IN THE SUPREME COURT OF THE STATE OF NEVADA

JERICHO JAMES BRIOADY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 70311

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction following a jury verdict by which Jericho Brioady was found guilty of two counts of lewdness with a child under age 14.

Prior to trial, Brioady made a motion to suppress his admissions to police. In that motion, defense counsel expressly conceded that there was no violation of the ruling set out in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), because the defendant was not in custody at the time of the interrogation. 1 AA 105. Instead, the defense clearly argued only that the admissions were involuntary. The district court made extensive findings of fact and denied the motion. 6 AA 1314. Among other things, the court noted

that not only was Brioady repeatedly told he was free to leave (and in fact did leave) but that at one point he got up as though to leave, but then re-engaged, saying that he had more that he wanted to say. The court found that the encounter was voluntary "on many levels." 6 AA 1314.

Also before trial, the court ruled on two proposed bits of evidence. However, the court left open the possibility that the evidence might become relevant during the trial. 1 AA 189. As it turned out, Brioady renewed the argument on only one of the issues. 3 AA 636. That one issue involved prior unfounded accusations of violence by the child victim, but the offer of proof identified no one with any personal knowledge of any such accusations.

The trial ended with a verdict on January 22, 2016. On February 10, 2016, the defense filed a motion for a new trial, claiming juror misconduct in *voir dire*. 5 AA 1099. The motion was denied when the court found that the juror had withheld information that she had been a child-victim of a sexual crime, but that she had withheld it because she did not find it relevant. The court also determined that there was no prejudice attending the juror. 5 AA 1169-70.

II. STATEMENT OF THE FACTS

The crime took place in the home of a friend of the victim's family. There are a couple of different families involved in this case. The victim is

Cherish, age 12. She lives in a blended family. Her mother is Leslie. Leslie has a more-or-less-permanent fiancé, Michael Voigt. Voigt's daughter is Ashley, who is four years older than Cherish. Voight's son, Charles, is a couple years older yet. They had all been living in Alaska when they started making their way back to Northern Nevada.

Once in Sparks, Michael Voigt became re-acquainted with his childhood chum, Jericho Brioady. Both families lived on Gault Street, but at opposite ends of the street, perhaps a ten minute journey in between them. On the day of the first crime, Cherish and her family were invited to the Brioady home for a barbecue. At some point, Michael and Leslie decided to leave and go to a movie alone, leaving their brood in the custody of Brioady. Charles also left, on Brioady's bicycle, heading for home. That left the two young girls.

The two girls ended up in the Brioady home, in the living room, watching horror movies with the sound turned up quite loud. Cherish was on a foam mat with Brioady. According to Cherish, they were covered by a blanket and the loud television prevented anyone from hearing as she was groped by Brioady. She described several lewd acts and some penetration, although the jury apparently was not persuaded by the testimony of penetration. After the groping, Brioady grabbed her hair and told her that if she told, he would kill her. 3 AA 563. She didn't tell for quite some time.

Some short time thereafter, Brioady appeared at the home of the victim and asked the adults if the children could come over again. Cherish did not want to go, but went along anyway. Much the same happened as they again laid together watching television. That formed the second charge.

The crime did not come to the attention of police for some time. Cherish first informed her friend Dasia, and that led to the parents becoming aware of the crime. Leslie took Cherish to the Sparks police station but it turned out that was the day of the shooting at Sparks Middle School and police did little but take a very bare-bones report. 2 AA 422; 3 AA 585-587. It was not until a month or so later that the investigation started anew. Cherish gave a more detailed statement and police talked with Brioady. Brioady made several admissions, although he denied penetration.

III. ARGUMENT

1. The Court Did Not Err in Denying the Motion for a New Trial.

The motion for a new trial was filed beyond the time allowed by the Legislature for such a motion, in NRS 176.515. It was based on the allegation that defense counsel had learned that a juror had failed to mention that she had been the victim of a sexual offense in the middle of the last century. The defense tried to justify the delay in bringing the motion as it claimed that the prosecutor had purposefully withheld the relevant information. The State

notes first that the allegation that the prosecutor knew and withheld information was never proved, nor was there even any attempt to prove it. The court, therefore, did not resolve the question. Second, there is no relevant exception in the statute. The court may extend the time for a motion for a new trial, but the order allowing more time must itself be entered within that first week. The time limit is mandatory, at least where the prosecutor objects to the motion. *See Hunter v. Sutton*, 45 Nev. 427, 195 P. 342 (1921). Thus, the court should not even had considered the motion.

There was also no abuse of discretion in denying the motion. The denial of a motion for a new trial will not be reversed absent a clear abuse of discretion. Denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court. Absent clear error, the district court's findings of fact will not be disturbed. *Meyer v. State,* 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). That standard, in turn, asks whether the record reveals that the district court acted arbitrarily. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. ___, ___, 267 P.3d 777, 780 (2011) (defining manifest abuse of discretion as a clearly erroneous interpretation or application of the law and arbitrary or capricious exercise of discretion as "one founded on prejudice or preference rather than on reason" or "contrary to the evidence or established rules of law" (internal quotations

and citations omitted)). Here, there is no reason to believe that the district court simply flipped a coin or otherwise acted arbitrarily. Instead, the court gave a decision, with extensive reasoning, demonstrating that the court found no reason to believe that there was any sort of prejudice from having that juror on the panel. 5 AA 1159-1160.

The type of "prejudice" advanced now, in this appeal, is simply a claim that if the juror had disclosed that she had been the victim of a crime as a child, then counsel would have used a peremptory challenge. In other circumstances, with similar arguments, this Court has held that the claim of prejudice requires a demonstration that the jury that was actually empaneled was biased or unfair. *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005). The district court made that inquiry and was convinced that the individual juror, and the panel as a whole, was fair and unbiased. Thus, the district court considered that which should be considered and made a reasoned decision. Therefore, this Court should find that sort of reasoned decision is not synonymous with a flip of the coin.

A fair reading of the *voir dire* reveals that the Judge would ask a general question, about such things as knowing police officers or other jurors and being victims of crimes. Then, with each response the court would assure the

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jurors that the real question was whether they could be fair. *See e.g.*, 1 AA at 213, 229. 233, 234, 238, 241. Indeed, even when other jurors revealed a history of being the victim of sexual crimes, the court was quick to move to the question of being fair. *See e.g*, 1 AA 242-246. It is not surprising, then, that one juror decided not to mention something that seemed to have no impact on her ability to be fair. Nevertheless, the court decided that there was indeed misconduct in failing to respond to the question during *voir dire*, but then the court carefully evaluated the question of prejudice. That finding, that the juror was indeed a fair and impartial juror, should be respected by this Court and the Court should find no clear abuse of discretion.

2. The District Court Did Not Err in Denying the Motion to Suppress.

Before addressing the standard of review concerning a motion to suppress, the State would point out that Appellant Brioady asserts both that his statements were involuntary and that they were obtained in violation of the prophylactic rules set out in *Miranda v. Arizona*. Those are two different things. In the district court, Appellant Brioady conceded that there was no *Miranda* violation. He agreed that the questioning was not "custodial" and so there was no hearing on that subject. The State never inquired into additional details or evidence on the subject of a violation of the *Miranda* rules. Thus, there is nothing for this Court to review.

On the subject of voluntariness, the Opening Brief recites several times that Brioady's will was overborne. However, Brioady did not testify in the suppression hearing and thus gave no testimony regarding his will being overborne.

As to the balance, this Court has ruled that voluntariness determinations present mixed questions of law and fact subjected to this Court's *de novo* review. *Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005). The factual determinations of scene and action, are entitled to deference. *Id.* Here, the district court made findings relevant to the question. The court noted that Brioady was repeatedly told that he was free to leave. The suggestion in the Opening Brief that there was some "strong arm tactics" was not supported by anything. There is certainly no finding of fact by the court that would support that assertion. While it is true that there was a conversation in the hallway, the claim that the defendant was forced back into the interview room is supported by nothing. Indeed, of especial import to the trier of fact, was that the defendant was indeed allowed to leave, but as he left the interview room, he voluntarily stopped, turned around and stated, "I have more things that I want to say," and then voluntarily resumed his seat. 6 AA 1314. That would seem to be a fairly definitive finding on the subject.

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The court also reviewed the recording, finding it to be superior to a transcript, and determined that the encounter was voluntary "on so many different levels." 6 AA 1314. The district court also noted Brioady's demeanor in the recording. 6 AA 1315.

In general, although actual blood-letting is not required, an involuntary statement is one preceded by torture or coercion, of sufficient magnitude to make the confession unreliable. Of course, not every claim of involuntary confessions requires torture. Instead, the primary question is whether the means of extracting the confession offends constitutional principles. *Lego v. Twomey*, 404 U.S. 477, 484, 92 S. Ct. 619, 624 (1972). So, it seems appropriate to apply that to the instant case and ask if the Constitution prohibits an officer having a polite discussion with a suspect and asking the suspect if he is willing to continue the conversation. As nothing about that offends any articulated constitutional principle, the district court did not err. As the findings of the district court are supported by substantial evidence, and the claim that the defendant was subject to "strong arm tactics" that overbore his will is supported by absolutely nothing, the judgment of the district court should be affirmed.

Under the same banner, Brioady contends that the conviction must be reversed because a police officer testified that after Brioady left the police

station, he was unable to speak with him again. That is presented as though it were a comment on post-arrest, post-*Miranda* silence. This case involves pre-arrest silence. This Court has addressed post-arrest silence, and post-*Miranda* silence, but in this case the defendant had not been advised of his *Miranda* rights and he had not been arrested. The Supreme Court has held that "the Fifth Amendment is not violated by the use of prearrest silence." *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S. Ct. 2124, 2129, (1980). The State would also point out that there was no objection to the testimony. 3 AA 741. Thus, if there is to be error at all, it must be viewed in guise of plain error. Plain error has no presumption of prejudice. Instead, the appellant must demonstrate prejudice. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Here, there was no argument urging the jury to draw any prohibited inference. Hence, if the comment is viewed in the guise of plain error, there is no affirmative demonstration of prejudice and so there should be no relief. For those reasons, the judgment should be affirmed.

3. The Judgment Is Supported by Sufficient Evidence.

The standard for evaluating the sufficiency of the evidence is well known. "When determining whether a jury verdict was based on sufficient evidence to meet due process requirements, the Court will inquire 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. *Origel–Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (internal quotation marks omitted). Furthermore, in sexual assault cases, the testimony of the victim may be sufficient evidence. *Rose v. State*, 123 Nev. 194, 163 P.3d 408 (2007).

Brioady was convicted of two counts of lewdness with a minor. He was acquitted of other counts. His convictions were supported by the testimony of the victim and the admissions of Brioady. That is sufficient and so the judgment should be affirmed.

4. The Conviction Is Corroborated.

Brioady next raises two separate issues in a single argument. He contends that the evidence was insufficient because the verdict is supported solely by admissions with no corroborating evidence, and that the district court erred in failing to instruct the jury on the need for corroboration. Those are two different issues.

As for the evidence, the verdicts are supported by the testimony of Cherish, in addition to the admissions of the defendant. That is sufficient. *Koza v. State,* 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

As for the instructions, Brioady has chosen to present the argument as though the court failed to instruct on a theory of defense. The requirement of

corroboration is not a theory of defense and an instruction on that subject would not focus on an element of the charge. Instead, the requirement of corroboration is primarily an appellate issue concerning the sufficiency of the evidence. *See Azbill v. State*, 84 Nev. 345, 351, 440 P.2d 1014, 1018 (1968). The jury must be instructed that the crime must be proved beyond a reasonable doubt, but the requirement of corroboration is for the reviewing court, not the jury. As the court noted in *Azbill*, the order of presentation of the evidence is not a factor. Instead, the question is a question of the sufficiency of the evidence. Thus, it appears that the rule of law is not about jury instructions, but it is instead primarily a rule establishing a standard of appellate review. In other words, both the district court and the reviewing court have a sort of gate-keeping function, but the jury does not. Instead, the State contends that if the jury were instructed on the *corpus delicti* rule, that would run afoul of NRS 175.211(2), requiring a specific definition of a reasonable doubt, and prohibiting any other instruction on the subject. An instruction on the need for corroboration would seem to require the jury to quantify the evidence instead of evaluating the quality of the evidence. That role should be reserved to the courts, not to the jury.

There are courts that have suggested that a jury must be instructed on the *corpus delicti* rule, but those courts seem to be misguided. Requiring a

jury to determine just what portion of the crime that must be shown, and requiring it to determine if the evidence is sufficient, seems inconsistent with the general rule that juries only determine if the evidence is persuasive, while the courts determine whether the evidence is sufficient.

If the court were to disagree and hold that the jury must be instructed on the *corpus delicti* rule, then it seems appropriate to draw guidance from the cases concerning corroboration of accomplices and hold that the lack of an instruction is harmless when there is indeed corroborating evidence. *See Howard v. State*, 102 Nev. 572, 576, 729 P.2d 1341, 1344 (1986). If the testimony is corroborated, a cautionary instruction is favored, but failure to grant it is not reversible error. *Id.* Thus, even if the jury should decide if there is independent evidence, the lack of an instruction will be harmless when there is corroborating evidence. Here, the corroborating evidence of the testimony of Cherish established the crime independently of the admissions of the defendant.

5. The District Court Did Not Err in Refusing to Allow Impeachment on Collateral Matters.

There were rulings before trial that led to some follow up during the trial, concerning allegations of other conduct by the child-witness. 1 AA 188-89. The district court made clear that the pre-trial ruling was not final and would depend on the evidence adduced at trial. *Id.* The caption in the

Opening Brief suggests that the district court did not allow cross-examination of the child, but the actual rulings were a bit different.

One assertion is that the defense had evidence that the child had falsely accused an "uncle" of having sex with her. Notably lacking is any citation to the record of anyone claiming personal knowledge of the accusation. There is also no witness identified who would testify that the accusation, if made, was false. Cherish's step-father at one point claimed that Cherish's mother proposed to present hearsay testimony that there had been an accusation and that a medical exam by a physician showed that Cherish was a virgin. Putting aside the triple hearsay, an intact hymen, of course, does nothing to dispel an claim with no known specifics. Indeed, the child testified out of the presence of the jury that there never was an accusation, but that her friend had just started an unfounded rumor of sexual abuse. 1 AA 171-173. The defense never proposed to identify any witness to contradict that testimony from Cherish. Also notably lacking is the ruling where the court prohibited cross-examination. Indeed, when the subject came up at trial, defense counsel, Mr. Ohlson, specifically denied that he wished to get into the subject of the alleged accusation against the family friend. 3 AA 636. Instead, the only subject that came up concerned a possible false accusation against Cherish's step-father, concerning black eyes inflicted on the child. 3 AA 635-636. On that subject,

the child denied making any accusation concerning black eyes and denied making any accusation of any sort against her step-father. 3 AA 638-641.

The district court indicated that there would be no evidence concerning the alleged prior accusation that Cherish's step-father had caused her black eyes. The court ruled that the issue was too far afield from the instant case. 3 AA 646-647. The court was correct. Even assuming that the defense had identified a witness who could testify that Cherish had claimed to someone at some time that the step-father had inflicted black eyes, there would no abuse of discretion.

In general, a court has wide discretion to allow or to reject evidence. When it comes to impeachment on a collateral matter, the Court has noted that "NRS 50.085(3) limits the admissibility of extrinsic evidence for the purpose of attacking credibility based upon specific instances of conduct attributable to the witness. Unless in some way related to the case and admissible on other grounds, extrinsic prior bad act evidence is always collateral and therefore inadmissible to attack credibility." *Lobato v. State*, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004). That is, if the defense had proposed to ask Cherish about false accusations of inflicting a black eye, and Cherish had denied that, the court would generally exclude evidence from other sources tending to show the existence of the prior false accusation.

This Court has distinguished between prior false accusations of sexual misconduct and other sorts of prior false statements. *Abbott v. State*, 122 Nev. 715, 733, 138 P.3d 462, 474 (2006). Clearly the allegations that the step-father had inflicted black eyes, if proven, would be seen as falling within the general rule and not the exception. As to the assertion that the child has previously falsely accused someone of some sort of sexual misconduct in Alaska, there was no description of any person with knowledge of any accusation or any person with knowledge that such an accusation was false.

Preparatory to examining Cherish on the subject, defense counsel described the process, acknowledging that he was limited to cross-examination of the child. He argued that he should be allowed to inquire of Cherish, and "if it falls flat, it falls flat." 3 AA 637. That is a relatively accurate description of the general rule that one might inquire into collateral matters, but that one may not adduce extrinsic evidence to contradict an answer given on cross-examination where the subject matter is collateral to the case. Following that, the examination fell flat as the child denied making any accusations about the black eyes. 3 AA 648-651.

This Court ruled in *Abbott, supra*, that "trial court has sound discretion to admit or exclude evidence of a victim's prior false allegations or prior sexual experiences." The review, then, is for an abuse of discretion. As noted above,

in *State v. District Court (Armstrong)*, that does not call for this Court to weigh those factors anew, but instead it calls for examining the record to see if the district court examined the correct factors. The district court considered the nature of the proposed evidence and the relationship to the current charges and elected not to allow the evidence. That is hardly the sort of decision that would be called "arbitrary or capricious." Instead, when the court engages in a reasoned analysis of the proper factors, this Court should find no abuse of discretion and affirm the judgment of the district court.

6. The Court Did Not Err in Refusing to Instruct the Jury on a Non-Included Offense.

Brioady sought an instruction on the subject of NRS 207.260, ostensibly a lesser-related offense. Nevada law no longer requires instructions on offenses that are related but not included within the charged offense. *Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000) *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). In *Rosas*, the Court held that the defendant need not testify in support of a lesser-included instruction, but the instructions should only address crimes that are necessarily included within the charged offense. That is, the instruction is warranted only where the elements of the lesser are subsumed by the greater, such that it is not possible to commit the greater without committing the lesser. *Rosas, supra*.

Here, the proposed lesser crime, proposed to be included within both sexual assault and lewdness, is NRS 207.260. There is no sexual component to that crime. It is limited to children more than 5 years younger than the accused and it involves causing the child to feel terrorized, intimidated or harassed. That is, each crime has elements not found in the other. Thus, one is not a lesser-included of the other. *See Jackson v. State*, 128 Nev. Adv. Op. 55, 291 P.3d 1274, 1280 (2012). Therefore, NRS 207.260 is not a lesser-included offense to any of the charged offenses and the court did not err in refusing the instruction.

7. Cumulative Errors Do Not Lead to Relief.

Brioady next raises to specter of cumulative error. The State first notes that the argument is inappropriate because it combines alleged errors of different sorts. The claim that there was insufficient evidence should not be combined with others because they do not lead to the same sort of relief. Instead, the analysis should be limited to the claims of error that would lead to a new trial if they existed. That is, the motion to suppress and the claim concerning the instructions might be considered cumulatively, but there was no error in either case, cumulative or otherwise. Accordingly, the judgment should be affirmed.

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8. The Statute Does Not Offend the Prohibition Against Cruel and Unusual Punishment.

The mandatory sentencing scheme of NRS 202.230, setting forth a mandatory sentence of ten years to life, is not unconstitutional. *See Goudge v. State*, 128 Nev. ____, ____, 287 P.3d 301, 304 (2012) ("[T]he Legislature is empowered to define crimes and determine punishments, as long as it does so within constitutional limits. Moreover, it is within the Legislature's power to completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes." (internal citation and quotation marks omitted)). The mere fact that the sentence is mandatory changes nothing. The minimalized description of the crime by appellant changes nothing. The fact of the matter is that the Legislature determined that lewd acts with a child warrant a sentence with the potential for life imprisonment. That is the role of the Legislature and this Court should not interfere.

Lengthy prison terms do make a sentence unconstitutional. *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179 (2003)(life term for theft of golf clubs under California Recidivist laws.) Even life terms are not limited to homicides. *See Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680 (1991)(mandatory life without parole for possession of 24 ounces of cocaine.) One can debate the wisdom of such a sentence, but that debate takes place in the halls of the Legislature, not in this Court.

IV. CONCLUSION

The case was fairly tried and the jury reached a conclusion based on the evidence. The sentence was lawful and so the judgment of the Second Judicial District Court should be affirmed.

DATED: October 18, 2016.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

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 Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

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 does not exceed 30 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 appropriate references 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: October 18, 2016.

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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on October 18, 2016, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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