparity of well over eighty percent. Vol. 3, 407. When the comparative disparity is well over fifty percent, this is strong evidence that the distinctive group is under-represented. Morgan v. State, 416 P.3d 212, 221 (Nev. 2018). In support of his argument, Mr. Ortiz relied upon documents provided by the jury commissioner, including the Race Report, the Ethnicity Report and United States Census data showing the percentage of African Americans in Clark County, Nevada. Vol. 9, 1714-1719.

Mr. Ortiz then alleged that, pursuant to NRS 6.045, the jury commissioner is required to pull potential jurors from four different sources, including registered voters, the department of motor vehicles, a public utility and the Employment Security Division of the Department of Employment, Training and Rehabilitation. Vol. 3, 407-417. Mr. Ortiz then presented prior testimony from the jury commissioner establishing that no potential jurors were being pulled from the Employment Security Division of the Department of Employment, Training and Rehabilitation. Vol. 9, 1720-45. Mr. Ortiz then requested an evidentiary hearing on the issue in order to establish systematic exclusion. Vol. 3, 407-417. This request was wrongly denied.

While the jury commissioner is required to draw from the Employment Security Division of the Department of Employment, Training and Rehabilitation, an evidentiary hearing would have established that, at the time of trial, this Department was not providing potential juror information. Further, pursuant to NRS 232.920, this very same Department is required to provide written reports to the Director of the Legislative Counsel Bureau containing the rate of unemployment of residents of this State, which is broken down by demographic information, including race. This information, which is required to be posted on the Department's website, would have established systematic exclusion due to the number of African American residents

receiving unemployment benefits and the fact that they were not included in the juror selection process. However, this information was not presented to the District Court as the request for evidentiary hearing was denied. Vol. 3, 407-417.

The District Court concluded that, based on the arguments of counsel that there was no way to obtain a constitutional jury in Clark County because the jury commissioner was not drawing from the four required sources. Vol. 3, 407-409. This is incorrect, as a jury could be drawn which met the requirements of a fair cross section, even though the jury commissioner was still unable to comply with NRS 6.045. If the defense could not establish a comparative disparity in excess of fifty percent, a fair cross section challenge would fail. Accordingly, once the District Court denied the request for an evidentiary hearing, the Defense requested a new panel. This request was denied as well. Vol. 3, 407-417. This was structural error and Mr. Ortiz's conviction must be overturned.

B. The District Court Erred in Denying Ramel Ortiz's Objection to the State's Tailoring Arguments Thereby Violating his Rights Under the Nevada Constitution

In the instant matter, Mr. Ortiz exercised his right to testify on his own behalf during trial. Vol. 8, 1487-1533. During cross examination of Mr. Ortiz, the State set the stage to argue that Mr. Ortiz had tailored his testimony in closing arguments. Vol. 8, 1519-1522. Specifically, the State questioned Mr. Ortiz about his review of

discovery, his preparation for trial, his sitting in the courtroom and his listening to witnesses prior to his giving testimony. Vol. 8, 1519-1522. Before the case was submitted to the jury and prior to closing arguments, the defense made a detailed objection to the State's tailoring argument based upon the Nevada Constitution and requested a curative instruction. Vol. 9, 1751. This request was denied. Vol. 9, 1590-95.

Thereafter, during rebuttal closing arguments, the State made repeated references to tailoring, objections to which were overruled. Vol. 9, 1663, 1664, 1667. The allegation of Mr Ortiz tailoring his testimony was also contained in the State's power point presentation used during rebuttal closing arguments. Vol. 9, 1753. Such references to tailoring were improper and violated Mr. Ortiz's rights to appear and defend in person under Article I, Section 8 of the Nevada Constitution, which violation mandates reversal.

The United States Supreme Court, in Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), has directed, in a split decision, that arguments that a defendant tailored his testimony after being present and hearing the State's presentation of the evidence in a trial, do not violate a defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. However, as this Court has noted in Woodstone v. State, 2019 Nev. Unpub. LEXIS 208, 435

P.3d 657 (February 22, 2019), that generic accusations of tailoring – accusations not based upon the evidence – are "particularly troubling", especially where they are raised for the first time during rebuttal closing arguments. This Court, however, declined to address the issue of whether Nevada Courts will decline to follow Portuondo because Woodstone failed to object at trial. Since Mr. Ortiz repeatedly objected during trial, the issue is now ripe for review.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Noticeably absent from the Sixth Amendment is a specific right to be present at trial, however, the right to confront witnesses has been construed to mean that a defendant has a constitutionally protected right to be present at trial. Illinois v. Allen, 397 U.S. 337, 25 L.Ed.2d 353, 90 S.Ct. 1057 (1970). Conversely, the Constitution of the State of Nevada, Article I, Section 8 (1) states:

> No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the Legislature) except on

> presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or Attorney General of the State, ***and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions***. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself.

(Emphasis added).

Nevada, unlike the Sixth Amendment, has specifically guaranteed a defendant the right to both appear *and* defend, *in person* and with counsel, in *any* trial in *any* court, whatsoever. Thus, the Nevada Constitution provides Mr. Ortiz more protections than the United States Constitution when it comes to his right to be present during trial. Because Nevada provides more protections to those accused, the United States Supreme Court decision in Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), should not apply in the instant matter and the State's tailoring arguments made during rebuttal closing arguments violated Mr. Ortiz's rights under the Nevada Constitution.

In Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), the Supreme Court set forth distinctions between the different kinds of tailoring arguments. Generic tailoring arguments are those tied solely to a defendant's presence at trial while specific tailoring arguments are accusations supported by "specific evidence of actual fabrication." *Id.* at 71, 77. The type at issue in the

instant matter is a generic tailoring argument tied solely to Mr. Ortiz's presence at trial as there was no specific evidence of tailoring. And as this Court has long held, a prosecutor may not argue facts or inferences not supported by the evidence. Williams v. State, 103 Nev. 106, 110, 734 P.2d 700 (1987).

Several other States who have addressed the propriety of tailoring arguments have split with the United State Supreme Court on the issue. In State v. Daniels, 861 A.2d 808 (N.J. 2004), the Supreme Court of New Jersey declined to follow the decision enunciated in Portuondo, establishing instead that the prosecution can make tailoring arguments only where there is evidence of tailoring and can only discuss the evidence and inferences to be drawn therefrom. The prosecution is prohibited from making generic tailoring arguments.

In State v. Swanson, 707 N.W.2d 645 (Minn. 2006), the Supreme Court of Minnesota indicated that "the better rule" was that the prosecution cannot make a tailoring argument to a jury ". . . in the absence of evidence that the defendant has tailored his testimony to fit the state's case." Id. at 657-58. Likewise, in Martinez v. People, 244 P.3d 135 (Colo. 2010), the Supreme Court of Colorado found that the Prosecution made improper tailoring arguments where they failed to tie the argument to the evidence in the record. Both the Supreme Court of Minnesota and the Supreme Court of Colorado analyzed the impropriety under a harmless error analysis. *Id.*

In State v. Mattson, 226 P.3d 482 (Haw. 2010), the Supreme Court of Hawaii found that it was improper to make a tailoring argument where there was no evidence of tailoring. Specifically, the Court found that Hawaii's constitution provided more protection to defendants than the United States Constitution. However, because the prosecution's comments were based upon specific evidence in the record, there was no impropriety.

Here, the State made generic tailoring arguments based solely upon Mr. Ortiz's presence at trial. As stated above, the Nevada Constitution provides more protection than the United States Constitution as it guarantees Mr. Ortiz the specific right to be present and defend, in person. Further, the tailoring arguments, although "set up" during cross examination, were raised for the first time during rebuttal closing arguments by the State as well as the State's power point presentation accompanying that argument. Vol. 9, 1663, 1664, 1667, 1753. Mr. Ortiz made a detailed objection prior to closing arguments and objected during the State's closing when the arguments were actually made. Vol. 9, 1590-95, 1663, 1664, 1667. Further, Mr. Ortiz's request for a curative instruction was denied. Vol. 9, 1590-95, 1751. This deprived Mr. Ortiz of the opportunity to reply to those arguments and violated Mr. Ortiz's right to be present under Article I, Section 8 of the Nevada Constitution.

This was not harmless error. Harmless error is "[a]ny error, defect, irregularity or variance which does not affect substantial rights . . ." NRS 178.598. Where the error is of constitutional dimension, reversal is required unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). Here, the evidence against Mr. Ortiz was not strong.

Mr. Ortiz did not deny having entered the home and having a sexual encounter with the accuser – the issue for the jury to determine was credibility as Mr. Ortiz testified that the accuser let him into the residence that morning and he was having a consensual relationship with her. Vol. 8, 1487-1533. There were no other witnesses to the alleged burglary or the sexual encounter.

The accuser's and Eylin Castro's testimony was counter-intuitive. For example, despite allegations that Mr. Ortiz had a gun and entered the residence to commit a burglary and a sexual assault, the evidence adduced was that Mr. Ortiz *knocked* on the accuser's bedroom door and, when there was no answer, did not go further inside the bedroom. Vol. 6, 997. During the alleged sexual assault, and despite the allegation that he had a gun, Mr. Ortiz *asked* to have sex in Eylin Castro's bedroom but the accuser said no – and Mr. Ortiz took no for an answer. Vol. 6, 1002, 1007, 1084. In fact, the accuser said no when Mr. Ortiz *asked* for anal sex and *asked*

for fellatio as well and Mr. Ortiz took no for an answer. Vol. 6, 1002, 1007, 1084.

Despite the allegation that he had a gun, the evidence was that he *asked* for socks, *asked* to use Eylin Castro's phone (then he returned it) and *asked* for a ride. Vol. 6, 1021, 1074-76. When Eylin went to the bedroom to get the socks, she took her telephone with her but did not call police. Vol. 8, 1508. In fact, the testimony was that the accuser *offered* him Eylin Castro's car, which he declined. Vol. 6, 1076. While the State alleged that Mr. Ortiz entered the residence in order to commit larceny and that he stole jewelry, the evidence also disclosed that a jar of money, a laptop, a PS4 Game console, television sets, purses, unopened jewelry boxes and other valuable property was in plain view and untouched. Vol. 7, 1287, 1290-92. While Mr. Ortiz and the accuser watched a pornographic video on a tablet in the bedroom, Mr. Ortiz did not take the tablet and he was not observed taking anything else. Vol. 6, 1028, 1070, 1072.

Eylin testified that, prior to learning Mr. Ortiz was in the residence, she heard her mother speaking, in English, *calmly* in the bedroom for approximately twenty minutes. Vol. 6, 1109. Eylin never told police that Mr. Ortiz had a gun and testified that she forgot about the gun. Vol. 8, 1401, 1406. Eylin walked out of the house, leaving both her mother and Mr. Ortiz inside. Vol. 8, 1384-86. She had her phone with her at the time but didn't call police. Vol. 8, 1384-86. The accuser also left the

house – unaccompanied by Mr. Ortiz – and stopped to get a hoodie on the way. Vol. 8, 1399.

Further, as to the DNA evidence obtained from a stain on the bed sheets, there were at least two male contributors and Mr. Ortiz's DNA could not be confirmed as one of the contributors. Vol.8, 1429-34. In fact, the only DNA evidence found at the scene was on Mr. Ortiz's underwear, which also had the accuser's DNA on it. Vol. 8, 1434-41. This was despite the total lack of evidence that the accuser ever touched Mr. Ortiz's underwear.

This was the classic "he said, she said" situation and credibility was the primary issue that the jury had to decide. Accordingly, it cannot be said that the State's improper tailoring argument did not contribute to the verdict. As a result, Mr. Ortiz's conviction must be reversed.

C. The District Court Erred in Denying Ramel Ortiz's Objection to Jury Instructions and in Failing to Give Jury Instructions Propounded by the Defense

Here, the District Court improperly added to the reasonable doubt instruction required by NRS 175.211. In addition, Jury Instruction 36 mis-stated the law relating to the number of sexual assaults which could be derived from a single sexual encounter. Further, the defense requested a jury instruction that the witnesses must testify with particularity, however, the District Court refused to give the requested

instruction. A District Court's determination in settling jury instructions is subject to review for abuse of discretion. Hoagland v. State, 126 Nev. 381, 384, 240 P.3d 1043, 1045 (2010).

1. The District Court Improperly Added to the Reasonable Doubt Instruction

The Reasonable Doubt Instruction is set forth by statute. See NRS 175.211(1). The Legislature has specifically indicated that "No other definition of reasonable doubt may be given by the court to juries in criminal actions in this state." See NRS 175.211(2). In the instant matter, the District Court gave instruction Number 6, which stated:

> A defendant is presumed innocent unless and until the contrary is proved. This presumption places upon the State of Nevada the burden of proving, beyond a reasonable doubt, every element of the crime charged, and te Defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It's not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of th jurors, after the entire comparison and consideration of all the evidence around such, a condition that they can say they feel an abiding conviction of the truth as charged, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation. ***If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.***

Vol. 9, 1603-04 (emphasis added).

During trial, Mr. Ortiz objected to the last sentence of this instruction. Vol. 7, 1314. Mr. Ortiz asserted that this last sentence shifted the burden and presumed his guilt, unless there was reasonable doubt. Vol. 7, 1314. As a result, Mr. Ortiz requested the following inverse instruction:

> If you find the State has failed to prove beyond a reasonable doubt that Mr. Ortiz is guilty, you must return a verdict of not guilty.

Vol. 7, 1314.

As this Court stated in Crawford v. State, 121 Nev. 746, 753, 121 P.3d 582, 588 (2005): "this court has consistently recognized that specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request." The error, however, is harmless if the jury is properly instructed on reasonable doubt. Id. at 756.

Here, the jury was not properly instructed on reasonable doubt. The State proffered and the District Court gave the above referenced reasonable doubt instruction. Although it primarily comported with NRS 175.211, the last sentence of the instruction – which presumed guilt unless reasonable doubt arose – was added in violation of NRS 175.211(2). This sentence is not contained in the statute and the added sentence instructed the jury that guilt was presumed unless there was reasonable doubt. Mr. Ortiz objected and requested the inverse instruction above.

Accordingly, the District Court abused its discretion, the jury was not properly instructed on reasonable doubt, the instruction given presumed guilt and it was an abuse of discretion to fail to give Mr. Ortiz's requested instruction.

As this error dealt with the presumption of innocence, a constitutional issue, th State must establish beyond a reasonable doubt that the error did not contribute to the verdict. Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). As stated above, the evidence against Mr. Ortiz was not strong and credibility of witnesses was the main issue for the jury. Because the jury had to assess credibility, an instruction which advised that Mr. Ortiz was guilty unless reasonable doubt arose (presumed guilty until proven innocent) was not harmless error.

2. Jury Instruction Number Thirty Six Mis-Stated the Law Relating to the Number of Sexual Assaults Derived from a Single Encounter

During trial, the District Court gave Instruction 36 to the jury as follows:

> Number 36. Where multiple sexual acts occur as part of a single criminal encounter, a Defendant may be found guilty for each separate or different act of sexual assault or lewdness. Where a Defendant commits a specific type of act constituting sexual assault or lewdness, he may be found guilty of more than one count for that specific type of act of sexual assault, lewdness if,
>
> > 1) there is an interruption between the acts which are of the same type – I'm sorry, the same specific type,

> 2) where the acts of the same specific type or [sic] interrupted by a different specific type of sexual assault or lewdness, or
>
> 3) for each separate object, manipulated or inserted into the genital or anal opening of another.
>
> Only one sexual assault or lewdness occurs when a defendant's actions were one specific type of sexual assault or lewdness and those acts were continuous and did not stop between the acts of that specific type.

Vol. 9, 1611-12.

Mr. Ortiz submitted Defendant's Proposed Instruction 25 and 26. In Defendant's Proposed Instruction 25, Mr. Ortiz requested the following language be added to the State's Proposed Instruction 24:

> Where a single act of sexual conduct is interrupted briefly for some reason and then resumed, a separate charge for the continuing sexual conduct will not lie for activity after the brief interruption.

Vol. 7, 1335.

Mr. Ortiz further objected to the State's Proposed Instruction 35 and requested that Defendant's Proposed Instruction 26 be given, which stated as follows:

> Where multiple sexual acts occur as part of a single criminal encounter, a defendant may be found guilty for each separate or distinct act of sexual assault and/or lewdness. However, when the sexual acts are part of the same episode, the Defendant may be found guilty of only one count of sexual assault or lewdness. When there is no interruption between the acts, or any interruption amounts to merely a hypertechnical division of a single act, the sexual acts are part of the same episode. Additionally, when the sexual act is done merely to predispose the alleged victim to a subsequent act[s], the acts are part of the same

episode and the Defendant may be convicted of only one count of sexual assault or lewdness.

Vol. 7, 1336.

In requesting these instructions, Mr. Ortiz noted that additional language he requested in Defendant's Proposed Jury Instruction 25 came from an unpublished decision[5], however, for both instructions, Mr. Ortiz relied upon Townsend v. State, 103 Nev. 113, 120, 734 P.2d 705, 710 (1987), Wicker v. State, 95 Nev. 804, 603 P.2d 265 (1979) and Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285 (2004).

A defendant is entitled to have the jury instructed on his theory of the case as disclosed by the evidence. Barger v. State, 81 Nev. 548, 552, 407 P.2d 584, 586 (1965). Here, Mr. Ortiz was charged with one sexual assault for every time he and the accuser changed sexual positions while on the bed in addition to the sexual encounter in the shower - a total of eight sexual assault allegations. Vol. 1, 78-85. During closing arguments, the State argued that every time they changed sexual position, this constituted another sexual assault. Vol. 9, 1634-39. As to the encounter on the bed, Mr. Ortiz, however, asserted that this was a single, consensual sexual encounter. Vol. 9, 1660.

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[5]This language actually came from Valdominos v. State, 124 Nev. 1515, 238 P.3d 862 (2008), which is an unpublished order. This Order was not cited for any precedential value but only to inform the District Court from where the language requested was drawn.

Separate convictions for one continuous course of conduct cannot stand. In Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004), this Court held that where actions during a sexual assault were not interrupted, the act of rubbing the victim's penis as a prelude to fellatio were not a separate and distinct offenses. The act of rubbing was incidental to the sexual assault and, therefore, could not support a separate conviction. 120 Nev. at 34.

Further, in Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987), this Court found that rubbing lubricant over the victim's vaginal opening, removing the finger to obtain more lubrication and then penetrating the victim's vagina were *not* separate sexual assaults as this was a "hypertechnical division of what was essentially a single act . . ." Id. at 103 Nev. at 121.

Here, Mr. Ortiz was entitled to have the jury correctly instructed and the instruction given to the jury here incorrectly told them that his actions, in order to only constitute one sexual assault, must have been continuous and did not stop. However, the jury should have been instructed that they were to determine if the numerous sexual assault allegations were a hypertechnical division of a single act. In other words, was a first action incidental to a second action thus constituting only one sexual assault or was the interruption(s) indicative of two (or more), separate criminal acts. The correct statement of the law is that there *can* be interruptions and

still amount to only one sexual assault – this is a question of fact for the jury. Here, however, the jury was instructed that there could *not* be any interruption – that the actions must have been continuous and did not stop – which instruction is in direct contradiction of Townsend and Crowley. Accordingly, Mr. Ortiz's conviction must be reversed.

3. The District Court Erred in Refusing to Instruct the Jury Regarding the Witness Testifying with Particularity

Mr. Ortiz requested the following jury instruction be given to the jury based upon the testimony of the accuser during trial:

> Where multiple counts are charged, the alleged victim must testify with some particularity regarding each incident in order to uphold each charge. There must be some reliable indicia that the number of acts charged actually occurred.

Vol. 7, 1334.

In La Pierre v. State, 108 Nev. 528, 836 P.d 56 (1992), while noting that a sexual assault victim's testimony, alone, is sufficient to uphold a conviction, this Court indicated that the victim must testify with some particularity and there must be some *reliable indicia* that the number of acts charged actually occurred. Id. at 108 Nev. at 531. Whether or not there is "reliable indicia" is a question of fact for the jury.

Here, Mr. Ortiz was charged with eight counts of sexual assault and counts five through nine were identically pled. Vol. 1, 78-85. In fact, prior to trial, Mr. Ortiz moved to dismiss these counts or, in the alternative, for a bill of particulars, which motion was denied. Vol. 1, 226-234. Then, during trial, the accuser was unable to recall the details of the alleged sexual assaults on direct examination.

She initially described what the State alleged as two separate instances of sexual assault - where she got on top of Mr. Ortiz and where Mr. Ortiz got behind her.[6] Vol. 6, 1004-05. She could not remember any others. Vol. 6, 1006. Much later during direct examination, the State attempted to refresh her recollection with her grand jury transcript. Vol. 6, 1029-36. It was only after she reviewed her grand jury testimony that she testified about how many positions she was allegedly in during the alleged sexual assault and, even then, she had problems recalling. Vol. 6, 1036-38. The Court noted during a bench conference that the witness was "having a hard time remember[ing] everything" and the State agreed. Vol. 6, 1031.

This instruction was requested due to the inability of the accuser to recall the details of the alleged sexual assaults on direct examination. Even after her memory

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[6]Mr. Ortiz maintains that the encounter was consensual. For the sake of argument, if *any* sexual assault occurred (which he denies), there was only one course of conduct and that any interruption between the alleged acts was incidental in nature and, thus, there were not several sexual assaults.

was refreshed, she was still unable to remember. As a result, the issue of whether or not there was "reliable indicia" of the number of sexual assaults was at issue.

A defendant is entitled to have the jury instructed on his theory of the case as disclosed by the evidence. Barger v. State, 81 Nev. 548, 552, 407 P.2d 584, 586 (1965). Here, the number of sexual assaults was at issue and the witness was unclear as to that number or the details of the sexual assaults. Accordingly, Mr. Ortiz's request for the above entitled instruction should have been granted and his conviction must be reversed.

D. The District Court Erred in Refusing to Grant the Defense's Motion for Mistrial when the Witness had an Emotional Outburst on the Stand

During the second day of testimony, the State called Eylin Castro to the stand. Ms. Castro began her testimony, however, during a bench conference, she had a spontaneous emotional breakdown which was not in response to any questioning or any other obvious stressor in the courtroom. Vol. 6, 1112-15; Vol. 7, 1121-64.[7] Initially, she began to cry during the bench conference and she can be observed on the video sitting with her head down for several minutes. JAVS at 11:54-12:45. At

[7]Mr. Ortiz has filed a Motion to allow the JAVS video of the incident to be transmitted to this Court and included in the record for this appeal. Trial Counsel moved for the JAVS video to be made part of the record during trial, which motion was granted. Vol. 7, 1121. The video is Court's Exhibit 14.

that point, the bench conference ends and the District Court asks the witness if she is okay. JAVS at 13:05. Once the District Court asks that question, the witness becomes unexplainably hysterical, crying, screaming, bouncing up and down, hitting her chest and retching into a trash can. JAVS at 13:05 - 15:18. During this display, the District Court begins to admonish the jury and send them from the courtroom. JAVS at 13:20. However, the witness continues her disruption, which gets louder and more elaborate to the point that the Court stops the jury admonishment and just tells the jurors that they can go. JAVS at 13:33. This display continues to escalate as the jury is filing from the courtroom. JAVS at 13:20-13:44. Not even the District Attorney is able to calm the witness down and she continues to escalate her outburst even as the video clearly shows the jury still exiting from the courtroom. JAVS at 13:44- 13:55. Although the jury appears to have exited the courtroom at this point, JAVS at 14:30, the witness then begins loudly retching into a trash can just after the jury left[8]. JAVS at 14:46.

Due to the witness's reaction, however, paramedics needed to be called into the courtroom, which incident is not reflected in the video. Vol. 7, 1121-64. When

[8]This may have been heard by jurors loitering in the hallway outside the courtroom. While there is an indication in the record that several jurors stayed outside the courtroom while this was taking place, Vol. 7, 1125, they were never asked if they overheard anything after they left.

Defense Counsel left the courtroom, they saw several jurors loitering in the hallway outside the courtroom. Vol. 7, 1125-26. Further, numerous members of the jury observed the paramedics and, at least one juror admitted that the paramedics were the subject of discussion among the jurors. Vol. 7, 1121-64.

The next morning, the defense moved for a mistrial based upon the witness's emotional outburst, stressing the fact that the outburst was spontaneous, not in reaction to any question by either party and began while all counsel were at the bench for a bench conference. Vol. 7, 1121-64. The State suggested that the jury should be admonished, however, they also repeatedly noted that the witness's demeanor on the stand is something the jury is allowed to consider during deliberations. Vol. 7, 1128-33.

The District Court then brought the jurors in and subjected them to individual voir dire to determine if what they saw would interfere with their continuing ability to serve as jurors. Vol. 7, 1129. Juror Number 1 candidly admitted that she was leaning more toward one side because of the witness's spontaneous outburst. Vol. 7, 1130-36. The remaining jurors indicated that they could be fair and impartial, however, all of the remaining jurors, with the exception of Jurors 4 and 9, indicated that they had seen the paramedics. Vol. 7, 1136-64. As to Juror 9, he indicated he did not see the paramedics at all. Vol. 7, 1150. Juror 4, however, indicated that while

she did not see the paramedics personally, the Juror admitted that she had *heard about the paramedics being present from speaking about the incident with other jurors*. Vol. 7, 1141. No other jurors mentioned speaking to each other about the incident. Vol. 7, 1129-64.

As a result of the jury being polled, Juror 1 was excused from further duty and an alternate took her place. Vol. 7, 1160. At that point, the defense renewed the motion for mistrial due to indications that the jurors had been discussing the issue in addition to the spontaneous and unprovoked outburst from the witness. Vol. 7, 1161. This motion was denied. Vol. 7, 1161-62. The denial of the motion for mistrial was error.

"Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)). "Due process 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

(1982). (emphasis added). Errors of constitutional dimension must be reviewed under the harmless error standard. Watters v. State, 129 Nev. 886, 892, 313 P.3d 243, 248 (2013). A conviction will be reversed if the State fails to prove, beyond a reasonable doubt, that the error did not contribute to the verdict. *Id.* The denial of a motion for mistrial is reviewed for an abuse of discretion. Owens v. State, 96 Nev. 880, 620 P.2d 1236 (1980).

During argument on the motion for mistrial, both the Defense and the State referred the Court to several cases from other jurisdictions as well as one Nevada case dealing with emotional outbursts on the stand. Vol. 7, 1120-64. However, because the outburst began during a bench conference – when no evidence was being adduced – and not all jurors were forthcoming about their discussions of the matter when they failed to mention they had discussed paramedics being present, the cases cited by both parties did not adequately address the issue before the District Court.

The Defense cited to State v. Vinson, 833 S.W.2d 399 (Mo. Ct. App. 1992), case where a witness had a screaming and aggressive outburst on the stand and threatened both the defendant and his attorney. While the court refused to grant a mistrial in that case, the motion to strike the witness's testimony was granted and a curative instruction was given to the jury.

The State cited to several cases which dealt with emotional outbursts, however, they were nothing like the display Ms. Castro engaged in here. The State cited to McKenzie v. State, 410 N.E.2d 1308 (Ind. 1980), where the court refused to grant a mistrial because the witness had mistakenly thought he was on trial and became confused and upset. The Supreme Court of Indiana found no grounds for reversal because the District Attorney had not deliberately elicited such responses and the responses did not relate to the trial or the defendant's defense.

In State v. Scott, 263 N.W.2d 659 (Neb. 1978), the witness stumbled in the courtroom, hurt her knee and started to cry while her relatives called for a doctor. Because there was no emotional outburst or crying on the stand during testimony, the motion for mistrial was properly denied.

In Commonwealth v. McCloughan, 421 A.2d 361 (Penn. 1980), the witness cried for a brief period during testimony but was able to resume testifying without a recess and without crying further. This was not prejudicial.

In Coley v. State, 612 S.E.2d (Ga. Ct. App. 2005), the victim paused her testimony, said "I'm sorry" and the prosecution asked for a recess so that the witness could regain her composure. It was not an abuse of discretion to deny the motion for mistrial in this instance.

The State last cited Evans v. Nev., 112 Nev. 1172, 926 P.2d 265 (1996), wherein the trial court judge shed one single tear and his voice shook during the penalty phase of a capital murder trial. This Court characterized this as a "minor show of emotion" which did not influence the jury.

Here, however, one of the alleged victims had an extended emotional outburst on the stand which involved a screaming, crying, hysterical response to *NOTHING*. This is remarkable due to the fact that the outburst was not due to any questioning by either party or any other incident which took place during the bench conference. Further, the witness, prior to her display, had calmly been answering questions on direct examination. The reason for her outburst is unknown and unprovoked and the disruption was not made during a portion of the trial during which evidence was being adduced. Because no evidence was being adduced, her demeanor was irrelevant to the jury's determination of the issues.[9]

Further, the District Court, although it individually polled the jury regarding the outburst, did not admonish the jury to disregard the outburst, did not strike the

[9]Despite this disruption's lack of connection to *any* question asked or evidence adduced, the State repeatedly argued (and the District Court agreed) that this outburst was appropriate for the jury to consider. Vol. 7, 1129-30, 1132-33; Vol. 9, 1642, 1656-57. The defense opposed and argued that, because the outburst was not connected to the evidence, the disruption *should not* be considered. Vol. 7, 1132-33.

testimony and denied the motion for mistrial. In fact, there was no guidance from the District Court as to how the jury should handle the spectacle at all. Further, the District Court completely failed to address the fact that the jurors had been discussing the paramedics being called. In fact, the District Court took the position that the outburst could be considered and the State argued to the jury to consider the emotional outburst during closing – especially to counter the defense that Ramel Ortiz and Mirsa Pineda were having an affair and the encounters were consensual. Vol. 7, 1129-30, 1132-33; Vol. 9, 1642, 1656-57, 1668. Further, instruction number 7 informed the jury that they could consider a witness's demeanor on the stand as it relates to their credibility or believability. Vol. 9, 1604.

Due to the outburst and the jury's subsequent conversations regarding the incident, the motion for mistrial should have been granted. The jury had heard testimony that Eylin Castro had mental health issues. Vol. 6, 1002. Her outburst would have garnered sympathy for her and impinged upon Mr. Ortiz's right to a fair trial by an impartial jury. The guilt or innocence of a defendant should not be influenced by emotion and it is improper for the prosecution to rely upon this emotional outburst in making the case against Mr. Ortiz. In the alternative, Ms. Castro's testimony should have been stricken. At the very least, the jury should have been admonished to not consider or further discuss the outburst – it was not evidence.

The District Court's disregard of the incident in failing to give a curative instruction was improper and, given the severity of the witness's display and the subsequent conversation of the jurors about the paramedics being called, it was an abuse of discretion to deny the motion for mistrial.

E. The District Court Committed Cumulative Error

In Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008), this Court addressed cumulative error:

> "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). When evaluating a claim of cumulative error, we consider the following factors "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-44 (2000).

Here, the issue of guilt was close as it was a credibility determination between Mirsa Pineda and Ramel Ortiz. The quantity and character of the errors were such that reversal is required. The Court improperly denied Mr. Ortiz's fair cross section challenge, allowed the State to make improper tailoring arguments, gave faulty jury instructions and improperly denied the motion for mistrial based upon the hysterical emotional outburst of Eylin Castro. As to the gravity of the offense charged, Ramel Ortiz was charged with kidnaping and sexual assault - Category A felonies which

carried potential life sentences – in addition to other crimes. Accordingly, Ramel Ortiz herein requests that his conviction be reversed based upon the cumulative error.

VIII. CONCLUSION

The District Court improperly denied the fair cross section challenge, improperly allowed the State to make tailoring arguments based upon nothing more than Mr. Ortiz's presence at trial, gave faulty jury instructions and improperly denied the motion for mistrial due to a hysterical witness. Cumulative error requires reversal.

DATED this 28th day of February, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with 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 Word Perfect Office 11 in 14 point font of the Times New Roman style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(A)(ii). The relevant portions of the brief are 11,915 words.

4. 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 of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of February, 2020

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_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 28th day of February, 2020, a copy of the foregoing Opening Brief was served as follows:

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