

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 66963

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**RESPONDENT'S ANSWERING BRIEF**

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

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ROUTING STATEMENT..... **Error! Bookmark not defined.**

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS ..... 2

SUMMARY OF THE ARGUMENT ..... 9

ARGUMENT ..... 10

I. THE COURT PROPERLY DENIED THE MOTION FOR  
MISTRIAL 10

II. ANY ERROR IN THE CASE WAS HARMLESS ..... 14

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT  
DEFENDANT’S CONVICTION ..... 15

CONCLUSION..... 20

CERTIFICATE OF COMPLIANCE..... 22

CERTIFICATE OF SERVICE ..... 23

## TABLE OF AUTHORITIES

Page Number:

### Cases

Byford v. State,

116 Nev. 215, 245, 994 P.2d 700, 720 (2000)..... 11

Evans v. State,

112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996)..... 17

Hernandez v. State,

118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002)..... 17

Jackson v. Virginia,

443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979) ..... 17

Kelly v. State,

108 Nev. 545, 552, 837 P.2d 416 (1992)..... 15

Knipes v. State,

124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008)..... 15

Krause Inc. v. Little,

117 Nev. 929, 931, 34 P.3d 566, 567 (2001)..... 11, 12

McNair v. State,

108 Nev. 53, 56, 825 P.2d 571, 573 (1992)..... 17

Milton v. State,

111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) ..... 16

Origel-Candido v. State,

114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)..... 17, 18

Parker v. State,

109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993) ..... 10

Rudin v. State,

120 Nev. 121, 142, 86 P.3d 572, 586 (2004)..... 10

<u>State v. Purcell,</u>	
110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994).....	17
<u>Wesley v. State,</u>	
112 Nev. 503, 507, 916 P.2d 793, 797 (1996).....	12
<u>Wilkins v. State,</u>	
96 Nev. 367, 374, 609 P.2d 309, 313 (1980).....	16, 17
<u>Williams v. State,</u>	
113 Nev. 1008, 1016, 945 P.2d 438, 443 (1997).....	11
<b><u>Statutes</u></b>	
NRS 48.015 .....	11
NRS 48.025 .....	11
NRS 48.035 .....	11
NRS 178.598 .....	15

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**Appeal from Judgment of Conviction  
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**STATEMENT OF THE ISSUES**

1. Whether the District Court properly denied the Motion for a Mistrial.
2. Whether there was sufficient evidence to support Lee’s Conviction.

**STATEMENT OF THE CASE**

On November 18, 2011, Michael Alan Lee was charged by way of Information with: Count 1 – Murder (NRS 200.010, 200.030, 200.508) and Count 2: Child Abuse and Neglect With Substantial Bodily Harm (Felony – NRS 200.508). 1 Appellant’s Appendix (“AA”) 60-62. Before trial on June 10, 2014, Lee filed a Motion in Limine to Exclude Autopsy Photographs. 2 AA 263-92. The State filed its Opposition on June 20, 2014. 2 AA 306-10. The court denied the Motion on June 25, 2014. 2 AA 479-88. Lee’s jury trial commenced on August 4, 2014. 3 AA

492. On August 15, 2014, the jury returned a verdict of guilty on both counts. 2 AA 347-48. On August 18, 2014, Lee filed a Motion for Judgment of Acquittal. 2 AA 349-54. On August 20, 2014, Lee filed a Motion for a New Trial. 2 AA 358-65. The State filed its Oppositions to the Motions on August 21 and 22, 2014. 2 AA 369-78. The court denied the Motions on September 3, 2014. 7 AA 1368-76.

On October 21, 2014, Lee was adjudicated guilty and sentenced as follows: as to Count 1: life without the possibility of parole; and as to Count 2: a minimum of 96 months and a maximum of 240 months, consecutive to Count 1.<sup>1</sup> 7 AA 1393, 1397. Lee received no credit for time served. 7 AA 1393. A Judgment of Conviction was filed on November 10, 2014. 2 AA 408-408a. A Notice of Appeal was filed on November 24, 2014. 2 AA 409-412. On September 8, 2015, Lee filed his Appellant's Opening Brief.

### **STATEMENT OF THE FACTS**

In December of 2008, Arica Foster gave birth to Brodie Aschenbrenner. 4 AA 849. Brodie's father was Dustin Aschenbrenner. Id. When Arica's relationship with Brodie's father dissolved, she kept custody of Brodie. Id. Brodie was a fearless, loving and rambunctious child. 4 AA 851. In October of 2010, Arica met and began dating Lee after they were introduced to each other by their respective sisters. 4 AA

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<sup>1</sup> On October 27, 2014, a hearing was held to clarify the sentence on count 2. At that time Lee was adjudicated guilty of child abuse and neglect with substantial bodily harm and sentenced to 96 to 240 months consecutive to Count 1.

854-55. In the beginning of the relationship, Lee and Brodie liked each other and got along. 4 AA 855. In February of 2011, Arica, Brodie and Lee moved into an apartment together. 4 AA 857. At some point, Arica became concerned about Brodie's physical condition. 4 AA 859. Arica became concerned because she started to find more bruises on Brodie than usual. 4 AA 860. Arica noticed that the bruises were appearing on Brodie's face and were much darker than the normal everyday bumps Brodie used to get. Id.

In early May of 2011, Arica and Lee began to have arguments over Brodie's potty training. Id. Lee felt that Arica was babying Brodie too much and that Brodie should have been potty trained by that point. Id. Arica and Lee also argued about Lee waking Brodie up in the early mornings to use the bathroom and changing him from his diaper into his pull up underwear. 4 AA 871. Arica kept waking up and finding Brodie in his pull up underwear instead of the diaper she put on him at night so he did not wet the bed. Id. Arica and Lee also argued about keeping Brodie's bedroom door open at night. 4 AA 874. While Arica wanted the door open so she can hear Brodie at night, Lee insisted on the door being closed. Id. When Arica would wake up in the morning she would find Brodie's bedroom door closed. Id.

Around the same time, Brodie's demeanor towards Lee began to change. 4 AA 861. Brodie began not to want to be around Lee; he would cower, cry and run over to Arica. Id. Brodie's reaction towards Lee began to put a strain on his and

Arica's relationship. 4 AA 862. After noticing the bruising on Brodie, Arica decided to have her sister Amanda babysit Brodie instead of Lee's sister Jennifer. 4 AA 862. Once Amanda started babysitting Brodie, the bruising stopped for about two to three weeks but started back up again. 4 AA 865. The bruises began to show up more frequently, in different locations on Brodie's body and were more much severe than usual. 4 AA 865-66. At some point, Arica researched nanny cams because she was concerned about the bruises on Brodie. 4 AA 875.

On May 25, 2011, Arica and Brodie were involved in a fender bender. 4 AA 866. Brodie was in his car seat at the time of the accident. Id. After the impact, Arica turned around in her seat to look at Brodie and he appeared fine. 4 AA 867. Arica went to the hospital to be checked out, while her mother took Brodie home. 4 AA 868. When Arica returned home, she examined Brodie and felt no concern as he was acting like his normal playful self. Id. The next day, Arica brought Brodie to ABC Pediatrics just to be safe. 4 AA 869. Brodie was examined by Dr. Sirsy, who found Brodie to be injury free. Id. In June 2011, Arica decided to take Brodie's racecar bed apart and put padding around it so Brodie would not bump his head on the wall. 4 AA 871. Around the same time, Arica began to look for a new place to live because Brodie did not like Lee or want to be around him anymore. 4 AA 875.

In the evening of June 6, 2011, Arica noticed that Brodie had a fat lip underneath his nose. 4 AA 876. Arica was not home at the time the injury happened

so she asked Lee about the injury since he was with Brodie. Id. Lee told her that the board from the toddler bed fell on Brodie. Id. On June 9, 2011, Brodie was riding his power wheel while walking the dogs around the apartment complex with Arica. 4 AA 877. While riding his power wheel, Brodie hit a curb and fell off. 4 AA 878. After falling down, Brodie jumped back up and continued to act like his normal self. Id. Brodie ended up with a tiny little bruise on his cheek from the fall. Id. That night Brodie never complained about being in any type of pain and appeared normal. 4 AA 879. On June 10, 2011, Arica noticed that Brodie's eyes were goopy so she took him to ABC Pediatrics, where he was diagnosed with pink eye and prescribed eye drops. 4 AA 879-80. Arica never mentioned the power wheel incident to the physician because Brodie never complained of any pain. 4 AA 881.

On June 11, 2011, Arica dropped Brodie off at her parents' house while she went to work. 4 AA 882. After work, Arica and Lee went out to dinner. 4 AA 883. At dinner they had a discussion regarding the jealousy between Lee and Brodie. Id. Arica told Lee that Brodie was her number one priority. Id. On June 12, 2011, Lee told Arica that he would do whatever it took for everything to work out and for them to be together. 4 AA 884. That evening, Arica picked Brodie up from her parent's house. 4 AA 885. When Arica and Brodie came home, Brodie got mad because Lee was there. 4 AA 886. That same evening, Brodie was playing around with the

curtains in his room when they fell down and scratched his lower back. 4 AA 887. The scratches were small and barely bled. Id.

On June 13, 2011, Arica, Brodie and Lee went to the swimming pool with Lee's sister Jennifer and her two boys. 4 AA 889. Brodie swam in the pool and acted like his normal self. Id. They left the swimming pool around 1:20 p.m. and Arica left for work around 4 p.m. 4 AA 890. Prior to leaving for work, Arica put Brodie down for a nap and then left him alone with Lee. Id. Arica returned home around 8:15 p.m. and checked on Brodie. 4 AA 891. When she bent down to give Brodie a kiss, Arica noticed a quarter sized bruise on his forehead. Id. When she asked Lee about the bruise, he told her that Brodie fell in some rocks while leaving his friend Danny Fico's house. Id.

The next morning June 14th, when Brodie woke up, Arica noticed that he had a lot more bruises on him than the night before. 4 AA 894. He had a couple of bruises on his forehead and the bruise on his cheek was a lot bigger and darker. Id. Brodie also seemed very upset; he ran into Arica's room screaming and wanting to be cuddled. Id. That type of behavior was not normal for Brodie. Id. That day Arica, Brodie and Lee had plans to go the Mandalay Bay Shark Reef. 4 AA 895. After Brodie ate breakfast, Arica dressed him for the day. Id. When Arica was dressing him, Brodie complained that his head hurt. Id. Before leaving the house, Lee mentioned to Arica that he did not want to bring Brodie anywhere because it

looked like they beat him. 4 AA 896. Before going to the Shark Reef, they made a stop at the gas station where Lee worked. Id. Lee told Arica that he did not want her to bring Brodie inside the store because of his bruises. Id. Arica and Brodie went inside the store, while Lee went to the car wash part of the gas station. Id. Inside the store, Arica ran into Danny Fico, who commented on the bruises on Brodie's face. 4 AA 897. When they got to the Shark Reef and began walking inside, Brodie refused to hold Lee's hand. 4 AA 898. Arica had to tell Brodie that if he did not hold Lee's hand they would not go to the Shark Reef. Id.

After the Shark Reef, they went to a McDonalds in Circus Circus to eat. 4 AA 899. While in McDonalds, Brodie had an accident and wet himself through his pull-ups. Id. Lee became annoyed and commented that Brodie should have been potty trained. 4 AA 902. Before returning home that day, Arica stopped by a hair salon. 4 AA 903. She left Brodie, who was sleeping in his car seat, with Lee. Id. Arica was gone approximately 5- 10 minutes. 4 AA 904. When she returned, Brodie was crying and screaming hysterically inside the car. Id. Lee told her that Brodie woke up when she got out of the car. Id. Afterwards, they went to Best Buy where Brodie kept saying "night night," which was a way of him telling Arica he was tired and wanted to go to bed. 4 AA 905. Inside Best Buy, Brodie wanted to get a movie. 4 AA 906. Arica told Brodie that if he wanted the movie he had to be nice to Lee. Id. However, when Lee attempted to walk up to Brodie, Brodie got angry and kept

saying “no, no, no,” so Arica had to put the movie back. Id. When they got home, Arica put Brodie in his room and went to make dinner. 4 AA 907. During dinner, Arica had to spoon feed Brodie, which was not normal. 4 AA 908.

After dinner, Arica put Brodie to bed. Id. Arica then told Lee she had to go grocery shopping and run some errands. 4 AA 908. Lee got upset and asked Arica why she just didn’t do it earlier. Id. Arica told Lee that if he didn’t want her to leave Brodie with him, she would wake him up and take him with her. 4 AA 909. Lee told her to just leave Brodie at home. Id. Arica was gone for approximately an hour. 4 AA 910. When Arica got home, she put the groceries away, took a bath and went to bed. 4 AA 912-13. At approximately 1:00 a.m. the next morning, June 15<sup>th</sup>, Arica woke up and noticed Lee walking into their bedroom. 4 AA 913. Lee told her that he went to use Brodie’s bathroom and it stunk and he thought Brodie had thrown up. 4 AA 914.

Arica immediately got up to check on Brodie. Id. When she went into Brodie’s room Arica could smell vomit and saw that Brodie was covered in vomit. Id. She took him to the bathroom, where he threw up again. Id. Brodie told Arica that his head hurt. 4 AA 916. Arica cleaned Brodie up, laid him down on the couch in the living room, and laid next to him for a short time until Brodie drifted off to sleep. 4 AA 915. After Brodie fell asleep, Arica went back to bed. 4 AA 916. Sometime in the early morning when it was still dark outside, Lee carried Brodie

into the bedroom and laid him next to Arica. 4 AA 917. When Arica woke up around 8:50 a.m. she began rubbing Brodie's back. 4 AA 918. As she was rubbing his back, Arica noticed that he was cold to the touch. Id. Arica jumped up out of bed and ran around the bed to face Brodie, whose eyes were open but not moving. Id. At that point, Arica called 911. Id. Brodie was pronounced dead at 11:00 a.m. 4 AA 729.

Clark County Coroner's Office Medical Examiner Dr. Lisa Gavin performed an autopsy on Brodie on June 16, 2011. 4 AA 735. The autopsy revealed Brodie had suffered fatal internal injuries along with several external injuries. 4 AA 738-64. Ultimately, Dr. Gavin determined Brodie died from blunt force trauma to his head and abdomen resulting in a transected duodenum and acute peritonitis. 4 AA 768. Dr. Gavin ruled Brodie's death a homicide. Id.

### **SUMMARY OF THE ARGUMENT**

This Court should affirm Lee's Judgment of Conviction. First, the District Court properly denied the Motion for Mistrial. Lee was not prejudiced in a way that prevented him from receiving a fair trial. The autopsy photographs' shown to the witnesses were relevant to their testimony and the photographs prejudicial effect did not substantially outweigh the probative value. Second, there was sufficient evidence to find Lee guilty of Murder and Child Abuse and Neglect with Substantial Bodily Harm. The State presented sufficient evidence for a rational trier of fact to

adopt Dr. Gavin's timeline that Brodie's fatal abdominal injury occurred up to 24 hours before his death and that Lee could have been the one who caused the fatal injury.

## **ARGUMENT**

### **I**

#### **THE COURT PROPERLY DENIED THE MOTION FOR MISTRIAL**

The decision to grant or deny a motion for a mistrial rests within the sound discretion of the trial court. Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). A defendant's motion for a mistrial must demonstrate prejudice that prevents the defendant from receiving a fair trial. Id. at 144, 86 P.3d at 587. A defendant's request for a mistrial may be granted for any number of reasons where prejudice prevents the defendant from receiving a fair trial. Id. The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned absent an abuse of discretion. Id. at 142, 86 P.3d at 586 (citation omitted); Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993).

Lee alleges that the use of the autopsy photographs during the testimony of several witnesses deprived him of his right to a fair trial. Appellant's Opening Brief ("AOB") 5. Under Nevada law, only relevant evidence, or that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence" is admissible. NRS 48.015; 48.025. Evidence, although relevant, is not

admissible if its probative value is substantially outweighed by the danger of unfair prejudice. NRS 48.035. By requiring the prejudicial effect of evidence to substantially outweigh its probative value, NRS 48.035 strongly favors admissibility. Krause Inc. v. Little, 117 Nev. 929, 931, 34 P.3d 566, 567 (2001). “The decision to admit or exclude evidence, after balancing the prejudicial effect against the probative value, is within the discretion of the trial judge.” Williams v. State, 113 Nev. 1008, 1016, 945 P.2d 438, 443 (1997) overruled on other grounds by Byford v. State, 116 Nev. 215, 245, 994 P.2d 700, 720 (2000). In this case, the court did not abuse its discretion when it found that the prejudicial effect of the autopsy photographs did not substantially outweigh their probative value.

Lee claims that mistrial was warranted because the autopsy photographs’ probative value was substantially outweighed by the danger of unfair prejudice. AOB 8. Lee argues that the photographs improperly appealed to the emotion and sympathy of the jury. AOB 9. To merit exclusion, the evidence must unfairly prejudice an opponent, usually by appealing to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence. Krause Inc., 117 Nev. at 931, 34 P.3d at 567. A district court's decision on this issue will not be disturbed unless it is manifestly wrong. Id. Photographic evidence of the victim is admissible unless the photographs are so gruesome as to shock and inflame the jury. Wesley v. State, 112 Nev. 503, 507, 916 P.2d 793, 797 (1996). In

this case, the autopsy photographs in question were not so gruesome as to shock and inflame the jury and were relevant to the determination of when Brodie's fatal abdomen injury occurred.

Prior to trial Lee filed a Motion in Limine to exclude autopsy photographs of Brodie. 2 AA 263-92. In his motion, Lee argued the autopsy photographs' probative value was substantially outweighed by the danger of unfair prejudice. Id. The Court denied the motion, ruling that the autopsy photographs were admissible as relevant evidence. 2 AA 311-12. During trial, the State admitted the autopsy photographs during Dr. Gavin's testimony. 4 AA 731-73. Dr. Gavin was the coroner who performed the autopsy on Brodie and testified to the injuries on Brodie, and the cause and manner of death. Id. Additionally, the State showed some of the autopsy photographs during the testimony of Merridee Moshier, Hershaw Sirsy, Jennifer Lee, and Danny Fico. 4 AA 819, 5 AA 1058, 6 AA 1120, 1146. Lee objected to the photos being shown to the jury again and argued that it was being done only to inflame the jury. 4 AA 823-26. Lee also argued that the State had violated the court's order on the motion in limine and moved for a mistrial. 4 AA 826. The court properly denied the motion for mistrial because the evidence was relevant, the photographs were more probative than prejudicial and the State did not violate the court's order. 5 AA 936-37.

First, the autopsy photographs were relevant to the witnesses' testimony. The main issue of this case was the timing Brodie's fatal injuries. 5 AA 937. The photographs were presented and shown to those witnesses who could establish that time frame. Id. The defense's theory of the case was that the injuries were caused at a different time and in a different manner than what the State was alleging. Id. The court properly found that the photographs were relevant to the timing issues of when the injuries occurred or when they became readily apparent to the naked eye. Id. Based on that relevance the court properly ruled that the photographs were more probative than prejudicial. Furthermore, the State did not violate the court's order on the motion in limine. In denying the motion in limine, the court ordered the autopsy photographs to be limited to those absolutely necessary. 2 AA 482. At trial, the State only used those photographs that were necessary to help determine the timeline of the injuries through the different witnesses.

Additionally, Lee's claim that the State introduced into evidence "photographs of Brodie's dead, cut open body as it lay on the autopsy table" to appeal to the emotions and sympathy of the jury is without merit. AOB 9. Lee's argument that "to see those photos repeatedly on the screen had to be nothing less than horrific to the jury and undoubtedly had an impact on their analysis of the evidence" is flawed. The photographs of Brodie's body cut open on the autopsy table were not "repeatedly" shown to the jury. Those photographs were only shown

once and it was during the testimony of Dr. Gavin. 4 AA 748-63.<sup>2</sup> Id. Those photographs were relevant to Dr. Gavin's testimony regarding Brodie's injuries and the manner of death. The autopsy photographs shown to the other witnesses were all of Brodie's external injuries.<sup>3</sup> 4 AA 819, 5 AA 1058, 6 AA 1120, 1146. The only things that those photographs depicted were the outside of Brodie's body, his face, his ear, and the white part of his eye. 4 AA 739-45, 747. Therefore, Lee's argument that the jury was so inflamed because of the nature of the photographs that it undoubtedly had an impact on their analysis fails.

In this case, the autopsy photographs were relevant evidence to the testimony of the witnesses and their probative value was not substantially outweighed by the danger of unfair prejudice. Additionally, the photographs were not gruesome so as to inflame the jury or appeal to their emotions or sympathy instead of their ability to judge the evidence. Therefore, the court did not abuse its discretion in denying the motion for a mistrial because Lee was not deprived of his right to a fair trial.

## **II. ANY ERROR IN THE CASE WAS HARMLESS**

Nevada law provides that any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. This Court has long held that errors in admitting evidence "will be deemed harmless" when the

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<sup>2</sup> Those photos were admitted as State's Exhibit 67-76.

<sup>3</sup> The witnesses were shown State's Exhibits 49, 50, 52, 53, 57, 59, 61, and 63.

evidence of guilt is strong. Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416 (1992) Nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). In this case, any error in showing the photographs to the jury through other witnesses was harmless because the photographs were already properly admitted and shown to the jury through Dr. Gavin.<sup>4</sup> Second, the error was harmless because as discussed *infra* the evidence against Lee was strong.

**III.**  
**THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S**  
**CONVICTION**

Lee argues that there was not sufficient evidence presented to support the jury's verdict finding him guilty of murder and child abuse and neglect with substantial bodily harm. AOB 14. Specifically, Lee argues that the State did not present evidence at trial that put Lee alone with Brodie during the timeframe that the fatal abdomen injury occurred.<sup>5</sup> AOB 12-13.

When reviewing a sufficiency of the evidence claim, the relevant inquiry is *not* whether the court is convinced of the defendant's guilt beyond a reasonable

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<sup>4</sup> Lee does not dispute that it was proper to admit the autopsy photographs during Dr. Gavin's testimony.

<sup>5</sup> Because Lee focuses on the fatal injury alone and does not address the traumatic brain injury or the other various injuries, the State will focus its response on the fatally transected duodenum and corresponding peritonitis and Lee's conviction for murder.

doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the defendant guilty, the limited inquiry is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (quotation and citation omitted).

Thus, the evidence is only insufficient when “the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury.” Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (emphasis removed). “[I]t is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses.” Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury’s role “[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, “circumstantial evidence alone may support a conviction.” Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

First, Lee's argument that based on Dr. Gavin's testimony Brodie's fatal abdomen injury occurred sometime on the 14<sup>th</sup> prior to 8:30 a.m. is erroneous. AOB 13. Dr. Gavin testified that with an injury like a transected duodenum, the inflammatory response and signs of symptoms appear rapidly. 4 AA 763. Any food that may be present in the stomach would start coming out into the abdomen. Id. Within minutes to hours, neutrophils would come out and very quickly, the inflammatory process would start. 4 AA 764. Additionally, Dr. Gavin testified that the body begins to respond to the injury quickly, but you can see the changes or symptoms for a period of up to 24 hours. Id. Dr. Gavin approximated that the time window for the type of injury that Brodie sustained was *hours and up to 24 hours* from the time of death. 4 AA 765. (emphasis added). However, Dr. Gavin testified that there is no exact science and the timeline is only an approximation. 6 AA 1217. Based on Dr. Gavin's testimony, the earliest time that the injury could have been inflicted was the morning of Tuesday June 14<sup>th</sup>. However, based on the testimony, the injury could have also occurred as late as a couple of hours before Brodie's death, which would put the injury on the evening of June 14<sup>th</sup> or the early morning of June 15<sup>th</sup>. There was testimony at trial that Lee was alone with Brodie on two occasions on June 14<sup>th</sup>. First, Lee was alone with Brodie in the car for about 5-10 minutes while Arica went inside the hair salon. 4 AA 904. Second, Lee was alone with Brodie for approximately an hour in the evening while Arica ran errands. 4 AA 910.

After viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the fatal injury occurred sometime during the time that Lee was alone with Brodie.

Second, Lee claims that there was not sufficient evidence because Dr. Arden, the defense expert, disagreed with Dr. Gavin's timeline of when the fatal injury occurred. AOB 13. Dr. Arden disagreed with Dr. Gavin and placed the same injury as having occurred at least 48 hours but more like around 72 hours prior to Brodie's death. 6 AA 1288, 1292. However, it is the jury's function to assess the weight of a witness' testimony and determine its credibility. Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. After viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have adopted Dr. Gavin's version of the timeline and rejected Dr. Arden's.

At trial, numerous witnesses testified to Brodie's behavior and demeanor in the 72 hours preceding his death. Brodie's grandparents, Merridee and Brad Moshier watched Brodie on Saturday June 11<sup>th</sup> and part of Sunday June 12<sup>th</sup>. 4 AA 882-85. They testified that Brodie was normal and healthy as of Sunday. 4 AA 818-20. He was acting like his normal self, playing around in the back yard and inside the house. 4 AA 814. At no point did he show signs of a head injury, abdominal pain, exhaustion, nausea or vomiting. 5 AA 1015-16. Nothing indicated that he was sick or injured. 5 AA 1026. Both Merridee and Brad gave Brodie a bath while he

was in their care. 4 AA 815, 5 AA 1013. During the bath they had an opportunity to observe Brodie's full naked body, and they did not observe any bruises on Brodie that were different or out of the ordinary compared the usual bumps and bruises he got when playing. 4 AA 815. Alayne Opie testified that on Sunday June 12<sup>th</sup> she took Brodie and her niece Lilly to breakfast. 5 AA 1091. At that point, Brodie was still not exhibiting any symptoms of an abdominal injury. Alayne testified that Brodie ate almost a stack of pancakes and drank all of his syrup. *Id.* Brodie was his typical normal self. 5 AA 1092.

Even Lee's sister, Jennifer Lee and Lee's best friend, Danny Fico, testified that Brodie was normal and healthy as of Monday evening. Jennifer testified that she saw Brodie on the morning of June 13<sup>th</sup> at the Whitney Ranch Aquatic Center and then later that evening at Danny's house. 6 AA 1122-23. There was nothing unusual about Brodie in the morning; he was not complaining about abdominal pain nor was he nauseous or vomiting. 6 AA 1123. In the evening at Danny's house Brodie was acting normal. 6 AA 1124. He was playing with Jennifer's kids and was interacting with the other people in the house. 6 AA 1141. Brodie did not exhibit any lack of appetite as he ate chicken parmesan that evening. 6 AA 1142. He did not show signs of any vomiting or nausea. *Id.* It was not until Tuesday that Brodie began to exhibit symptoms – pain, loss of appetite, lethargy, and much later, vomiting. 4 AA 895-915. Based on the testimony of all the witnesses, Brodie began

exhibiting symptoms of his fatal injury on Tuesday – well within Dr. Gavin’s 24-hour window.

In addition, there was circumstantial evidence surrounding Brodie’s murder. There was testimony about the rising tension between Arica and Lee, the jealous relationship between Brodie and Lee, the recent changes in Brodie’s behavior towards Lee, the unexplained bruising to Brodie’s head and body, and Lee’s impatience and frustration with Brodie’s potty training. 4 AA 876-885. Furthermore, Lee’s claim that Brodie was injured while at Danny’s home was contradicted by both his sister and Danny. 6 AA 1125, 1146. The direct and circumstantial evidence presented in the case was overwhelming. Based on all the direct and circumstantial evidence, a rational trier of fact could have adopted Dr. Gavin’s timeline of the injury and could have found that Lee was the cause of Brodie’s fatal abdominal injury. Therefore, there was sufficient evidence to support Lee’s conviction.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that Lee’s Judgment of Conviction be AFFIRMED.

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Dated this 13<sup>th</sup> day of October, 2015.

Respectfully submitted,

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BY */s/ Ryan J. MacDonald*

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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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 5,195 words and 20 pages.
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 13<sup>th</sup> day of October, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 13<sup>th</sup> day of October, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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