IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

JANET SOLANDER,

Respondent.

CASE NO: 67711

APPELLANT'S REPLY BRIEF

Appeal From Findings of Fact, Conclusions of Law, and Order Granting, in Part, Defendant's Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUE

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THE INSERTION OF A CATHETER INTO A GENITAL OPENING CANNOT CONSTITUTE SEXUAL ASSAULT AS A MATTER OF LAW

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THE INSERTION OF A CATHETER INTO A GENITAL OPENING CANNOT CONSTITUTE SEXUAL ASSAULT AS A MATTER OF LAW

In her Answering Brief, Janet contends the district court properly dismissed Counts 7-8, 19, and 30-36 because the forcible insertion of a catheter into the genital openings of A.S. (10/21/01), A.S. (1/23/03), and A.S. (7/25/04) cannot constitute sexual assault as a matter of law. Janet specifically forwards several arguments in her attempt to justify the court's actions: 1) The law defining and prohibiting sexual

penetration requires a sexual motivation; 2) Applying the plain language of the statute would produce absurd results; 3) Applying the plain language of the statute would violate the Equal Protection Clause; 4) The rule of lenity required dismissal. These arguments are without merit.

First, Janet's claim that penetration as it is defined under NRS 200.364(5) requires a sexual motivation is belied by the plain language of the statute. As the parties agree, NRS 200.364(5) defines sexual penetration, in relevant part, as: "any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another." Nothing in this definition requires a sexual motivation or intent to accompany the penetration of the genital or anal openings of the body of another. Janet attempts to impute a requirement that a penetration be sexually motivated by noting "the plain language of the statute criminalizes sexual penetration." Respondent's Answering Brief ("RAB") p. 16 (emphasis in original). However, Janet's argument ignores the fact that the plain language of the statute then defines sexual penetration and that definition does not include a requirement that the penetration be sexually motivated. Instead, the definition of sexual penetration makes clear that it includes the penetration of sexual organs, regardless of specific intent or motivation. Further, to suggest that the definition of sexual penetration is sexual penetration begs the question and does nothing to resolve the issue presented to this Court.

Additionally, Janet appears to contend, without argument or case authority, that penetration of the victims' vaginas did not constitute sexual assault because the catheters were inserted into their urinary openings as opposed to their genital openings. See RAB p. 16. This is an attempt to revive an argument Janet unsuccessfully made to the district court. The argument was properly rejected by the court as controlling and persuasive authority both demonstrate any penetration of the vaginal lips of a victim constitutes sexual penetration within the scope of NRS 200.364(5). See Hutchins v. State, 110 Nev. 103, 110, 867 P.2d 1136, 1141 (1994) ("Based upon the testimony, the jury was properly able to determine that Hutchins accomplished at least a slight penetration of the victim's vagina by placing his tongue on it. According, we conclude that even if it were only shown that Hutchins had placed his tongue on and not in the victim's vagina without her consent, this constituted sufficient evidence to sustain a conviction for sexual assault."); Mejia v. State, 122 Nev. 487, 493, 134 P.3d 722, 725 (2006) (same); People v. Quintana, 89 Cal. App. 4th 1362, 98 Ca. Rptr. 2d 235 (App. 2001) ("[A] 'genital' opening is not synonymous with a 'vaginal' opening as appellant's argument assumes. The vagina is only one part of the female genitalia, which also include inter alia the labia majora, labia minora, and the clitoris. . . Thus, 'genital' opening does not necessarily mean 'vaginal' opening."); State v. Albert, 252 Conn. 795, 750 A.2d 1037 (2000) (finding penetration of a genital opening includes penetration of the labia majora). It is

beyond doubt that, in order to penetrate the victims' urethra, Janet necessarily penetrated their vaginal lips and committed "sexual penetration" as defined in NRS 200.364(5). As such, Janet's unsupported claim is without merit.

Contrary to Janet's assertions, the State is not arguing for a "per se" penetration standard but instead is simply asking this Court to apply the plain language of NRS 200.364(5). The relevant portion of the statutory definition prohibits the penetration, no matter how slight, of a person's genital or anal openings. Such application does not impose a strict liability *mens rea* as Janet suggests because NRS 200.364 requires general intent. Winnerford Frank H. v. State, 112 Nev. 520, 525-26, 915 P.2d 291, 294 (1996); Manning v. Warden, 99 Nev. 82, 84, 659 P.2d 847, 848 (1983). The definition also excludes the penetration of other openings so long as such does not constitute fellatio or cunnilingus, even if sexually motivated. See NRS 200.364(5).[1] Thus, it was never the State's position that any penetration of any opening of the three victims constituted sexual assault through some "per se penetration" interpretation of NRS 200.364(5) and Janet's argument is a straw man fallacy.

Janet next argues the plain language of NRS 200.366 and NRS 200.364 should not be applied because it would produce absurd results. RAB pp. 17-18. However,

[1] Although crimes against lewdness may apply to such acts.

this argument ignores the established principle that, if the language of a statute is plain, courts are not to look beyond that plain language to other canons of statutory construction, such as the prohibition against absurd results. See State Dep't of Bus. & Indus. v. Check City P'ship, 130 Nev. Adv. Rep. 90, 337 P.3d 755, 756 (2014); Attorney Gen. v. Nevada Tax Comm'n, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008); Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980). As the language of NRS 200.364(5) is clear that sexual penetration includes ***any*** intrusion, no matter how slight, of the genital or anal openings of a victim, consideration of anything beyond that plain language is improper.

Further, Janet's argument entirely ignores Subsection C of the State's Opening Brief, wherein the State contended the allegedly absurd results Janet cited in her pretrial Petition for Writ of Habeas Corpus raised issues of fact, not law, to be considered, if at all, by a jury. Instead of addressing the State's lengthy analysis concerning *mens rea*, consent, and the defense of necessity, she merely regurgitates the same hypothetical examples provided in her Petition and specifically discussed in the State's Opening Brief. Under Polk v. State, 126 Nev. Adv. Rep. 19, 233 P.3d 357, 359-60 (2010), Janet's failure to address the State's arguments that her Petition raised issues of fact, not law, should be construed as a confession of error.

Next, Janet claims, without supporting argument or a single citation to case authority, that application of the plain language of NRS 200.366 and NRS 200.364 would violate the Equal Protection Clause. First, this argument should be summarily dismissed as it lacks citation to any authority or any argument beyond the mere claim. See, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority).

Additionally, Janet's claim is without merit. Janet contends male victims would not be protected by the plain language of the statute as their nonconsensual catheterization would not be included. However, Janet once again fails to read the plain language of the NRS 200.364(5) which defines sexual penetration, in part, as "any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the ***genital*** or anal openings of the body of another." Males and females both have genitalia, which is defined as "the organs of the reproductive system; especially, the external genital organs." MERRIAM-WEBSTER, MEDICAL DICTIONARY (2015), http://beta.merriam-webster.com/medical/genitalia. As the male penis and urethra are part of the male reproductive system, any intrusion into the opening of the penis would likewise

constitute sexual assault if it occurred with the necessary *mens rea* and without the male victim's consent. See MERRIAM-WEBSTER, MEDICAL DICTIONARY (2015), http://beta.merriam-webster.com/medical/penis, http://beta.merriam-webster.com/medical/urethra. In other words, if the female victims in this case happened to be male, NRS 200.366 and NRS 200.364(5) would still prohibit Janet's actions. As such, the plain language does not treat male victims differently than female victims and there is no Equal Protection Clause violation. See also Quintana, 89 Cal. App. 4th 1362, 98 Ca. Rptr. 2d 235 (distinguishing between vaginal opening and genital opening).

Finally, Janet contends the rule of lenity should be applied to affirm the district court's dismissal of the relevant counts. RAB p. 19. Once again, however, canons of statutory construction like the rule of lenity only apply if the plain language creates an ambiguity. See United States v. Mills, 621 F.3d 914, 916-17 (9th Cir. 2010) ("The rule of lenity applies only where after seizing everything from which aid can be derived, the Court is left with an ambiguous statute."); United States v. Nader, 542 F.3d 713, 721 (9th Cir. 2008) (noting "[t]he language of the statute must be 'grievously ambiguous' for the rule of lenity to apply). Further, a statute is ambiguous only when its language is capable of two or more reasonable interpretations. Estate of Smith v. Mahoney's Silver Nugget, 127 Nev. Adv. Rep. 276, 265 P.3d 688, 690 (2011). Janet continually fails to offer an alternative

reasonable interpretation of the plain language of the statute and instead seeks to insert a specific intent requirement out of whole cloth. Adding desired words to a statute in an attempt to create ambiguity does not justify application of the rule of lenity. As there is no ambiguity in the plain language of NRS 200.366 and NRS 200.364, due process does not require dismissal of the relevant counts and the district court's decision should be reversed.

CONCLUSION

Based on the foregoing, and the State's Opening Brief, the State respectfully requests the district court's decision to grant, in part, Janet's Petition be REVERSED and the relevant charges be reinstated.

Dated this 25th day of November, 2015.

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 page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 1,657 words and is does not exceed 15 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 25th day of November, 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 November 25, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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