

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERICO JAMES BRIOADY,

SUPREME COURT No. 70311

Dist Ct. Case. CR14-0357

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

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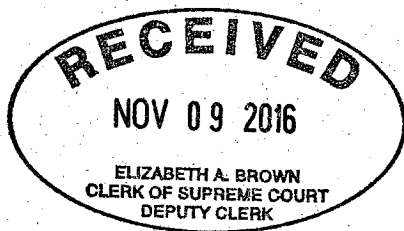
APPEAL FROM JUDGMENT OF THE HONORABLE SCOTT FREEMAN

SECOND JUDICIAL DISTRICT COURT

APPELLANT'S REPLY BRIEF

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16-35075

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STATEMENT OF FACTS

Appellant realleges the Statement of Facts found in his Opening Brief, except as otherwise cited to herein. Additional facts will be recited, as necessary, during the Argument portion of this Brief.

LEGAL ARGUMENT

- 1. Juror misconduct during voir dire deprived Appellant of his Sixth Amendment guarantee to the right to a fair trial by a panel of impartial, indifferent jurors who are unbiased.**

Respondent's Answering Brief misses the mark on the failure of a juror to reveal critical background information during voir dire, in spite of the serious efforts of defense counsel and the court to elicit the potential of bias by a juror in a child sexual assault allegation trial. Juror three was deemed by the District Court to have failed to disclose that she was a victim of child sexual assault, in spite of being given ample opportunity to do so. 5AA 1159-60. Juror number three observed two other potential jurors express personal information child abuse experiences and molestation of their child. 1AA 240-247. Yet, juror number three remained silent about her sexual victimization as a child. 2AA 322, 327, 339, 344. Victimization that was so serious that she sought counseling as an adult. 5AA

1142-45. The fact that juror number three was a victim of child sexual assault was brought up during jury deliberations. 5AA 1154.

It is clear that the Parties disagree on the approach taken by the District Court as well as the standard of review to be employed by this appellate court when it conducts a review relating to juror misconduct during voir dire. The State has put forth its view that this type of misconduct must be discovered by the defendant within the seven day parameter of NRS 176.515.

A motion for a new trial based on any other grounds must be made within seven days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period. NRS 176.515 (4). Yet, this requirement would be impossible to meet on a question of juror misconduct. In reality, NRS 176.515(3), which provides that motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt, should be applied to juror misconduct during voir dire. It is common that this type of issue will not be discovered within 7 days of the verdict and more common that the information will come out by way of additional

investigation after conviction and sentencing. The misconduct of juror number three was newly discovered evidence to the Defendant. There was no procedural bar or mandatory requirement for the District Court to deny the motion procedurally. Further, NRS 176.515 is non-jurisdictional and may be extended by the Court as it sees fit. See by way of analogy, *Eberhart v. United States* that Rule 33 is “nonjurisdictional.” 546 U.S. 12, 19, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005).

Respondent makes light of the failure of juror number three to advise the District Court, or counsel, during extensive voir dire, that she was indeed the prior victim of child sexual assault. 5AA 1145. Respondent phrases it that the juror failed to disclose that he was the victim of a sexual offense “in the middle of the last century”. Respondent’s Answering Brief p4. Yet, this juror admitted that she underwent therapy and that her experience as a juror on this case as pretty intense and emotional. 5AA 1142-45. Clearly, the passage of time did not erase the wounds she suffered and it affected her decision making process on this case.

Respondent minimized the obligation of the juror to be candid and honest during voir dire as well as the harm that is caused by a juror who is intentionally

silent on a critical background matter such as being the victim of the same type of crime charged in the pending case. The key to the jury system is that of being provided a jury panel who is unbiased. Respondent's argument does nothing to traverse the failure of juror number three to be candid during voir dire examination and does not controvert the standing law cited by Appellant. The prosecution did not meet its burden of disproving prejudice. See *Remmer v. United States*, 347 U.S. 227, 229 (1954).

Ferretting out juror bias and dishonesty does not involve an inquiry into the validity of the verdict. *Warger v. Shauers*, — U.S. —, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014); 135 S.Ct. at 528.

Juror number three's deception denied Mr. Brioady the opportunity to exercise a valid challenge for cause before the start of the trial. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). The Sixth Amendment guarantees right to trial by an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968).

There certainly was no allegation by Appellant that the District Court was

on the trial bench flipping coins. Appellant's argument is that if juror deception on a critical issue such as being the victim of a prior childhood sexual assault requiring counseling as an adult is insufficient to demonstrate prejudice on a case in which the allegations were that of childhood sexual assault, then prejudice would be an impossible standard to meet. This Court must grant relief and uphold Mr. Brioady's right to jury trial with an impartial jury panel.

2. **The convictions violate the *corpus delicti* rule and due process under the Fifth & Fourteenth Amendments. The District Court's refusal to instruct the jury on the corpus delicti rule deprived the Defendant from pursuing his defense.**

Respondent has taken the liberty of changing this argument into on of whether the conviction was corroborated.

Although the government may rely on a defendant's confession to meet its burden of proof in order to serve as the basis for conviction, the government must also adduce some independent corroborating evidence. *United States v.*

Valdez-Novoa, 780 F.3d 906, 922 (9th Cir.2014).

Although the state need not introduce independent evidence of the corpus

delicti in conformance with the traditional test, it must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred. Second, it must introduce independent evidence tending to establish the trustworthiness of the admissions, unless the confession is, by virtue of special circumstances, inherently reliable. *United States v. Lopez-Alvarez*, 970 F.2d 583 (9th Cir.1992), 970 F.2d at 592.

Appellant argued that his statements to the police were involuntary. That argument is incorporated herein. The key question on voluntariness was what happened in the hallway at the police department. The District Court ruled that it was a little unclear about the events in the hallway. 6AA 1314-15. Respondent ignored that factor in its argument. The statements of the victim herein were unreliable. The State admitted as much when it advised this jury that it could convict Mr. Brioady even if they did not believe the victim. The State is required to supply corroboration of the defendant's confession—that is to say evidence that fortifies, augments, or supports it—from which a jury may infer that the defendant's confession was a trustworthy admission to core conduct that actually

occurred.

The corpus delicti rule is not inevitably satisfied whenever a confession is not tainted by a constitutional violation or any indicia of undue coercion. The government is still obligated to introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred in order to satisfy the concerns of the *corpus delicti* rule. Where guilt must be established beyond a reasonable doubt, the Supreme Court requires a conviction to rest on more than the uncorroborated confession of the defendant. *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954). The State actually told the jury to rely only on the statements of the Defendant and still convict him. 4AA 960. Jury deliberations were approximately ten hours on this case.

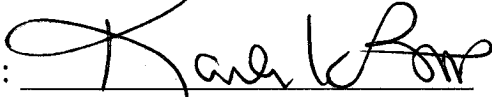
The State's failure to prove the corpus delicti of the crime with evidence independent of Mr. Brioady's own extrajudicial admissions constitutes plain error warranting reversal. The State's argument to the jury during closing arguments violated its obligation to prove each and every element of the offense beyond a reasonable doubt, not to the standard of providing the jury persuasive evidence.

This same argument misstated the evidence as Mr. Brioady never admitted to penetration of any type, never admitted to having the requisite sexual intent for sexual gratification, and never admitted to having the victim perform fellatio on him. The State's argument that Mr. Brioady could be convicted on the basis of his own statement only reduced their burden of proof and violated the *corpus delicti* rule. 4AA 767, 774, 775, 784, 787, 959-60 986, 998; 6AA 1253, 1406.

CONCLUSION

This conviction must be reversed. JERICHO JAMES BRIOADY is entitled to a new trial. His convictions were obtained in violation of the Fifth, Sixth and Fourteenth Amendments. The verdicts and sentences must be vacated by this Court.

DATED this 9th day of November, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does exceed 30 pages but meets the word and line counts found in

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. The document was prepared in Word Perfect. There are 8 typed pages, 1549 words in this brief and 139 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman with 2.45 line spacing, so as to imitate double spacing of Word.

DATED this 9th day of November, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

_____ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada, first class postage paid.

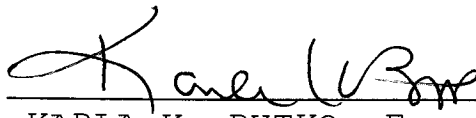
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DATED this 9th day of November, 2016.



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