

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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5 MICHAEL ALAN LEE,
6 Appellant,

7 vs.

8
9 THE STATE OF NEVADA,
10 Respondent.

) NO. 66963

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12 **APPELLANT'S OPENING BRIEF**

13
14 (Appeal from Judgment of Conviction)

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MICHAEL ALAN LEE,) NO. 66963
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1 **specific reference to arguments in the Fast Track Statement.** This case is
2 not presumptively assigned to the Court of Appeals because Mr. Lee went to
3 trial and was convicted of a Category A felony. Rule 17(b)(1) of the Nevada
4 Rules of Appellate Procedure excludes defendants who went to trial and were
5 convicted of a Category A felony from “presumptive assignment” to the
6 Court of Appeals.
7
8

9
10 **ISSUES PRESENTED FOR REVIEW**

11 **I. THE TRIAL COURT ERRED WHEN IT DENIED THE**
12 **DEFENSE MOTION FOR A MISTRIAL.**

13
14 **II. THROUGHOUT THE PROCEEDING AGAINST HIM,**
15 **THERE WAS INSUFFICIENT EVIDENCE PRODUCED**
16 **TO SUSTAIN THE ALLEGATIONS THAT MICHAEL**
17 **LEE MURDERED BRODIE ASCHENBRENNER.**

18
19 **STATEMENT OF THE CASE**

20 A Criminal Complaint, filed on October 26, 2011, charged Michael
21 Lee with the crimes of Murder and Child Abuse and Neglect with Substantial
22 Bodily Harm. (App. Vol. I, pgs. 1-2)

23
24 A Preliminary Hearing was held on November 8, 2011, in Henderson
25 Justice Court before the Honorable David S. Gibson. (App. Vol. I, pgs. 6-41)
26 At the conclusion of the Preliminary Hearing, Mr. Lee was held to answer on
27
28

1 the two charges, and was bound over to District Court. (App. Vol. I, pg. 41)
2 An Information, counting the two criminal charges, was filed in District
3 Court on November 18, 2011. (App. Vol. I, pgs. 60-62)

4
5 A jury trial was held in Department 23, before the Honorable Stefany
6 Miley. The trial began on August 4, 2014, and concluded on August 18,
7 2014. (App. Vol. III, pg. 492-Vol. VII, pg. 1367) At the conclusion of
8 deliberation, the jury returned verdicts of guilty for both counts. (App. Vol.
9 II, pgs. 347-48) Mr. Lee was sentenced on Count 1 (Murder) to Life without
10 the possibility of parole, consecutive to case C199242; and Count 2 (Child
11 Abuse and Neglect with Substantial Bodily Harm) to a maximum of 240
12 months with a minimum parole eligibility of 96 months, consecutive to Count
13 1. Because he was on parole at the time of these charges, Mr. Lee received
14 zero days credit for time served. (App. Vol. II, pgs. 408-408A)
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21 **STATEMENT OF THE FACTS**

22 In December of 2008, Arica Foster gave birth to a boy who she named
23 Brodie. Brodie's father was Dustin Aschenbrenner. (App. Vol. IV, pg. 849)
24 When the relationship between Arica Foster and Dustin Aschenbrenner
25 dissolved, Ms. Foster had custody of Brodie and was his primary caregiver.
26 (App. Vol. IV, pg. 849; 851)
27
28

1 In October of 2010, Ms. Foster met and began dating Michael Lee,
2 after they were introduced to each other through their respective sisters.
3
4 (App. Vol, IV, pgs. 854-55) For a period of time, Mr. Lee's sister Jennifer
5 baby sat Brodie. (App. Vol. IV, pg. 856) In February of 2011, Ms. Foster
6 and Mr. Lee moved into an apartment together. (Prior to that, Ms. Foster had
7 been living in Green Valley with her parents.) (App. Vol. IV, pg. 857)
8 Brodie lived with Ms. Foster and Mr. Lee. Ms. Foster relied on family and
9 friends to help care for Brodie. (App. Vol. IV, pgs. 856-57; 862-63)
10
11

12 Brodie Aschenbrenner was found dead at approximately 8:50 in the
13 morning of June 15, 2011. (App. Vol. IV, pg. 917) Ms. Foster testified that
14 the previous evening, Mr. Lee was alone with Brodie for roughly an hour
15 while she ran some errands. (App. Vol. IV, pgs. 909-10) Around 1:00 the
16 next morning, Ms. Foster woke up as Mr. Lee was coming to their bed from
17 the bathroom. He told Ms. Foster that it stunk and he thought Brodie had
18 thrown up. (App. Vol. IV, pgs. 913-14) Ms. Foster got up and cleaned
19 Brodie up. (App. Vol. IV, pg. 914) She ended up laying him on a towel that
20 she spread out on the sofa, before she returned to her bed. (App. Vol. IV, pg.
21 915) Sometime in the early morning (it was still dark outside), Mr. Lee
22 carried Brodie in a fuzzy blanket and laid him into bed with Ms. Foster.
23
24 (App. Vol. IV, pg. 917) When Ms. Foster awoke at 8:50, she began rubbing
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1 Brodie's back and noticed that he was cold. (App. Vol. IV, pg. 918) She
2 jumped out of bed and called 911. (App. Vol. IV, pg. 918)
3
4

5 **SUMMARY OF THE ARGUMENT**
6

7 The Defense, prior to the beginning of trial, filed a Motion in Limine to
8 Exclude Autopsy Photographs of Brodie Aschenbrenner. The Court should
9 have prevented the continuous publishing of Brodie Aschenbrenner's autopsy
10 photos. Failure to do so, denied Mr. Lee of his constitutionally guaranteed
11 right to due process and a fair trial.
12
13

14 Throughout the course of these proceedings against Mr. Lee, questions
15 persisted as to whether or not there was sufficient evidence to proceed
16 against, and to ultimately convict him of the murder of Brodie
17 Aschenbrenner. These questions were never satisfactorily answered beyond a
18 reasonable doubt. Therefore, Mr. Lee's conviction for Murder and Child
19 Abuse and Neglect with Substantial Bodily Harm denied Mr. Lee of his
20 constitutionally guaranteed right to due process and a fair trial.
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1 photographs from coming before the Court. The State argued that they were
2 needed and required because the coroner needed them to describe their
3 testimony. We argued to the Court that we believed that the photographs
4 were much more prejudicial than they were probative, if anything, but you
5 allowed them to be introduced for purposes of the coroner's testimony.
6
7

8 And here we are a day later and they're being introduced again and
9 shown to the jury again through a different witness. They aren't needed to
10 explain that witness's testimony. They aren't needed for anything that's
11 probative. They're using them for the prejudicial effect on the jury and to
12 bring out the ire of the jury to have an emotional effect on the jury. That's
13 what they're being shown [for] again. They're not being shown for any
14 probative value. You can simply ask the witness did any of these injuries
15 exist at the time you saw Brodie and the witness can say no, they did not.
16 You don't need to -- showing the -- publishing the photographs over and over
17 and over again.
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22 So we would renew the objection that they're not probative of any fact.
23 We believe and I actually would believe that the showing of them to this
24 particular witness violates the Court's order with regard to the motion in
25 limine that they could be used and provided to the coroner for explanation of
26 the coroner's testimony.
27
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1 And actually I think at this point, Your Honor, since that order's been
2 violated, a motion for mistrial may even be needed at this point because the
3 Court's order on the motion in limine to use them solely for the purpose of
4 the coroner's and to the explain the coroner's testimony has been violated.
5 They've been published to the jury again and we can move for a mistrial and
6 would move for a mistrial. (App. Vol. IV, pgs. 825-26)
7

8
9 Later in the proceedings, the State indicated that they would be
10 "showing several witnesses the photographs of Brodie's external injuries at
11 autopsy." (App. Vol. V, pg. 934) The Defense renewed its motion for a
12 mistrial, again arguing, "[t]hey're, in my opinion, being used to bring an
13 emotional response out of the jury, a highly prejudicial response out of the
14 jury. They're not probative with these other witnesses of any particular fact.
15 ... The same evidence can be elicited without the display of the photographs
16 to the jury." (App. Vol. V, pg. 935) The Court denied the renewed motion.
17 (App. Vol. V, pg. 935)
18

19 Nevada law mandates that "evidence is not admissible if its probative value
20 is substantially outweighed by the danger of unfair prejudice, of confusion of
21 the issues or of misleading the jury." **NRS 48.035(1)**. Since all effective
22 evidence is prejudicial in the sense of being damaging to the party against
23 whom it is offered, prejudice which calls for exclusion is given a more
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1 specialized meaning: *an undue tendency to suggest decision on an improper*
2 *basis, commonly but not necessarily an emotional one, such as hatred,*
3 *contempt or horror.* Fair trials demand that evidence not be admitted in cases
4 where, by virtue of its prejudicial nature, that evidence is more likely to
5 distract from the essential issue than to bear upon it. Nester v. State, 75
6 Nev. 41, 54, 334 P.2d 524,531 (1959)
7

8
9 In the present case, the State of Nevada repeatedly introduced into
10 evidence photographs of Brodie Aschenbrenner's dead, cut open body as it
11 lay on the autopsy table. To see those photos repeatedly on the screen had to
12 be nothing less than horrific to the jury, and undoubtedly had an impact on
13 their analysis of the evidence against Mr. Lee. There had to be a balance
14 between probative value and prejudicial effect of these photographs, as the
15 Court recognized when it indicated that only "absolutely necessary"
16 photographs were to be shown to the jury. (App. Vol. II, pg. 312) Repeated
17 showing of the photographs violated that balance.
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22 The United States Supreme Court has long recognized that the
23 admission of some evidence can so infect a case that the proceeding cannot
24 be considered fundamentally fair, and the admission of such evidence
25 violates the Due Process Clause of the United States Constitution. Estelle v.
26 McGuire, 502 U.S. 62 (1991).
27
28

1 If evidence unfairly prejudices a party by appealing to the emotional
2 and sympathetic tendencies of a jury, rather the jury's intellectual ability to
3 evaluate evidence, the evidence should be excluded. Krause Inc. v. Little,
4 117 Nev. 929, 34 P.3d 566 (2001). The Court should have prevented the
5 continuous publishing of Brodie Aschenbrenner's autopsy photos. Failure to
6 do so, denied Mr. Lee of his constitutionally guaranteed right to due process
7 and a fair trial.
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9

10
11 **II. THROUGHOUT THE PROCEEDING AGAINST HIM,**
12 **THERE WAS INSUFFICIENT EVIDENCE PRODUCED**
13 **TO SUSTAIN THE ALLEGATIONS THAT MICHAEL**
14 **LEE MURDERED BRODIE ASCHENBRENNER.**

15 This Court has jurisdiction to review the evidence presented at trial and
16 determine whether there was sufficient evidence presented to sustain the
17 conviction. State v. Van Winkle, 6 Nev. 340, 350 (1871) (the Nevada
18 Supreme Court has jurisdiction "to decide, as a question of law, whether the
19 evidence is sufficient to sustain such a verdict or decision in a criminal
20 case."). "The Due Process clause of the United States Constitution protects
21 an accused against conviction except on proof beyond a reasonable doubt of
22 every fact necessary to constitute the crime with which he is charged. Carl v.
23 State, 100 Nev. 164, 165, 678 P.2d 669, 669 (1984)." Oriegel-Candido v.
24 State, 114 Nev. 378, 382 (1998); U.S. CONST. AMEND. V; U.S. CONST.
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1 AMEND. XIV. The standard this Court applies when reviewing the evidence
2 supporting a jury's verdict is whether the jury, acting reasonably, could have
3 been convinced beyond a reasonable doubt by the evidence it had a right to
4 consider. Wilkins v. State, 96 Nev. 367, 374 (1980) (citing Edwards v.
5 State, 90 Nev. 255, 258-59 (1974)); see also, Jackson v. Virginia, 443 U.S.
6 307 (1979).
7

8
9 Beginning with the Preliminary Hearing held in this matter, there was
10 insufficient evidence established to establish beyond a reasonable doubt that
11 Mr. Lee was guilty of murdering Brodie Aschenbrenner – something his trial
12 attorneys fought to rectify every step of the case.
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14

15 A. Writ of Habeas Corpus
16

17 At the conclusion of the Preliminary Hearing, Mr. Lee's attorney filed
18 a writ of habeas corpus to refute the finding that there had been a finding of
19 probable cause against Mr. Lee. (App. Vol. I, pgs. 63-95) Most troubling
20 was the apparent recognition of the State and the Court that it was impossible
21 to establish that Mr. Lee was the person responsible for the acts that led to
22 Brodie Aschenbrenner's death. The State argued to the Court that, "[t]his
23 child died at the hands of another human being and critically that it's a non-
24 accidental trauma. So one of three things took place. The defendant
25 murdered this child, the mother murdered this child, or they both did. Now,
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1 what we have in this case is the mother of this child and the care and concern
2 that you saw of what and how she cared for this child under oath. With that
3 testimony, Judge, I would submit that there's only one of three options that
4 exist based upon this evidentiary presentation and that the defendant
5 committed the charge that's set forth in the criminal complaint and ask that
6 you bind him over." (App. Vol. I, pg. 41) In essence the State was arguing
7 to the Court that "we aren't really sure who did this – there's a couple of
8 ways this could have happened, but since the Mom was such a good witness
9 today, we think that rules her out as a possible suspect, so we ask that you
10 bind over Mr. Lee." The Court indicated that, "I have some problems with
11 this case, with the amount of knowledge that I've been given here this
12 afternoon. ... The question of who did it is a big question." (App. Vol. I,
13 pg. 41) Owing to this problem of being able to establish who in fact inflicted
14 these injuries on Brodie, the charges against Mr. Lee should not have been
15 allowed to stand.
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22 B. Motion for Judgment of Acquittal

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24 At the conclusion of the trial, Mr. Lee's attorneys filed a Motion for
25 Judgment of Acquittal . (App. Vol. II, pgs. 349-54) The essence of the
26 argument of that motion was that there was no evidence presented at trial that
27 put Mr. Lee alone with Brodie during the timeframe established by medical
28

1 testimony, for the possible infliction of the injury that would have resulted in
2 the death of Brodie Aschenbrenner. The State did present evidence that Mr.
3 Lee, the evening before Brodie died, was alone with Brodie for roughly an
4 hour, beginning around 8:00 in the when Ms. Foster ran some errands. (App.
5 Vol. IV, pgs. 909-10) Ms. Foster also testified that Mr. Lee was alone with
6 Brodie, in the car, for about five to ten minutes while she ran into a hair salon
7 to pick up a refund. (App. Vol. IV, pgs. 903-04) Apart from that testimony,
8 the record is devoid of any facts alleging that Mr. Lee had any other time
9 alone with Brodie, on June 14 or June 15, that was not supervised by Brodie's
10 mother, Ms. Foster.
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15 During the trial there was testimony from two doctors that established
16 possible timeframes for the infliction of injury on Brodie. The doctors who
17 testified were, Dr. Lisa Gavin, the medical examiner, for the State (App. Vol.
18 IV, pgs. 731-71; Vol. VI, pgs. 1214-40); and Dr. Jonathan Arden for the
19 defense (App. Vol. VI, pgs. 1280-1311) Both witnesses gave testimony that
20 Brodie's time of death was several hours prior to his mother finding him cold
21 and stiff. Dr. Arden estimated that the injury to Brodie's abdomen (the injury
22 that caused Brodie's death) occurred somewhere between 48 and 72 hours
23 prior to Brodie's death. (App. Vol. VI, pgs. 1288-92) It would seem that Dr.
24 Arden's opinion put the critical injury sometime on June the 12th or 13th.
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1 This would be outside of the dates – the 14th or 15th - alleged by the State as
2 the dates that the fatal injury happened to Brodie.
3

4 Dr. Gavin, the State medical examiner, established a different
5 timeframe. Dr. Gavin felt that the injury to Brodie occurred roughly 24 hours
6 prior to his death. (App. Vol. VI, pgs. 1215-17) There was no evidence that
7 Mr. Lee struck or injured Brodie on the 14th prior to 8:30 in the morning. It
8 would therefore seem that Dr. Gavin's testimony puts the critical injury to
9 Brodie outside of any time that there was evidence that established the fact
10 that Mr. Lee was alone with Brodie; that is, any time Mr. Lee would have had
11 the opportunity to injure Brodie in the way that led to Brodie's death.
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15 Throughout the course of these proceedings against Mr. Lee, questions
16 persisted as to whether or not there was sufficient evidence to proceed
17 against, and to ultimately convict him of the murder of Brodie
18 Aschenbrenner. These questions were never satisfactorily answered beyond a
19 reasonable doubt. Therefore, Mr. Lee's conviction for Murder and Child
20 Abuse and Neglect with Substantial Bodily Harm denied Mr. Lee of his
21 constitutionally guaranteed right to due process and a fair trial.
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25 **CONCLUSION**

26 Based on the foregoing, Mr. Lee's right to a fair trial under the Due
27 Process clauses of the Fifth and Fourteenth Amendments to the United States
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1 Constitution, as well as Art. 1, Sec. 8(5) of the Nevada Constitution, was
2 violated by the errors in the proceedings against him. Based on these errors,
3
4 the judgment of conviction in this case must be reversed.

5 Respectfully submitted,

6
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8 CLARK COUNTY PUBLIC DEFENDER
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This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

Proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages.

1 accompanying brief is not in conformity with the requirements of the Nevada
2 Rules of Appellate Procedure.
3

4 DATED this 8th day of September, 2015.

5 PHILIP J. KOHN
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