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 REPLY BRIEF

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I. STATEMENT OF THE FACTS

Mr. Ortiz hereby incorporates that Statement of Facts contained in the Appellant's Opening Brief, by reference.

II. 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

In *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), the United States Supreme Court made it clear that discrimination on the basis of race by excluding members of a certain race from a jury, was a violation of the United States Constitution and would not be countenanced. Now, one hundred forty years later, we are still addressing that very same issue – the systematic exclusion of persons from jury service on the basis of race – because it is still happening. *See Valentine v. State*, 135 Nev. Adv. Op. 62, 454 P.3d 709 (2019). And it happened in this case.

The exclusion of jurors on the basis of race is not a "random variation" if it repeatedly rears its ugly head in jury trials and appeals. And the fact that it continues to happen is established through the use of objective factors such as, in the instant matter, a comparative disparity of over eighty percent. This is indicative of a serious and ongoing problem, not a "random variation".

The State has argued that Mr. Ortiz failed to establish systematic exclusion of African Americans in the jury process and that, at trial, he only made a general allegation that because no potential jurors were being pulled from the Department of Employment, the selection process must be systematically excluding African Americans. *See* State's Answering Brief, pg. 21. What the State ignores is that this serious and ongoing problem was directly addressed by the Legislature in amending NRS 6.045. Assembly Bill 207, which amended NRS 6.045 to include the Employment Security Division of the Department of Employment, Training and Rehabilitation as one of the sources from which the Jury Commissioner is *required* to draw potential jurors, was introduced to specifically address the issue of under inclusion of minorities in jury rolls. *See* Revising Provisions Governing Juries; Minutes of the Meeting of the Assembly Committee on Judiciary, A.B. 207, 79th Session, 6-22 (March 3, 2017). As Mr. Robert Eglet, who presented the Bill with Assemblyman Fumo, testified:

> Assembly Bill 207 is an important bill and one that I felt compelled to offer my testimony and support. It will remedy a reoccurring and serious issue that plagues our judicial system, one that I frequently encounter as a trial lawyer: a noninclusive and unrepresentative jury pool.

Id. at 7. Mr. Eglet went on to note that, under the then current system of drawing jurors from only three sources:

> If you rent and do not own your home, or are not registered to vote or do not drive, you potentially could be excluded from a prospective jury pool. It is not difficult to perceive which section of our communities make up the largest percent of this demographic; it is our poor black and Hispanic citizens.

Id. at 8-9. Where the process used in selecting jurors fails to include black and Hispanic members of the community, this is the very definition of systematic exclusion.

As this Court stated in *Evans v. Nevada*, 112 Nev. 1172, 926 P.2d 265 (1996): "The fair-cross-section requirement mandates that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *quoting Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). Further, in *Williams v. State*, 121 Nev. 934, 125 P.3d 627 (2005), this Court noted that a defendant ". . . is entitled to a venire *selected* from a fair cross section of the community under the Sixth and Fourteenth Amendments of the United States Constitution." *Id.* at 939. It is the very *selection process* that is at issue here.

The passage of AB 207 and the amendment of NRS 6.045 indicate that the Nevada Legislature recognized that systematic exclusion of minorities continues to be an issue. The remedy to the issue, as required by the Legislature, was that jurors would be drawn from an additional source – the Employment Security Division of the

Department of Employment, Training and Rehabilitation – which was intentionally included in order to remedy the under representation of minority members of the community in the jury selection pool. As a requirement of the Legislature, neither the Jury Commissioner's Office nor the Department of Employment, Training and Rehabilitation, both of whom are State actors, were at liberty to ignore that statute, however, that is exactly what was taking place at the time of Mr. Ortiz's trial. And the statute they ignored was the one specifically designed to preclude discrimination in the selection of jurors for jury venires thus, by not complying with the statute, the system specifically excluded African Americans from Mr. Ortiz's jury.

In the instant matter, there is no question that African Americans are a distinctive group, that only one African American on the jury venire was a comparative disparity of over eighty percent and that the Jury Commissioner's Office was not in compliance with NRS 6.045 and was not drawing from the required four sources. Vol. 3, 406-417. This was sufficient to establish systematic exclusion rather than a variation based on chance[1]. If the District Court had any further doubt, the defense request for an evidentiary hearing should have been granted and could have

[1]If there was a variation based on chance, it would have been that there were an adequate number of African Americans on Mr. Ortiz's jury – which would have negated the need for the instant analysis.

established the exact demographics that failing to draw from this mandated source excluded from the jury pool. *See* NRS 232.920.

As this Court noted in *Williams v. State*, 121 Nev. 934, 125 P.3d 627 (2005), "[A] district court cannot substitute its own judgment for that of the Legislature as to how best to compose a venire." *Id* at 943, *quoting State v. Echineque*, 73 Haw. 100, 828 P.2d 276, 279 (Haw. 1992). The Legislature has determined that, in order to not exclude minorities from jury pools, the Jury Commissioner is required to draw from four separate sources when selecting jurors. The fact that the Jury Commissioner, at the time of Mr. Ortiz's trial, was not doing so, systematically excluded minorities from Mr. Ortiz's jury. 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

The United States Supreme Court has found that making a general tailoring argument is not unconstitutional under the United States Constitution, however, in limiting their decision to that specific issue – Federal Constitutionality – the Court specifically stated:

> Our decision, in any event, is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always

> desirable as a matter of sound trial practice. The latter question, as well as the desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work.

Portuondo v. Agard, 529 U.S. 61, n. 4, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000). Further, it is well established that States, under their own constitutions, may provide more protections to their citizens than provided under the United States Constitution. *See Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), (State courts are free and unfettered in interpreting State constitutions); *California v. Ramos,* 463 U.S. 992, 1014, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."); *Wilson v. State*, 123 Nev. 587, 170 P.3d 975, (2007) (States are free to provide additional constitutional protections beyond those provided by the United States Constitution). In other words, while a tailoring argument does not violate the Federal Constitution, it can (and does) violate Nevada's Constitution and remains questionable as a trial practice, the control of which is best left to the State's trial and appellate courts. Accordingly, *Portuondo* is not, as the State asserts, "binding precedent". The questions left to this Court are: is such a practice allowed by the Nevada Constitution and, although the practice *can* be done, *should* it be done. The answer to both is no.

In the twenty years since the United States Supreme Court issued its decision in *Portuondo*, this Court has addressed the issue exactly once, in the unpublished decision of *Woodstone v. State*, 2019 Nev. Unpub. LEXIS 208, 435 P.3d 657 (February 22, 2019). There, this Court stated that:

> In Portuondo v. Agard, the United States Supreme Court defined two categories of accusations—specific and generic. 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (distinguishing accusations supported by "specific evidence of actual fabrication," id. at 71, from those "tied only to the defendant's presence in the courtroom and not to his actual testimony," id. at 77 (Ginsburg, J., dissenting)). Here, while the State did not engage in specific accusations of tailoring, it did engage in generic accusations in its cross-examination of Woodstone and in its closing rebuttal argument. Although the Portuondo majority deemed such general accusations constitutionally permissible, id. at 71-73, we recognize the burden this prosecutorial practice imposes on a defendant's constitutionally protected right to be present at his own trial, We find this practice particularly troubling in instances where accusations are raised for the first time on rebuttal closing arguments—where a defendant has no opportunity to address the accusations and where such accusations do little to advance the truth-seeking function of trial. See id. at 7778 (Ginsburg, J., dissenting).
>
> Although Woodstone suggests that the prosecutor asked this question solely for the purpose of improperly commenting on Woodstone's Sixth Amendment rights, under these facts, we decline to address whether this court should depart from the Portuondo majority in the instant case because Woodstone did not object to the accusations at trial, and therefore, plain error review applies, Mitchell v. State, 124 Nev. 807, 817, 192 P.3d 721, 727-28 (2008).

Id.

This was the extent of the analysis. Further, this Court reserved for another day whether or not Nevada would follow the decision in *Portuondo* due to the fact that the defendant in *Woodstone* neglected to object at trial. Accordingly, the State's rigorous assertion in the instant matter that *Portuondo* is binding precedent on this Court is belied by the decision in *Woodstone* as well as *Portuondo* itself.

Further, this matter is now ripe for review as a detailed objection was made in the District Court below as well as continuing objections throughout the State's rebuttal closing arguments and a request was made for a limiting instruction, which instruction was provided by the defense. Vol. 9, 1590-1592, 1663, 1664, 1667, 1751. In addition, a review of whether a tailoring argument is proper pursuant to the Nevada Constitution has never been addressed and is an issue of first impression. As previously argued in the Appellant's Opening Brief, the Nevada Constitution, by its plain language, affords a defendant more protections at trial than the United States Constitution; in this instance, the specific and enunciated right to be present at trial and present a defense as opposed to a generalized right to confront witnesses.[2]

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[2] *See also:* NRS 178.388(1), which states, in pertinent part: "Except as otherwise provided in this title, the defendant must be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence." *Accord, Rose v. State*, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007).

This would not be the first time this Court has found that the Nevada Constitution provides more protections to Nevada citizens than the Constitution of the United States. *See Osburn v. State*, 118 Nev. 323, 44 P.3d 523 (2002) (Recognizing, in a Fourth Amendment context, the freedom State Courts have to interpret their own Constitutions); *Wilson v. State*, 123 Nev. 587, 170 P.3d 975 (2007) (In the context of a Double Jeopardy analysis, recognizing this Court's past practice of affording Nevada citizens more protections under the Nevada Constitution than allowed under the Federal Constitution); *Ennis v. State*, 122 Nev. 694, 137 P.3d 1095 (2006) (In the context of the potential retroactivity of new law, declining to strictly follow Federal precedent). Yet, the State characterizes Mr. Ortiz's argument as "nonsensical" despite Nevada's well documented "past practice of affording more citizen protections under the Nevada Constitution than are afforded under the federal Constitution", *Wilson v. State*, 123 Nev. 587, 595, 170 P.3d 975 (2007). The State ignores the plain language of the Nevada Constitution and fails to recognize that *Portuondo* is not "binding precedent". Accordingly, the State's argument must fail.

Further, Mr. Ortiz objected to any tailoring arguments being made prior to closing arguments. Vol. 9, 1590-1592. The State did not make any tailoring arguments in their initial closing, saving all such arguments for rebuttal. Vol. 9, 1614-46; 1663, 1664, 1667. As a result, the State's argument that the Defense could

have addressed any tailoring arguments in their closing is belied by the record. Had such arguments been addressed in the Defense closing, it would have "opened the door" to the State's rebuttal tailoring arguments as well as waived Mr. Ortiz's prior objection. *See Sherman v. State*, 114 Nev. 998, 965 P.2d 903 (1998) (Defendant's closing arguments opened the door to the State's arguments regarding defendant's lack of remorse). Therefore, the State's arguments are without merit and Mr. Ortiz's conviction must be overturned due to the State's use of an improper tailoring argument in rebuttal closing.

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

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

The Reasonable Doubt Instruction is set forth in NRS 175.211(1) and 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." *Id.* Here, the District Court added the following sentence to the reasonable doubt instruction: "If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty". Mr. Ortiz objected to this sentence on the ground that it impinges upon

the presumption of innocence because it presumes guilt and directs the jury that they must have a reasonable doubt in order to find Mr. Ortiz not guilty.

In response, the State has relied upon *Blake v. State*, 121 Nev. 779, 121 P.3d 567 (2005), for the assertion that the reasonable doubt instruction given in the instant matter, including the objected to sentence, was appropriate. A review of this case shows that the State's argument is not supported by this Court's decision in *Blake*. There, the issue was whether the instruction on the presumption of innocence, given pursuant to NRS 175.191, nullified the presumption of innocence due to how it was worded. This Court reviewed the presumption of innocence instruction in conjunction with the reasonable doubt instruction, both of which were given during trial in that matter, and concluded that the presumption of innocence instruction contemplated that guilt might not be proven. The issue in *Blake*, therefore, was not the reasonable doubt instruction and *Blake* has no application to the instant matter.

Likewise, in *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991), while it directly addressed the reasonable doubt instruction, finding that such instruction satisfied due process, the issue there was the "abiding conviction" language in the reasonable doubt instruction and whether it complied with recent Supreme Court precedent of *Cage v. Louisiana*, 111 S.Ct. 328 (1990). Finding that the instruction given in *Cage* was dissimilar to the Nevada instruction, there was no error.

The challenge in the instant matter, however, involves the last sentence of the reasonable doubt instruction - which is different from the challenge in *Lord*. The challenge here is two fold: this language impermissibly adds to the reasonable doubt instruction and it presumes guilt unless proven innocent: "If you have a reasonable doubt as to the guilt of the Defendant . . .". The proper standard is that the Defendant is presumed innocent unless the State proves each and every element of the crimes charged beyond a reasonable doubt.

There is no legal presumption of guilt in this case, only the presumption of innocence. Although the instruction given in the instant matter may be courtroom practice, such " [c]ourtroom practices that undermine the presumption of innocence are unconstitutional unless they serve an essential state interest." *Watters v. State*, 129 Nev. 886, 313 P.3d 243 (2013). There is no "essential state interest" which would justify impinging on the presumption of innocence. Accordingly, Mr. Ortiz's convictions must be overturned.

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

The instruction given – Jury Instruction 36 – indicated, in pertinent part, that: "[o]nly 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." (Emphasis added). Vol. 9, 1611-12. This is a mis-statement of the law and flies in the face of the clear Nevada precedent outlined in *Crowley v. State*, 120 Nev. 30, 83 P.3d 282 (2004) and *Townsend v. State*, 103 Nev. 113, 734 P.2d 705 (1987).

Interruptions during a sexual assault can give rise to multiple counts of sexual assault from a single act. This is not in dispute. However, where the actions of the defendant were simply a prelude to more sexual conduct or where the interruptions give rise to a "hyper-technical" division of a single act into multiple acts, there was only a single sexual assault. *See Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004) and *Townsend v. State*, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987). This is a question of fact for the jury. However, when the jury is instructed that, in order to constitute a single sexual assault the acts must be "continuous and did not stop", the jury is wrongly instructed. And since "[j]urors are presumed to follow the instructions they are given" *McNamara v. State*, 132 Nev. 606, 622, 377 P.3d 106, 117 (2016), this mis-statement of the law necessitates Mr. Ortiz's conviction be reversed.

. . .

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

In the instant matter, the State charged one count of sexual assault for every time the Defendant and the accuser allegedly changed positions while having sex. Vol. 7, 1300-04. Here, however, the accuser had problems recalling the exact number or the type of sexual positions when she testified at trial. 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. Vol. 6, 1004-05. She could not remember any others. Vol. 6, 1006. Even after the State refreshed her recollection as to the number and type of sexual positions, she was still unable to recall with particularity. Vol. 6, 1033-36. For example, when the State, *after* her recollection had been refreshed, asked her whether Mr. Ortiz would take his penis out of her vagina and then re-enter her vagina every time they changed positions, she speculated: "I don't remember very well, but I think so." Vol. 6, 1037-38. Mr. Ortiz, on the other hand, was very clear – he testified that there were two, specific positions which took place on the bed. Vol. 8, 1503-04. The State *never* questioned Mr. Ortiz about the number of sexual positions or the kinds of positions either during cross examination or re-cross examination[3]. Vol. 8, 1509-27; 1531-32.

[3]The State's assertion that Mr. Ortiz's testimony corroborated that of the accuser, therefore, is limited to only two specific sexual positions – which is not all of the

While this Court has repeatedly held that the testimony of a sexual assault *victim* alone is sufficient to uphold the charge, *LaPierre v. State,* 108 Nev. 528, 836 P.d 56 (1992), the *victim* must describe the charged incidents with some particularity and there must be some reliable indicia that the number of acts charged actually occurred. *Id.* at 108 Nev. at 531. This holding has never been limited solely to *child victims* of sexual assault. And while this Court has recognized that children often have difficulty recalling the specificity of the events, *See Rose v. State*, 123 Nev. 194, 163 P.3d 408 (2007), the accuser here is not a child.

The adult accuser here both could not remember and speculated – even after her recollection was refreshed. Because the State has the burden of proof, the outcome of an accuser's failure to remember *or* their speculation is the same: The State has failed to prove the alleged crimes beyond a reasonable doubt. It is, therefore, proper defense argument that, had the events happened as alleged, the accuser should have been able to recall the events in question with specificity and particularity, especially since her recollection was refreshed. Since it is the jury's function to assess the credibility of witnesses, *Rose v. State*, 123 Nev. 194, 163 P.3d 408, (2007), her inability to recall with particularity was an issue of fact for the jury

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eight sexual assaults alleged in the Amended Information. AB pg. 38; Vol. 7, 1300-04; Vol. 1, 78-85.

on which the jury should have been instructed. Accordingly, Mr. Ortiz's convictions should 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

"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, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), *quoting Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). Here, the antics of Eylin Castro on the stand, in full view of the jury, were "not adduced as proof at trial" but the jury was instructed that such antics (described as "demeanor") could be considered in determining Mr. Ortiz's case. Thus, the failure of the District Court to grant the motion for mistrial – or even to admonish the jury to not consider the witness's emotional breakdown – necessitates the reversal of Mr. Ortiz's conviction.

A review of the video clearly shows Eylin Castro become unexplainably hysterical, crying, screaming, bouncing up and down, hitting her chest and retching into a trash can. JAVS at 13:05 - 15:18. The State's argument that Eylin Castro's

actions were not a spontaneous outburst but were in response to direct examination defies logic. The State would have met with Ms. Castro prior to trial, discussed her testimony and prepared her for what to expect on the stand – as any ethical attorney presenting witness testimony would. Accordingly, the witness was presumably familiar with the Deputy District Attorney and thus, on direct examination, there were no stressors which would have triggered the severity of the behaviors the jury witnessed.

Further, it is fair to say that a lot of witnesses are nervous on the stand as it is a nerve wracking, stomach churning experience. Eylin Castro is not a professional witness so her being nervous was to be expected. Most witnesses, professional or not, manage to get through the experience without a complete emotional breakdown. Shedding a few tears and being nervous on the stand is a far cry from what happened in the instant matter.

Counsel has been unable to ascertain any Nevada precedent with regard to this exact situation. Accordingly, looking to how other states have handled similar situations is necessary – which is exactly what both sides did at trial. Vol. 7, 1120-64.

The granting of a mistrial is not unheard of when witnesses become hysterical. In *State v. Swindell*, 271 S.W.2d 533, 536 (Mo. 1954), the defendant was charged

with sexual assault and the alleged victim was repeatedly admonished about weeping on the stand. While the Missouri Supreme Court denied the appeal on this ground due to trial counsel's failure to adequately reflect on the record what the alleged victim was doing, the Court acknowledged that: "Of course all emotional outbursts should be prevented as far as possible and if sufficiently or obviously inflammatory may so deprive a defendant of a fair trial as to require the granting of a new trial. . . ." *Citing State v. Connor*, 252 S.W. 713, 722 (Mo.1923).

In *State v. Connor*, 252 S.W. 713 (Mo.1923), the victim's parents were in the gallery and the victim's mother was sobbing into the arms of another while her husband fanned her. Further, the District Attorney referred to these actions in closing and the Court found that these actions, along with other issues, were grounds for a new trial.

In *Burns v. State*, 968 A.2d 1012 (Del. 2009), the Delaware Supreme Court acknowledged that courtroom outbursts may be sufficient to grant a mistrial. In making that determination, the court should weigh the four factors of the nature, persistency and frequency of the outburst, the likelihood of prejudice to the jury, the closeness of the case and the mitigating effect of a curative instruction. *See also, Taylor v. State*, 690 A.2d 933, 935 (Del. 1997).

Mistrials are rarely granted due to the fact that trial court judges have adequately admonished the jury to disregard the witness's outburst. *See Commonwealth v. Andrews*, 530 N.E.2d 1222 (Mass. 1988) (Victim's mother made spontaneous outburst on the stand and motion for mistrial properly denied where comment was struck and jury was instructed to ignore). *Burns v. State*, 968 A.2d 1012 (Del. 2009) (Weighing four factors to determine whether witness outburst necessitated mistrial where trial court adequately instructed the jury). In *Nolan v. State*, 122 Nev. 363, 132 P.3d 564 (2006), this Court found it was plain error for the trial court to fail to admonish the jury where a juror started spontaneously asking questions of a witness during trial. And while this Court's ruling in *Nolan* is not directly on point with the current issue, it is instructive in that admonishment of the jury is key.

Here, the *State* suggested that the jury should be admonished yet the Court failed to do so. Vol. 7, 1128-33. Instead, the District Court, over objection, allowed the State to repeatedly reference Eylin Castro's demeanor on the stand and specifically instructed the jury that witness "demeanor" was something they could consider. Vol. 7, 1129-30, 1132-33; Vol. 9, 1642, 1656-57. And the subsequent individual voir dire of the jurors revealed that, while at least one juror was honest as

to the effect of the outburst, other jurors were not – they failed to inform the Court that the paramedics being called was the subject of discussion among them[4].

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. Accordingly, Mr. Ortiz's conviction must be reversed.

E. The District Court Committed Cumulative Error

In order to reverse for cumulative error, three factors must be met: "(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).

As stated in detail above, Mr. Ortiz's jury was unconstitutional. The State made improper tailoring arguments which were unconstitutional pursuant to the

. . .

[4]Juror 4 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.

Nevada Constitution.[5] The Jury was improperly instructed several times and the motion for mistrial was wrongly denied.

Further, the evidence was close. This was a consensual relationship between the accuser and Mr. Ortiz. The accuser was a married woman with a daughter who had mental health issues. Vol. 6, 1002. It was this daughter who caught the accuser and Mr. Ortiz having an affair in the proverbial "marriage bed" while her father was away at work. Vol. 6, 1016, 1018. There was no gun – the accuser admitted that she thought it was a fake, the daughter "forgot" about it and the jury acquitted Mr. Ortiz of it. Vol. 6, 998-99, 1082; Vol. 8, 1401; Vol. 9, 1761-64. There was no forced entry into the home. Vol. 6, 1058. Items of great value – including money – were untouched. Vol. 7, 1287, 1290-92. Mr. Ortiz knocked on the bedroom door and, when no one answered, he went elsewhere – he didn't go into the bedroom unannounced. Vol. 6, 997. He *asked* to use a cell phone. Vol. 6, 1021, 1074-76. He *asked* for a pair of socks. Vol. 6, 1021, 1074-76. He *asked* for a ride. Vol. 6, 1021, 1074-76. When he *asked* for certain sexual acts and his request was denied, he took "no" for an answer. Vol. 6, 1002, 1007, 1084. The accuser and her

[5]If not already clear, Mr. Ortiz did not concede that tailoring arguments are permissible. (State's Answering Brief, pg. 46). They are not prohibited by the United States Constitution but they *are* prohibited under the Nevada Constitution. The State has mis-apprehended the holding in *Portuondo v. Agard*, 529 U.S. 61, n. 4, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) and their argument is without merit.

daughter left the residence – unhindered. Vol. 8, 1384-86; 1399. The accuser had to keep up the charade because she got caught back then. Now, she's in too deep to change her story. The State concedes the gravity of the crime charged (AB 47) and, as a result, cumulative error must apply to the instant matter. Mr. Ortiz's convictions must be reversed.

III. 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 6th day of May, 2020.

Respectfully submitted,

/s/ MELINDA E. SIMPKINS

By:_____
MELINDA E. SIMPKINS
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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 5,171 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 6th day of May, 2020

/s/ MELINDA E. SIMPKINS

_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 6th day of May, 2020, a copy of the foregoing Reply Brief was served as follows:

BY ELECTRONIC FILING TO

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/s/ MELINDA SIMPKINS

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