IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMEL ORTIZ,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 78996

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(2) because it is a direct appeal from a Judgment of Conviction based on a jury verdict involving convictions for Category A and B felonies.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying Appellant's fair cross section challenge regarding the venire.
2. Whether the district court erred in denying Appellant's objection over the State making permissible "tailoring" arguments.
3. Whether the district court erred in denying Appellant's various objections to certain jury instructions.
4. Whether the district court erred in denying Appellant's Motion for a Mistrial.
5. Whether there was cumulative error.

STATEMENT OF THE CASE

On April 5, 2017, Ramel Ortiz (hereinafter "Appellant") was charged by way of Indictment with: Count 1 – Burglary While in Possession of a Deadly Weapon; Count 2 – First Degree Kidnapping with Use of a Deadly Weapon; Counts 3 and 4 – Second Degree Kidnapping with Use of a Deadly Weapon; Counts 5-12 – Sexual Assault with Use of a Deadly Weapon; Counts 13-15 – Attempt Sexual Assault with Use of a Deadly Weapon; Count 16 – Robbery with Use of a Deadly Weapon; Count 17 – Assault with a Deadly Weapon; Counts 18 and 19 – Coercion Sexually Motivated with Use of a Deadly Weapon; and Counts 20-22 – Open or Gross Lewdness. I Appellant's Appendix ("AA") 78-85. On April 13, 2017, Appellant pled not guilty and invoked his right to a speedy trial. I AA 91-94.

On May 30, 2017, at Calendar Call, the Public Defender's office withdrew due to a conflict of interest. I AA 183-86. The trial date was vacated. Id. On June 1, 2017, the Special Public Defender's office was appointed, represented by Susan Bush. I AA 187-93.

On June 8, 2017, Appellant maintained his desire to go to trial within sixty (60) days and the defense indicated they would not be ready for trial in that timeframe and noted the complexity of the case; trial was reset for August 1, 2017. I AA 194-98. On July 25th, at the second Calendar Call, defense announced they would not be ready for trial. I AA 201-09. The trial was reset for November 7, 2017.

I AA 208. On October 31, 2017, at the third Calendar Call, defense counsel indicated they were already in a trial in Department 12 and requested a continuance; the trial was reset for January 3, 2018. I AA 210-12.

On December 6, 2017, Appellant 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". I AA 226-34. On December 11, 2017, the State filed an Opposition to the Motion to Dismiss. II AA 281-92. On January 2, 2018, the district court denied the Motion to Dismiss and filed its Order on January 16, 2018. II AA 309-314, 319-20.

On December 8, 2017, the State filed a Motion to Admit Other Bad Acts. I AA 235- 47. On December 27, 2017, Appellant filed its Opposition to the Motion to Admit Other Bad Acts. II AA 304-08.

On December 11, 2017, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. II AA 278-80.

On December 19, 2017, the jury trial was again continued to July 31, 2018. II AA 299-302. At Calendar Call on July 24, 2018, the trial was continued to March 2019. II AA 322-23.

On March 11, 2019, the jury trial began, and concluded on March 19, 2019. III AA 393; XI 1582. An Amended Indictment was filed on March 18, 2019 and charged Appellant with: Count 1 – Burglary While in Possession of a Deadly

Weapon; Count 2 – First Degree Kidnapping with Use of a Deadly Weapon; Count 3 – Second Degree Kidnapping with Use of a Deadly Weapon; Counts 4-10 – Sexual Assault with Use of a Deadly Weapon; Count 11 – Robbery with Use of a Deadly Weapon; Count 12 – Assault with a Deadly Weapon; and Counts 13-15 – Open or Gross Lewdness. VII AA 1300-04.

On March 20, 2019, the verdict was entered. IX AA 1761-64. The jury found Appellant guilty on all counts except Appellant was found not guilty on Count 8 – Sexual Assault with Use of a Deadly Weapon and was found not guilty as to the deadly weapon enhancements for each count. IX AA 1684.

On May 16, 2019, the district court sentenced Appellant to: Count 1 – a maximum of one hundred twenty (120) months and a minimum of thirty-six (36) months in the Nevada Department of Corrections ("NDC"); Count 2 – Life with a minimum parole eligibility of five (5) years, concurrent with Count 1; Count 3 – a maximum of one hundred eighty (180) months and a minimum of forty-eight (48) months in NDC, concurrent with Count 2; Count 4 – Life with a minimum parole eligibility of ten (10) years, consecutive to Count 2; Count 5 – Life with a minimum parole eligibility of ten (10) years, consecutive to Count 4; Count 6 – Life with a minimum parole eligibility of ten (10) years, concurrent to Count 5; Count 7 – Life with a minimum parole eligibility of ten (10) years, concurrent to Count 6; Count 9 – Life with a minimum parole eligibility of ten (10) years, concurrent to Count 7;

Count 10 – Life with a minimum parole eligibility of ten (10) years, concurrent to Count 9; Count 11 a maximum of one hundred eighty (180) months and a minimum of forty-eight (48) months in NDC, concurrent with 10; and Counts 12-15 – credit for time served, with Counts 12-15 to run concurrent to each other, and seven hundred ninety-two (792) days credit for time served. IX AA 1765-81. The Judgment of Conviction was filed on May 21, 2019 and listed the aggregate total sentence as Life with a minimum parole eligibility of twenty-five (25) years. IX AA 1782-85. An Amended Judgment of Conviction was filed on May 29, 2019 to correct a clerical error. IX AA 1786-89

On June 11, 2019, Appellant filed his Notice of Appeal. IX AA 1790-91. On February 28, 2020, Appellant filed his Opening Brief.

STATEMENT OF THE FACTS

On March 8, 2017, Mirsa Pineda ("the victim") was living with in Las Vegas with her husband[1], Raul Vasquez, her son, Marvin Hernandez ("Marvin"), her daughter, Eylin Castro ("Eylin"), and a family friend named Darlyn Fernandez ("Darlyn"). VI AA 994-95. During that night, the victim knew that her son and ex-husband were in the home. VI AA 995. The victim's ex-husband typically worked from 5 o'clock a.m. to 2 o'clock p.m. VI AA 994-95. On March 9, 2017, at 5:30

[1] The victim testified that Raul is now her ex-husband. VI AA 994-95.

a.m., the victim woke up to the sound of a knock on her bedroom door. VI AA 996-97. She believed it was her son who was knocking, so she covered herself with a sheet before opening the door. VI AA 997. Upon opening the door, the victim walked out of the bedroom, but noticed that nobody was there; she walked over towards the kitchen and called her son's name. VI AA 997. When she made the turn, she walked right into Appellant. VI AA 997-98.

The victim did not know Appellant and described him as dark-skinned with curly hair. VI AA 998. The victim remembered that upon viewing a gun in Appellant's hand, she was very scared. Id. Appellant pointed the gun at the victim and told her to relax. VI AA 998-99. The victim asked Appellant why he was in her house, and Appellant responded for her to "let him be for five minutes"; the victim was unable to comprehend exactly what Appellant was saying. VI AA 999.[2] The victim remembered having some conversation with Appellant about how he had gotten into the home but could not remember what Appellant had said. VI AA 1024.

Appellant asked the victim for her phone, but she lied and said she did not have one, in hopes of being able to use the phone herself to call the police. VI AA 1000. Appellant took the victim into her room to look for a phone. Id. The victim was able to grab the phone and hid it under the sheet/blanket she was covered in. Id.

[2] The victim also testified that she speaks Spanish, and was barely able to communicate with Appellant in English; the victim does understand some English. VI AA 999-1000.

After trying to find a phone in the daughter's bedroom, Appellant told the victim that he wanted to have sex with her for five (5) minutes. VI AA 1001. The victim repeatedly told Appellant no. VI AA 1001-02. She also told Appellant that her daughter would be home soon and had mental issues. VI AA 1002. Appellant told her to comply, and that if the victim did, her daughter would be okay. Id. Appellant insisted on having sex with the victim in the daughter's room, but the victim told him no. Id.

The victim and Appellant went back to her bedroom, and the victim told him that she wanted to go to the bathroom. Id. Her plan was to call the police in the bathroom, but Appellant followed her. VI AA 1002-03. While in the bathroom, the victim dropped her sheet and phone, but as soon as she exited the bathroom, she put pants on. VI AA 1003. Appellant told her to take her clothes off, and the victim reluctantly complied. Id. Appellant then laid down on the bed and took his clothes off; the victim noticed that Appellant had a scar on his left arm. VI AA 1004, 1010. Appellant ordered the victim to get on top of him, so that the victim was straddling him, and then he penetrated her vagina with his penis. VI AA 1004.

The victim testified that she tried to forget the details of this horrific incident, but still remembered changing positions so that she was face down on her stomach. VI AA 1005. Appellant then penetrated her vagina again with his penis. Id. The victim did not want this to happen, and remembers that she was angry, but remained

calm so that she could gain Appellant's trust. VI AA 1005-06. Appellant again forced the victim to change positions so that she was on her side; he proceeded to penetrate her vagina with his penis. VI AA 1037. Then, Appellant forced the victim to straddle him again, which he then penetrated her vagina. Id.

Between the multiple assaults, Appellant told her to put his penis in her mouth, but she pleaded with him by telling him that is the worst type of humiliation, that it was against her religion. VI AA 1007. Appellant also attempted to have anal sex with the victim. Id. Appellant did not force her to complete those acts but forced the victim to complete other sexual acts. Id. At one point, Appellant had found lubricant, placed it on his penis, and told the victim to masturbate him. VI AA 1008. Appellant would also kiss the victim on her breast and neck. VI AA 1013.

After the multiple sexual assaults in the bedroom, which ended in Appellant ejaculating inside of the victim, Appellant ordered her to go into the bathroom so they could shower. VI AA 1010-11, 1017. Prior to entering the shower, Appellant put his gun on the bathroom mat. VI AA 1011. While in the shower, Appellant was behind the victim and he placed his fingers in her vagina. VI AA 1011-12. At one point, Appellant ordered her to lift up her leg on the tub, and Appellant put his tongue in her vagina as he began washing the victim. VI AA 1012-13. While in the shower, Appellant would kiss her breast and her neck. Id.

After the shower, Appellant demanded that the victim masturbate his penis while he watched porn; Appellant would also masturbate himself. VI AA 1014-15. When Appellant's penis was no longer erect, the victim and Appellant got dressed. VI AA 1014.

Appellant then went into the victim's son's room, where he began rummaging through the son's things. VI AA 1016. When she and Appellant exited the room, the victim saw her daughter sitting at the kitchen table. Id. Her daughter was shocked to see Appellant, and the victim tried to keep calm by telling her daughter that everything was fine and to do what Appellant told them to do. VI AA 1018.

Appellant asked Eylin for a phone so that he could call a friend; Appellant dialed a number but did not speak. VI AA 1019. While this occurred, the victim's daughter just stayed still- immobilized. Id. There was a discussion about the daughter having a car. VI AA 1020. The victim and her daughter headed out the door, but Appellant went back into a bedroom. VI AA 1021. While Appellant was in the room, the victim and her daughter got into the car and escaped; the victim was then able to call her husband. VI AA 1021-22. Her ex-husband then called the police. VI AA 1022. Raul testified that he met the victim at a shopping center. VII AA 1185-86. She was crying and shaking from the encounter with Appellant. VII AA 1186.

Throughout this terrifying encounter, the victim tried to stay calm whenever possible. VI AA 1027. At times, the victim noticed whenever she became nervous,

Appellant's eyes would go blank and he would act as though he was agitated. Id. When she would become agitated, her assailant would also become agitated. Id.

Eylin also testified at trial. On the evening of March 8, 2017, Eylin went to work for her normal graveyard shift. VI AA 1108; VIII AA 1375. She arrived home the next morning. VI AA 1108. She remembered that her brother was not home, and that it was her mom's day off from work. VI AA 1108. She grabbed breakfast and went to the living room to eat. VI AA 1109; VIII AA 1375. While eating, Eylin heard her mother speaking, but assumed she was on the phone. VI AA 1109; VIII AA 1376. After fifteen (15) to twenty (20) minutes, Eylin saw her mother appear from a room; her mother was crying and was holding one hand over the other in front of her chest. VI AA 1109-1110; VIII AA 1376-77. With her mother was a dark-skinned man, who was taller than her mom. VI AA 1110-1111.

When her mother began to speak to her, she had calmed down. VI AA 1111. The unknown man was still standing behind her mother. Id. She witnessed a gun in the man's hand as well as something orange or yellow. VIII AA 1380, 1387, 1400-01. Appellant asked if Eylin had a car. VIII AA 1382. Eylin attempted to give him her car keys, but he did not take them. VIII AA 1382. Appellant kept looking around, and then instructed the two (2) victims to leave with him. VIII AA 1382-83. Appellant asked for a pair of socks, so Eylin grabbed him a pair that were black with white lettering. VIII AA 1383. Eylin recognized her socks after seeing a photo from

State's Exhibit 128. VIII AA 1391. Upon viewing State's Exhibit 128, Detective Samples was able to identify a pair of socks that were found in Appellant's residence. VII AA 1257. In court, she identified Appellant as the unknown man. VIII AA 1391-92.

That same day, Johnny Rodriguez, employed at the time as a patrol officer for LVMPD, responded to the victim's house after the victim's husband called. VII AA 1199-1200. Officer Rodriguez encountered the victim who was crying and shaking. VII AA 1203. Sexual Assault Detective Jason LaFreniere remembered that the victim's daughter was also in a state of shock or disbelief. VII AA 1231, 1234-35.

Jeffrey Scott, a Senior Crime Scene Analyst from the Las Vegas Metropolitan Police Department, also responded to the victims' home that day. V AA 943-44. He completed a walk-through of the home in order to get an idea on what to look for and what items were irrelevant to the crimes. V AA 946-47. After completing the walk-through, Mr. Scott began taking notes and photographs of items of interest. V AA 947. A few houses down and across the street from the crime scene was a backpack. V AA 947-49. The items inside of the backpack was photographed. V AA 949. Chewed up blue gum was found outside the residence and photographed. V AA 949-50. In addition to this gum, other items were found outside the home which included jewelry and a wadded-up tissue. V AA 951-53. Additional jewelry and tweezers were located about two houses down in a drainage area/wash. V AA 953-

54. A cellphone was recovered from the victim's vehicle and was swabbed for potential DNA. V AA 958-59. In one bedroom, a jewelry box was found open on a dresser. V AA 964. Darlyn testified that some of her jewelry was taken and her tweezers but those items were found outside the home. VI AA 1093-94. Marvin testified that a cell phone was missing. VI AA 1099-1100.

In the master bedroom, there were additional items of interest: a bottle of lube on the floor near the bed, a piece of orange material located on a sheet on the bed, and a small orange material on the toilet lid. V AA 967-69. A black beanie cap was also found in the master bedroom. V AA 972. Next, the bed was examined for any possible stains. V AA 970. A towel, located on the bed, has a stain which tested presumptively positive for semen, and later came back negative. V AA 970-71. Sheets on the bed initially tested presumptive positive for semen. V AA 971. Within the master bedroom, two (2) orange pair of shorts and a pair of orange socks were located. V AA 972.

The victim was taken to a hospital to undergo an evaluation that was conducted by Jeri Dermanelian. VI AA 1040; VIII AA 1467. After the evaluation, she remembered speaking with detectives. VI AA 1041. With the assistance of an interpreter, Detective Rylan took the victim's statement at the University Medical Center; Detective Ryland noted that while the victim appeared to be calm, it was

clear she had been crying before and at times throughout the interview she would become emotional. VII AA 1260-61.

On March 11, 2017, David Prichard, a Sketch Artist for LVMPD, met with the victim. VII AA 1190-91, 1194. He was able to procure a sketch of the victim's assailant and a sketch of the suspect's arm. VII AA 1195. Sex Crimes Detective Matt Campbell testified that on March 12, 2017, he showed the victim the photo-lineup. VII AA 1217-20. State's Exhibit 140 was photos of different men used during the photo-lineup up. VI AA 1049. On one photo, the victim identified her assailant, Appellant, and wrote that "this was the man that assaulted me". VI AA 1049-51. Detective Jesse Ryland testified that the person chosen by the victim in the photo-lineup was the Defendant, Ramel Ortiz. VII AA 1273-75. Eylin later identified the assailant from a photo-line up. VIII AA 1388-90.

Allison Rubio, a forensic scientist for LVMPD, testified that she tested a sexual assault kit that yielded a presumptive positive for semen and saliva. VIII AA 1409, 1419-20. A swab from a breast yielded a presumptive positive for saliva. VIII AA 1422. As to the breast swab, there was a partial deduced DNA profile from Appellant. VIII AA 1425. Ms. Rubio also tested a bed sheet that yielded a presumptive positive for semen VIII AA 1427, 1432. From a pair of shorts, there was a DNA mixture profile from the victim and Appellant. VIII AA 1437-38. A

presumptive positive for semen was also located on the shorts where the major DNA profile was from Appellant. VIII AA 1438-39.

At trial, Appellant testified that he was in the area of Jones and Smoke Ranch on March 9, 2017. VIII AA 1497. He claimed he was in the area because he knew the victim after they met at the victim's job. VIII AA 1498. Appellant asserted he had an intimate relationship with her from December 2016 until March 2017; they were intimate four (4) to five (5) times. VIII AA 1499. According to Appellant, they had not been intimate since early February, because he was in jail and did not have any contact with the victim. VIII AA 1515-17.

On the day of the incident, Appellant testified that he remembered sitting in Eylin's bedroom and claimed that he and the victim were paranoid of getting caught. VIII AA 1504-05. Despite this alleged paranoia, according to Appellant, he had consensual relations with the victim in her bedroom. VIII AA 1502. Appellant stated that initially the victim was on top of him, and then he was on top of her while the victim was on her stomach. VIII AA 1503. When asked by counsel if Appellant had heard about the victim testifying about sexual acts in the shower, Appellant confirmed that there were sexual acts in the shower. VIII AA 1502-03. Appellant stated that he heard testimony about pornographic materials and confirmed that he and the victim watched porn together that morning. VIII AA 1503-04. Appellant

also confirmed that he was in Marvin's room to look for a pair of shorts. VIII AA 1505.

After the sexual acts, Appellant claimed that he and the victim left the room and met Eylin, who asked who he was. VIII AA 1506. Appellant does not understand Spanish, and his communication with Eylin was through the victim. Id. Appellant asked for a ride and used Eylin's phone. VIII AA 1506. When they all stood up to leave, Appellant went back to the bedroom because he forgot his beanie. VIII AA 1508. Appellant could not find the beanie, but when he went back, he was surprised to see that the victims has left. Id. Appellant ended up walking and left through the wash; he made a left on Jones, a left on Smoke Ranch, and a right on Rainbow to a friend's house. VIII AA 1508-09.

Appellant also testified that on March 16, 2017, he spoke with Detectives and understood what he had been charged with. VIII AA 1521. At that point, Appellant told the detectives that he could not think of any reason why his DNA would be at the victim's house. VIII AA 1522. Appellant further told Detectives that the socks found at his place where from his girlfriend. VIII AA 1522-23. Appellant also stated that he did not remember any orange shorts that were recovered from the area. VIII AA 1524-25. On March 16, 2017, Detective Lawrence Samples, was informed that Appellant had been apprehended. VII AA 1254.

/ / /

SUMMARY OF THE ARGUMENT

First, the district court did not err in denying Appellant's fair cross section challenge and Appellant's request for a new panel, as Appellant failed to show that there was a systematic exclusion of African Americans in the jury process. Moreover, the district court did not err in denying Appellant's request for an evidentiary hearing because there was prior testimony from the Jury Commissioner on the exact issue that Appellant raised here. Appellant's counsel had this testimony and presented it to the court.

Second, the district court did not err in overruling Appellant's objections based upon arguments made by the State. As Appellant concedes in his Opening Brief, "tailoring" arguments are permissible according to binding legal authority.

Next, the district court did not abuse its discretion in denying Appellant's Proposed Jury Instructions. As to the reasonable doubt instruction, the instruction given was in accordance with Nevada laws, properly defined the State's burden of proof, and stated that Appellant was innocent until proven guilty. As to Jury Instruction No. 36, this was a correct statement of law. Finally, Appellant's proposed Instruction regarding a witness testifying with particularity was not necessary since the instructions was covered by other instructions given to the jury, the victim here did testify with particularity, and there was corroboration of the victim's testimony by Appellant.

Fourth, the district court properly denied Appellant's motion for a mistrial because Appellant failed to show that the outburst was prejudicial, and the court took steps to mitigate any effect the outburst would have on the jury. Finally, since there was no error committed, there were no errors to accumulate.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S FAIR CROSS SECTION CHALLENGE AS THERE WAS NO SYSTEMATIC EXCLUSION OF ANY DISTINCTIVE GROUP

Appellant complains that the District Court erred in denying his fair cross section challenge because African Americans were underrepresented in the venire. AOB 18. According to Appellant, there was prior testimony from the Jury Commissioner indicating that no potential jurors were being pulled from the Employment Security Division of the Department of Employment, Training, and Rehabilitation ("Department of Employment"). AOB 22. Additionally, Appellant contends that an evidentiary hearing would have established that at the time of this trial, the Department of Employment was not providing potential juror information and that African Americans are systematically excluded from the jury process. AOB 22-23. Therefore, Appellant claims that the district court created structural error by concluding that there was no way to obtain a constitutional jury in Clark County, and for denying Appellant's requests for an evidentiary hearing and a new panel. AOB 23.

The Sixth and Fourteenth Amendments give criminal defendants the right to be tried by a jury made up of an impartial and representative cross section of their peers. Taylor v. Louisiana, 419 U.S. 522, 526-27, 95 S.Ct. 692, 696 (1975). However, "[t]he Sixth Amendment only requires that 'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Williams v. State, 121 Nev. 934, 939-40, (quoting Evans v. State, 112 Nev. 1172, 1186 (1996)). This right does not "guarantee a jury or even a venire that is a perfect cross section of the community" but recognizes that, as long as the process behind selecting the jury pool is fair, "random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." Id.

To prove a "prima facie violation of the fair-cross-section requirements" a defendant must show:

> (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 underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 940 (internal quotation and emphasis omitted). However, there is no constitutional right to a venire that perfectly reflects the community's composition. Id. at 939.

NRS 6.110(1) prescribes the process for the selection of jurors for counties with a population of more than 100,000 people. This statute directs the clerk of the court to select at least 500 names at random from the available lists and then mail those prospective jurors questionnaires. NRS 6.110(1). This Court has upheld this random process in the past. Kirksey v. State, 112 Nev. 980 (1996); see also Battle v. State, 2016 Nev. Unpub. LEXIS 607, *5-6, 2016 WL 4445494 (Nev. Aug. 10, 2016) ("We conclude that the process explained by the jury commissioner provides no opportunity for systematic exclusion of specific races.").

The district court did not err in denying the request for an evidentiary hearing and for a new venire panel. At trial, defense counsel claimed that they made a prima facie case for the third prong because there was prior testimony that potential jurors were not being pulled from the Department of Employment. III AA 408. The district court clarified that it was defense's argument that they cannot get a constitutional panel in Clark County, because potential jurors were not being pulled from the Department. Id. As the State pointed out, Appellant was merely speculating that if potential jurors were pulled from this Department, then there would be an "appropriate" proportion in the panel. III AA 410. Even defense counsel had to agree that part of this inquiry was speculative. III AA 414.

Appellant's purpose for an evidentiary hearing would have been to have someone from the Department testify that there was no list provided. AOB 22-23.

Appellant would have then wanted the district court to make the leap and conclude that without this information, there is a systematic exclusion. Such a general allegation fails since, at trial, Appellant submitted a copy of a transcript from State v. Arenas ("Arenas"), Case No. C-13-293029-1, where Mariah Witt, the Jury Commissioner for the Eighth Judicial District Court, testified regarding the exact issue raised. IX AA 1720. Ms. Witt testified that there has been issues with creating this list from the Department, but they were making progress towards compliance. IX AA 1731-32. The Jury Commissioner was clear that they were not preventing the inclusion of unemployment lists, but actively working to procure this information. IX AA 1734. Therefore, there was testimony on this exact issue.

Moreover, defense counsel's mindset was that if an evidentiary hearing was not needed, the transcript from Arenas could be used. III AA 395. The district court did exactly that, and relied upon previous testimony, which is permissible, where defense counsel represented the Commissioner had previously testified regarding these same issues. III AA 407-08, 240; see Battle, 2016 Nev. Unpub. LEXIS 607, *5-6, 2016 WL 4445494 (Nev. Aug. 10, 2016) (upholding the denial of a request for a hearing with the Jury Commissioner where the district court relied on previous testimony of the Jury Commissioner to conclude that the jury selection process "provides no opportunity for systematic exclusion of specific races" and the defendant had failed to provide any competing evidence in the record and so had

failed to make a prima facie showing as required under Williams). Appellant did not raise issues that had not previously been testified to by the Jury Commissioner, in fact, Appellant's counsel stated that the previous testimony would cover all issues raised. III AA 395, 407-08.

To the extent that Appellant relies on Valentine v. State, 135 Nev. __, 454 P.3d 709 (2019), to support any contention that the district court was required to hold an evidentiary hearing, said claim fails. In Valentine, the defendant complained that two (2) distinctive groups, African Americans and Hispanics, were not fairly and reasonably represented in the venire. Valentine, 135 Nev. at __, 454 P.3d at 713. Valentine challenged the jury selection system, alleging that summonses were not enforced and that the system itself excluded members from distinctive groups. Id. The district court denied the defendant's claim without an evidentiary hearing, instead relying on previous testimony from the Jury Commissioner, and recognizing that any underrepresentation was not due to systematic exclusion. Id. A panel of this Court held that the district court abused its discretion by not holding an evidentiary hearing because the defendant's specific allegations were not previously discussed in the Jury Commissioner's prior testimony. Id. at __, 454 P.3d at 714-15.

Here, Appellant 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. AOB 22. III AA 416. Further,

Appellant attempts to argue that since the Department has a responsibility to post unemployment statistics, a review would have shown systematic exclusion "due to the number of African American receiving unemployment benefits". AOB 23. In Valentine, a panel of this Court held that an evidentiary hearing is warranted "when the defendant makes specific factual allegations which, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement." 135 Nev. __, 454 P.3d at 714. The Valentine Court also acknowledged that there are instances when a district court can rely on the Jury Commissioner's prior testimony. Id. at __, 454 P.3d at 714 FN 1. In the instant case, because Appellant made no specific factual allegations regarding the selection process differing from the Commissioner's previous testimony, it was appropriate for the district court to rely upon the Jury Commissioner's previous testimony.

Additionally, Appellant failed to demonstrate that the juror summoning process systematically excluded African American individuals. The State acknowledges that African Americans make up a distinctive group in the community and that there appeared to be one (1) African American individual in Appellant's jury venire. IX AA 1714. However, Appellant failed to show that the alleged underrepresentation of African Americans in Appellant's jury venire was due to systematic exclusion in the jury-selection process from the Clark County jury pool as a whole. This Court has recognized that a defendant is not entitled to a new jury

venire merely because random variation causes one specific group to be over or underrepresented in his particular jury panel. Williams, 121 Nev. at 939-40. In Williams, the Court found that the defendant failed to show a history of discrimination and failed to show that Clark County systematically discriminates against African Americans. Id. at 941. Further, the Court stated that "[e]ven in a constitutional jury selection system, it is possible to draw venires containing" 0% to 2.5% or 15% to 20% African Americans and that such variations would be normal in a county with 9.1% African Americans. Id.

Absent evidence that the jury rolls in all of Clark County systematically exclude African Americans, Appellant's challenge to the make-up of his particular venire cannot support a prima facie showing of systematic underrepresentation as required by Williams. Therefore, Appellant cannot demonstrate that the selection process in Clark County systematically excludes African Americans and, thus, his claim fails. For these reasons, the district court did not err. As such, this claim should be denied.

II. THE DISTRICT COURT DID NOT ERR IN OVERRULING APPELANT'S OBJECTIONS REGARDING THE STATE'S "TAILORING" ARGUMENTS

Appellant argues that during his cross-examination, the State "set the stage" to present the argument, during closing arguments, that Appellant had tailored his testimony to what was offered during the trial. AOB 23. Appellant specifically

claims the questions were about his review of discovery, preparation for trial, and his presence in the courtroom during other witnesses' testimony. AOB 23-24. Appellant objected at trial to the tailoring arguments, but the district court overruled the objections. AOB 24. Appellant claims that this was in violation of his right to appear and defend himself pursuant to the Nevada Constitution. Id.

It is blatantly clear from Appellant's own brief that there is no basis to exclude such argument. As cited to by Appellant there is binding case law that holds that a prosecutor's comments, regarding a defendant tailoring their argument after being present, did not violate a defendant's Fifth and Sixth Amendments rights, nor did it violate due process. Portuondo v. Agard, 529 U.S. 61, 61-63, 120 S. Ct. 1119, 1121(2000). Moreover, defense counsel acknowledged the "fair points" that the State made, and that the case law defense presented was not binding upon the district Court. IX AA 1594. Now, Appellant argues that the Nevada Constitution affords him more protections than the United States Constitution, because an appellant has a specific right to be present and defend, and therefore the Supreme Court case should not apply. AOB 26. Logically, this argument makes no sense, because Appellant clearly states that while the Sixth Amendment does not have a specific right to be present at trial, there is case law from the United States Supreme Court that construes the sixth amendment to mean that a defendant has a right to be present at trial. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057 (1970). Therefore, Appellant's

argument that the Nevada Constitution affords more protections is meritless and nonsensical.

In Portunodo, the prosecutor made comments during rebuttal closing arguments that the defendant had the opportunity to change his testimony after hearing other witnesses, that the defendant's testimony sounded rehearsed, and that the defendant was a "smooth slick character". Id. at 63-64, 120 S. Ct. at 1122. The Supreme Court found that:

> the prosecutor's comments in this case concerned respondent's credibility as a witness. They were therefore in accord with the Court's longstanding rule that when a defendant takes the stand, his credibility may be assailed like that of any other witness—a rule that serves the trial's truth-seeking function, Perry v. Leeke, 488 U.S. 272, 282, 109 S.Ct. 594, 102 L.Ed.2d 624.

Id. at 61-62, 120 S. Ct. at 1121. The Supreme Court added that, "it is natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him." Id. at 67–68, 120 S.Ct. at 1124. Even though the Court found the prosecutor's argument to be generic, the Supreme Court determined that standing case law has approved of such "generic" comments before as seen in Reagan v. United States, where the,

> trial court instructed the jury that "[t]he deep personal interest which [the defendant] may have in the result of the suit should be considered ... in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." The instruction did not rely on

> any specific evidence of actual fabrication for its application; nor did it, directly at least, delineate the guilty and the innocent.

Id. at 71, 120 S.Ct. at 1126; (quoting Reagan v. United States, 157 U.S. 301, 304, 15 S.Ct. 610, 611 (1895). Finally, the Supreme Court took no issue with the fact that the arguments arose in closing arguments and not at an earlier point in trial. Id. at 71-72, 120 S.Ct. at 1126.

Appellant cannot be permitted to circumvent standing precedent. Here, the State asked specific questions, during the State's cross-examination of the Appellant:

> Q Now, sir, I want to talk a little bit about what's occurred these last couple weeks, since last Monday. It's fair to say that you've been in court every day during trial; is that correct?
> A Yes.
> Q Okay. You've sat in this courtroom during the State's opening arguments?
> A Yes.
> Q You've sat in this courtroom during the presentation of all the State's witnesses; is that correct?
> A Yes, sir.
> Q You sat in this courtroom while your attorneys crossexamined all the State's witnesses; is that correct?
> A Correct.
> Q You've heard all of the witnesses the State has to present; is that correct?
> A Correct.
> Q You've seen all of the photographs the State has to present; is that correct?
> A Yes.
> Q All before you testified her[e] today; is that correct?
> A Yes, sir.
> Q Have you had the opportunity to review the discovery the State provided to Defense counsel?

A Yes, sir.
Q So you've seen, prior to testifying today, all of the voluntary statements?
A Yes, sir.
Q You've seen all of the photographs?
A Most.
Q Most? You've seen photographs?
A Yes.
Q You've seen the medical documents? Is that a yes --
A Yes, sir.
Q Okay. You've seen the police reports?
A Yes, sir.
…
Q How many times have you met with your attorney regarding your testimony here today?
A Three, four.
…
Q And you met with your attorneys three to four times to prepare yourself for your testimony today?
A Yes.
Q So it's only taken you three to four times to rehearse this?
A Rehearse? This is the truth, sir.

VIII AA 1519-21.

Appellant refuses to see that the purpose of this questioning was to highlight the fact that Appellant's rendition of events changed after being able to view the testimony and evidence presented at trial. When Appellant met with detectives on March 16, 2017, he stated that he could not think of any reason why his DNA was found at the victim's house, that the socks at his apartment were from a girlfriend, and not from Eylin. VIII AA 1520-22. At the time he made this statement, Appellant had not had a chance to review discovery or voluntary statements. Id. Now, after viewing the evidence at trial, Appellant concocted this story that he had a consensual

relationship with the victim which resulted in the sexual acts. VIII AA 1502. Even his counsel asked Appellant if he heard the victim testify about certain acts and Appellant was able to then confirm that those acts had occurred. VIII AA 1502-04.

In Woodstone v. State, 435 P.3d 657 (2019) (unpublished) this Court expressed its concerns when generic tailoring arguments are raised for the first time during 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.". Unlike the defendant in Woodstone, Appellant had an opportunity to address these accusations during the re-direct examination and even in his closing arguments. Moreover, Appellant failed to demonstrate that the jury relied upon the State's accusations of tailoring versus the overwhelming evidence that was presented at trial. Such evidence included testimony from the victim about what had occurred, DNA testing, and items from other residents in the home that were found in the vicinity of the area. V AA 971; VI AA 1005-13, 1093-94, 1099-1100; VIII AA 1419-20, 1425, 1427, 1437-39. Therefore, Appellant cannot show that a substantial right was affected to the point that a reversal is mandated.

Finally, Appellant's reliance to case law from other jurisdictions has no authority over this Court. The fact is, there is binding authority that allows the State to make such arguments. Moreover, Appellant had the opportunity to refute such testimony, as the questions were initially raised in the State's cross-examination of

Appellant. Therefore, any concerns by this Court in Woodstone were cured here. For these reasons, Appellant's claims are meritless as the State made permissible arguments regarding Appellant.

III. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT OBJECTIONS TO THE JURY INSTRUCTIONS

A. Standard of Review.

District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). However, this Court reviews de novo "whether a particular instruction . . . comprises a correct statement of the law." Cortinas, 124 Nev. at 1019, 195 P.3d at 319 (2008).

A reversal will only occur if the error substantially affected the jury's verdict. Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) ("[i]f the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict."). "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598.

B. The Reasonable Doubt Instruction was Given in Accordance with Nevada Law.

Appellant complains that the last sentence of Jury Instruction No. 6 improperly shifted the burden and presumed his guilt, unless the jury was able to

determine that there was reasonable doubt. AOB 32-33. Appellant submitted his own proposed instruction and claims that the jury was not properly instructed on the issue of reasonable doubt. AOB 33.

The instruction submitted to the jury said:

> The defendant is presumed innocent unless and until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committee the offense.
>
> A reasonable doubt is one based on reason. It is 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 the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, 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.

AA 1314. Appellant objected to the last paragraph, and requested to have this sentence instead: "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."

The instruction submitted to the jury was in compliance with Nevada statute. Appellant has no real concern since the first paragraph clearly states that Appellant is presumed innocent, until proven otherwise. Moreover, that same paragraph articulates that the State has the burden of proof for every element. Next, focusing on the second paragraph, that paragraph is a direct quote from NRS 175.211(2). Finally, the last paragraph is not an attempt to shift the burden, as articulated when

the instruction is read as a whole. The instruction plainly contemplates that a defendant's guilty might not be proven.

In other Nevada cases, the last paragraph, and the entire reasonable doubt instruction, has been accepted:

> The challenged instruction tracked the language of NRS 175.191 and provided in part: "The Defendant is presumed innocent until the contrary is proved." Blake argues that the word "until" nullified the presumption of innocence by implying that his guilt would eventually be proven beyond a reasonable doubt. However, read as a whole, the instruction did not imply this. **The instruction also defined reasonable doubt in accordance with NRS 175.211 and concluded: "If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty."** The instruction plainly contemplated that guilt might not be proven.

Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005) (emphasis added).

A review of the cases submitted by Appellant shows no application to the matter at hand. Within Appellant's proposed instruction, he provided a citation to Hardin v. State, 422 P.3d 1230 (Nev. 2018) that says the 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.". In Hardin, the proposed instructions were about "inverse instructions", which sought to inform the jury that they must acquit if the State failed to prove guilt beyond a reasonable doubt. 422 P.3d 1230 (Nev. 2018). This Court found that the district court's error was harmless because the jury was instructed on reasonable doubt and the elements of the crimes. In Crawford v. State, 121 Nev. 744, 750–51,

121 P.3d 582, 586 (2005) this Court held that district court erred in relation to a "heat of passion" instruction, but that the error was harmless. The overall focus was "negatively phrased 'position' or 'theory' instruction[s]" that were proposed by the defense. Id. at 753, 121 P.3d at 588. These cases do not apply here because the instruction given is *the* reasonable doubt instruction, not an instruction on the elements for a crime, or on Appellant's theory of the case. Appellant's attempt to create concern has no merit as the jury was properly instructed on the definition of reasonable doubt and that the State has the burden of proof.

Finally, the jury's verdict shows that any error, assuming *in arguendo,* did not substantially affect their verdict. They jury acquitted Appellant of Count 8 and the deadly weapon enhancements on all charges- which indicates that they believed the State did not meet its burden of proof, beyond a reasonable doubt. Still, the State maintains that no error was committed as the jury was properly instructed on the definition of reasonable doubt, the State's burden of proof, and that Appellant was innocent until proven guilty.

C. Jury Instruction 36 is a Correct Statement of Nevada Law.

Appellant claims that Jury Instruction No. 36 misstates the law regarding the number of sexual assaults from a single encounter. AOB 34. Instruction No. 36 read:

> 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 specific type,
> 2) where the acts of the same specific type are 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.

VIII AA 1575. Appellant submitted his proposed instructions Nos. 25 and 26. AOB 35. In the Appellant's proposed Instruction No. 25, he asked that certain language to be added to the State's proposed instruction 24. AOB 35. The State's proposed Instruction No. 24 stated:

> Physical force is not necessary in the commission of sexual assault. The crucial question is not whether a person was physically forced to engage in a sexual act but whether the act was committed without the person's consent or under conditions in which the defendant knew or should have known, the person was incapable of giving consent or understanding the nature of the act.

VII AA 1335. Appellant requested that the following language be added:

> 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.

VII AA 1135.

Additionally, Appellant asked that his Proposed Instruction No. 26 be given instead of the State's no. 35. AOB 35. Appellant does state that his additional language came from an unpublished decision. AOB 36. Appellant Proposed Instruction stated:

> 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.

VII AA 1336. In Appellant's Proposed Instruction No. 26, certain language was included, and what Appellant sought to add was additional language from an unpublished decision. Appellant's Proposed Instruction No. 26 talks about interruption during a single sexual act, which was included within Jury Instruction No. 36. The final jury instruction did not hinder Appellant's ability to have the jury instructed on his theory of the case because the jury was properly instructed on how interruptions during a single sexual act can be charged. VIII AA 1575.

Jury Instruction No. 36 is a valid statement of Nevada law. According to Townsend v. State, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987) "separate and distinct acts of sexual assault committed as part of a single criminal encounter may

be charged as separate counts, and convictions may be entered thereon." In Townsend, this Court determined that the "hypertechnical division" from a single act was that the defendant lubricated the victim's vaginal area, took his hand away to then apply more lube, and proceeded to penetrate the child victim's vagina. Id. This Court determined that this was one act. In Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285 (2004) this Court focused on the fact that the defendant never interrupted his actions, as his act of rubbing the victim's penis on the outside of his pants was a prelude to him touching the victim's penis inside his pants.

Here, the victim testified that she remembered changing positions when Appellant sexually assaulted her. VI AA 1005. First, Appellant forced her to straddle him, which the victim referred to being on top of Appellant. VI AA 1004. Then, Appellant changed the position so that she was face down on her stomach and he penetrated her vagina again. VI AA 1005. Appellant forced her to change positions again so that she was on her side, and then back on top of him. VI AA 1037. Each time Appellant forced the victim to change positions, he would penetrate her vagina with his penis. VI AA 1037. While in the shower, Appellant performed two (2) additional sexual assaults by digital penetration, and penetration with his tongue. VI AA 1011-12. Appellant does not deny that these sexual acts occurred. VIII AA 1502-03. For these reasons, Appellant is not entitled to a reversal of his conviction because the jury was properly instructed on the law.

D. Appellant's Proposed Instruction Stating that a Witness Must Testify with Particularity is Unnecessary.

Appellant claims that the district court erred in denying his request to instruct the jury with this instruction:[3]

> 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.

AOB 38; VII AA 1344. Appellant cites to LaPierre v. State, 108 Nev. 528, 531, 836 P.d 56 (1992) for the holding that a "victim must testify with some particularity and there must be some reliable indicia that the number of acts charged actually occurred"; further, Appellant states that this is a question for the jury. AOB 38. According to Appellant, he requested this instruction because of the victim's alleged inability to recall the detail of the sexual assaults on direct examination. AOB 39. Again, Appellant cites that he is entitled to an instruction on the theory of his case. AOB 39.

First, the facts in LaPierre are dissimilar to the facts at hand. In LaPierre v. State, the Nevada Supreme Court stated that:

> [T]he testimony of a sexual assault victim alone is sufficient to uphold a conviction. However, the victim must testify with some particularity regarding the incident in order to uphold the charge. We are cognizant that child victims are often unable to articulate specific times of events and are oftentimes reluctant to report the abuse to anyone until quite

[3] Appellant cited to VII AA 1334, but the correct citation is to VII AA 1344.

> some time after the incident. We also understand that it is difficult for a child victim to recall exact instances when the abuse occurs repeatedly over a period of time. We do not require that the victim specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred.

108 Nev. 528, 531, 836 P.2d 56, 58 (1992) (internal citations omitted). In that case, the child victim could only speculate that, as to five (5) of the charged acts, the number of assaults happened at least ten (10) times. Id. As to the other five (5) counts, this Court found that the victim was able to testify as to exactly when the assaults occurred: "the first incident occurred while the child was watching television and the second incident occurred the next day…" Id. at 530, 836 P.2d at 57. This Court was clear that if the victim "had testified that the incidents occurred every weekend for the period of time Richard resided in the family home or that he assaulted her nearly every weekend", the case would have been viewed differently. Id. at 531, 836 P.2d at 58. This Court also noted that this speculation pertained to five (5) of the charged counts, and that the State conceded that there was insufficient evidence to convict the defendant of all the counts. Id.

In this case there was no speculation as to how Appellant sexually assaulted the victim. Appellant appears to claim that because the victim could not remember certain facts, she obviously was speculating. The victim was candid that she had a difficult time remembering exactly what happened, because she tried to forget the horrendous acts that occurred and that had ruined her life. VI AA 1033, 1038. Her

recollection was properly refreshed from her grand jury testimony. VI AA 1037. At the time she gave her grand jury testimony, on April 4, 2017, less than one (1) month had passed since the incident. I AA 01. By the time she testified at trial on March 14, 2019, a little over two (2) years had passed. Even with the passage of time, the victim as able to testify about how Appellant sexually assaulted her. Moreover, the testimony established separate sexual assaults with reliable indica, as confirmed by the jury's verdict. Additionally, unlike La Pierre, where the acts occurred on various days and the child victim was only able to speculate as to how many sexual acts occurred, the victim here was subjected to the multiple sexual assaults in one day.

Moreover, the language in Appellant's proposed instruction was covered by other instructions. Jury Instruction No. 6 stated the State's burden of proof, and the standard for reasonable doubt. Additionally, as clarified by Rose v. State, 123 Nev. 194, 205, 163 P.3d 408, 415–16 (2007).

> The discussion in LaPierre regarding the particularity required in the victim's testimony involves the sufficiency of the evidence. In other words, if there is no corroboration, then the victim's testimony must be sufficient to meet the State's burden of proof.

Here, there was corroboration as Appellant testified that sexual acts occurred, under his dubious assertion that the acts were consensual.

Finally, Appellant is not entitled to a reversal of his convictions because Appellant cannot show that any error in not giving this instruction substantially affected the jury's verdict. As shown above, the victim testified with particularity

regarding the multiple acts of sexual assault and Appellant himself confirmed that sexual acts had occurred. Further, the State was able to prove, beyond a reasonable doubt, that each act had occurred. For these reasons, there was no error, and if there was any error, Appellant is not entitled to a reversal.

IV. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MISTRIAL

Appellant argues that the District Court erred in denying his request for a mistrial due to the "spontaneous emotional breakdown" by the victim: Eylin Castro. AOB 40. At trial, Appellant's counsel agreed that the district court tried to mitigate the outburst by clearing the courtroom. VII AA 1122.

A "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993).

First, Appellant's assertion as to when the outburst occurred is belied by the record. Throughout the duration of this witness's testimony, it is apparent that she is nervous. During portions of her testimony, she is avoiding eye contact and looks down when speaking. JAVs at 4:47, 4:38:25 p.m. As Appellant states, she began crying during the bench conference as shown by her reaching for tissues. JAVs at 4:49:04 p.m. Then, the outburst began when the District Attorney was in the process of starting her questioning:

MS. KOLLINS: May I question from up there, Your Honor?

THE COURT: Yeah.
Are you okay, ma'am?

THE WITNESS: I feel bad.

VI AA 1113. There was nothing "spontaneous" about her emotional breakdown as the video shows throughout her testimony she is nervous. Moreover, while she is crying while on the stand, after the bench conference, the video appears to show that she is only slightly louder. Next, as Appellant admits, the jury was out of the courtroom by the time this victim began vomiting into the trash can. JAVs 4:52:24 p.m. This was approximately two (2) minutes after the district court started the admonishment. Still, the outburst occurred after extensive questioning by the State, which would be the obvious stressor for this victim. VI AA 1106-1111.

The next day, the district court brought each juror, individually, into the courtroom to question them about the outburst. VII AA 1129-32, 1136-60. The jurors were asked if there was anything about the incident that would interfere with their ability to serve on the panel, and that would interfere with their ability to be fair and impartial. Id. Jurors were asked if they also saw any medical personnel, and then were instructed that anything that happens outside the courtroom could not be considered. Id. Outside the presence of the jury, the State was clear that the jury could consider the emotion of a witness when judging credibility, but they cannot allow for the emotion to overcome their ability to be fair and impartial. VII AA 1129-

30. Jury Instruction No. 7 was also clear as to what the jury may consider. VIII AA 1546. Finally, as the State argued at trial, there was extensive questioning during voir dire about emotional outbursts, and the jurors stated that they would not allow such outbursts to overcome their will. II AA 571-72, 582; VII 1126-27.

Appellant asserts that the cases cited to by each party did not adequately address the issue before the district court, but then fails to cite any additional authority for his position. AOB 44.

Appellant again cited to State v. Vinson, 833 S.W.3d 399, 405 (Mo. Ct. App. 1992) where the Missouri Court of Appeals held that the trial court did not abuse its discretion in denying the motion for a mistrial.. According to the court, under their state law, the court recognizes that a,

> "trial court is in a better position to determine any prejudicial effects from an alleged error. "If reasonable minds can differ as to whether a mistrial should have been declared, the trial court's exercise of discretion must be upheld."

Id. (internal citations omitted). The court stated that the emotional outburst was spontaneous, and that the trial court immediately called for a recess and ordered the witness out of the courtroom. Id. The trial court struck the witness's testimony from the record and instructed the jury to disregard the testimony. Id. The appeals court also noted that this witness tended to become overagitated during questioning, and there was no assurance that a similar outburst would not occur during a retrial. Id. Finally, the court stated that the acquittal of the charge relating to this witness shows

that the outburst did not prejudice the defendant. Id. at 405-06. Here, unlike the witness in Vinson, the emotional outburst was not spontaneous and did not involve threats to Appellant and his counsel.

As the State pointed out, case law from other jurisdictions indicated that emotional outbursts do not mandate a reversal or a mistrial. See McKenzie v. State, 410 N.E.2d 1308, 1309–10, 274 Ind. 276, 278 (Ind., 1980) (Confused victim mistakenly thought he was on trial, and became annoyed and upset by the entire proceedings. Trial court denied defendant's motion for mistrial; appellate court upheld since the remarks were "completely irrelevant to the incident about which [the victim] was called to testify" and there was no indication that "prosecutor deliberately sought to elicit [victim's] responses."); Commonwealth v. McCloughan, 421 A.2d 361, 363, 279 Pa.Super. 599, 603–04 (Pa.Super., 1980) (Trial court did not abuse its discretion when it denied Motion for Mistrial because witness's crying episode was "brief" and trial court did not feel that prejudice resulted to the jury.); Evans v. State, 112 Nev. 1172, 1201, 926 P.2d 265, 283–84, (1996) (It was "highly unlikely" that Judge's showing of emotion to influenced the jury's determination of credibility.)

In Coley v. State, 612 S.E.2d 608, 611, 272 Ga.App. 446, 449–50 (Ga.App.,2005) the defendant moved for a mistrial after one of the victims suffered a panic attack. The prosecutor in that case immediately suggested to the Court that

a recess should be taken. Id. The Prosecutor further asserted that the victim's actions had no "prejudicial impact on the jury" and that this situation was akin to "anytime a victim or a witness becomes somewhat emotional and the Court takes a recess for the victim to regain her composure." Id. The appellate court determined that trial court did not abuse its discretion in denying the motion for mistrial. Id.

In State v. Anderson, 470 S.E.2d 103, 322 S.C. 89 (S.C.1996) there was an emotional outburst similar to the one that transpired in this case. In that case, after the witness on the stand identified the defendant, she addressed the defendant and said "Why, Shawn? Why did you do it? ... He didn't have to take her life." Id. at 104, 322 S.C. 89, 90–91. The judge called for a recess, but during the recess the witness began to bawl and scream "at the top of her voice, 'He didn't have to do it. She had so much to live for.'" Id. Defendant moved for a mistrial, and asserted that "although the jury was not present in the courtroom during this outburst, the conduct occurred in the area of the courtroom adjacent to the jury room, and that, therefore, the jury was very likely to have heard what transpired." Id. The trial court denied the motion, and the appellate court determined that the trial court did not abuse its discretion because "the judge here dismissed the jury and called a recess as soon as the outburst occurred in order to give the witness time to calm down." Id. at 105–06, 322 S.C. 89, 93–94.

Extending the logic of those Courts here, the victim in this case had an emotional outburst while on the stand and during her testimony. It is understandable that the trauma of the event would lead to such display of emotion. Still, the district court took the proper steps by having the jury leave the courtroom in order to mitigate any impact.

Even if this Court determines that the emotional outburst was not in response to any questioning, Appellant still failed to show that he was prejudiced by the emotional outburst. In fact, case law suggests that he was not entitled to a mistrial because the emotional outburst was unrelated to questioning. See State v. Scott, 263 N.W.2d 659, 661–62, 200 Neb. 265, 268–69 (Neb. 1978) (Witness left the witness stand, injured her leg, and began to weep. Trial court denied the motion for a mistrial and "admonished the jury to not consider the incident because it had no bearing on the guilt of the defendant". Trial court also noted that "witness had shown no emotion during her testimony, and that her weeping was the result of her stumbling and hurting her leg, and was not related to her testimony in the case.")

Appellant can only speculate that the outburst garnered sympathy for the victim, Eylin. Moreover, Appellant's assertion that the testimony should have been stricken is meritless since Appellant failed to cite to the record as to where they made such request. The only request made was for a mistrial, which was properly denied after it was assured that the jury panel could be fair and impartial and would not

allow the outburst to affect their duty. The district court took the proper steps to mitigate any affect from the outburst and ensure that the jury could be fair and impartial.

V. THERE IS NO CUMULATIVE ERROR

This Court considers the following factors in addressing a claim of cumulative error: (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, 854–55 (2000). Appellant must present all three (3) elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)).

First, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors"). The district court did not err in denying Appellant's fair cross section challenge for the reasons stated above in Section I. Moreover, Appellant conceded that tailoring arguments are permissible. Any concerns that this Court had in a prior unpublished case were rectified here as Appellant had the opportunity to address said arguments since they arguments were not raised for the first time in rebuttal closing arguments.

Furthermore, there was no error in the jury instructions nor did the district court err in denying Appellant's motion for mistrial.

Second, Appellant's assertion that the issue of guilt was close is belied by the record as there was sufficient evidence to establish each and every single crime that occurred. First, the victim testified about the multiple sexual assaults that occurred in her bedroom and shower. VI AA 1004-05, 1008, 1010-13, 1017, 1037. The victim also testified about Appellant's actions with him masturbating in front of her, forcing the victim to masturbate him, and that Appellant would kiss and lick her breast and neck. VI AA 1013-15. She also stated how she was afraid, especially when she saw the gun. VI AA 998. Next, there was evidence introduced to support a charge of a burglary as testimony at trial established that Appellant entered the victim's home, that he rummaged through her house, and items belonging to the household were found outside. V AA 951-54; VI AA 1000, 1024, 1093-94, 1099-1100; VIII AA 1383, 1391. There was testimony about how Appellant kidnapped the victim by seizing her and kidnapped her daughter by detaining her. VI AA 1002; VIII AA 1382-83. As to robbery, there was evidence introduced that there were items missing from the home, that Appellant entered the home with a gun, and that both victims were afraid. V AA 951-54; VI AA 998, 1000, 1019, 1093-94, 1099-1100; VIII AA 1383, 1391.

Finally, while the crimes can be articulated as grave, this does not rectify the fact that there was no error committed by the district court. Therefore, there was no error to accumulate, and Appellant is not entitled to a reversal of his convictions.

CONCLUSION

For the foregoing reasons, the State respectfully requests Appellant's Judgment of Conviction be AFFIRMED.

Dated this 9th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 11,725 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 9, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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