IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN LANGFORD, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 70536

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because it is a direct appeal from a Judgment of Conviction based on a jury verdict that involves conviction for a Category A Felony. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it denied a motion to compel privileged psychiatric records of the victim.
2. Whether the district court abused its discretion when it denied a motion for mistrial after it had already cured the error.

STATEMENT OF THE CASE

On March 14, 2014 the State filed an Information charging Justin Langford with Sexual Assault With a Minor Under Fourteen Years of Age (Category A Felony- NRS 200.364, 200.366), Lewdness With a Child Under the Age of Fourteen

(Category A Felony- NRS 201.230) and Child Abuse, Neglect or Endangerment (Category B Felony- NRS 200.508(1)). The crimes occurred on or between June 22, 2007 and January 21, 2014. 1 AA 001-02.

Langford's jury trial began on March 7, 2016. 1 AA 163. On March 17, 2016, following a nine-day trial, the jury returned a verdict of Guilty on one count of Lewdness With a Child Under the Age of Fourteen. On May 10, 2016, Langford was sentenced to Life with a possibility of parole after 10 years, to be served in the Nevada Department of Corrections. 4 AA 839-40.

On May 16, 2016, the district court entered the Judgment of Conviction. 4 AA 839-40. On June 10, 2016, Langford filed a Notice of Appeal. 4 AA 844.

STATEMENT OF THE FACTS

On June 21, 2014 the victim, H.H. (DOB: 06/22/2001), disclosed that she had been sexually abused by her stepfather, Justin Langford. The abuse began when she was eight years old. 1 AA 208. While at her stepfather's residence in Searchlight, Nevada, Langford would call H.H. into his bedroom and have H.H. take off her clothes. 1 AA 192-93. Langford would make H.H. lie on the bed and rub baby oil on H.H's legs. 1 AA 193, 195. Langford then placed his private parts in between her legs and rubbed himself back and forth until he ejaculated. 1 AA 196-98, 200. H.H. stated that Langford placed a white hand towel on the bed and had the victim lie on the towel during the molestation incidents. 1 AA 200. He would then use the towel

to clean up the baby oil. 1 AA 204. The abuse continued until the victim reported the abuse in January 2014. 2 AA 276-77.

H.H. testified of several instances of sexual abuse committed by Langford. H.H. described instances including Langford sucking on her breasts, putting his penis in her anus, putting his penis into her mouth more than once, touching her genital area with his hands and his penis, and fondling her buttocks and/or anal area with his penis. 1 AA 204-06, 209, 219-20, 221-22.

On January 21, 2014, the Las Vegas Metropolitan Police Department served a search warrant on Langford's residence in Searchlight. 2 AA 435, 436. Officers recovered a white hand towel that matched the description given by H.H. in the exact location H.H. described. 2 AA 440. The police also recovered a bottle of baby oil found in the same drawer as the hand towel and bedding. 2 AA 440, 442. These items were tested for DNA. Several stains on the white towel came back consistent with a mixture of two individuals. 3 AA 567. The partial major DNA profile contributor was consistent with Langford's. 3 AA 571. The partial minor DNA profile was consistent with victim H.H. 3 AA 569. The statistical significance of both partial profiles was at least one in 700 billion. 3 AA 571, 577.

SUMMARY OF THE ARGUMENT

This Court should deny Langford's appeal from his Judgment of Conviction. Langford raises two grounds for relief in his Opening Brief. He first argues that the

district court abused its discretion when it denied his Motion to Compel Psychiatric Records. This claim is without merit, as the State had no Brady obligation to produce the records as they were never in the State's possession. Moreover, the district court did not abuse its discretion when it denied Langford's request to compel production of the records directly from the mental health provider. A defendant is not entitled to the discovery or inspection of information that is privileged or protected from disclosure or inspection pursuant statute, as psychiatric treatment records are.

Langford next claims that the district court abused its discretion in denying his Motion for Mistrial. The Motion for Mistrial was made after spontaneous statements by witnesses, which were immediately cured by the district court. Langford is unsuccessful in showing that the district court's decision to deny his motion, made after curing the error and hearing argument from both parties, constituted an abuse of discretion. Accordingly, this claim is without merit and should be denied. Therefore, this Court should affirm Langford's Judgment of Conviction and the sentence imposed by the district court.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING LANGFORD'S MOTON TO COMPEL PRODUCTION OF PSYCHIATRIC RECORDS OF THE MINOR VICTIM.

Langford began molesting his step-daughter, H.H., when she was eight years old. H.H. received counseling because of this abuse. 1 AA 035. Before trial, Langford moved to compel production of the psychiatric records from the treatment

provider because, he speculates, the counseling records bear on H.H.'s credibility and might have been exculpatory or led to impeachment. The district court denied Langford's Motion to Compel.

This Court reviews a district court's discovery rulings for an abuse of discretion. See Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court, 128 Nev. Adv. Rep. 21, 276 P.3d 246, 249 (2012) (reviewing discovery decisions for an abuse of discretion); Foster v. Dingwall, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010) (reviewing the imposition of discovery sanctions for an abuse of discretion).

In his Motion, Langford asked that the mental health records be produced from third party treatment provider Mojave Health. In addition to his request to compel production directly from the provider, Langford also argued that the State had an obligation to turn over the records under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), and Giglio v. United States, 405 U.S. 150 (1972). 1 AA 034-37. In doing so, he asked the district court to expand the State's discovery obligations beyond the relevant statute and case law. As discussed below, Langford's request for the victim's psychological records was overbroad with regard to both the State and Mojave Health, and was not supported by Nevada statutes on discovery in criminal cases.

The Nevada Revised Statutes provide the discovery obligations for the State. NRS 174.235 outlines what discovery is to be provided by the State of Nevada. It includes:

> 1. Written or recorded statements or confessions made by the defendant or any witness the State intends to call during the case in chief of the State, within the custody of the State or which the State can obtain by an exercise of due diligence. (1)(a).
> 2. Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection to the case, within the control of the State, or which the State may learn of by an exercise of due diligence. (1)(b).
> 3. Books, papers, documents, tangible objects which the State intends to introduce during its case in chief, within the possession of the State, or which the State may find by an exercise of due diligence. (1)(c).

The statute makes clear that the defense is not entitled to any internal report, document or memorandum prepared by the State in connection with the investigation or prosecution of the case, nor is the defense entitled to any report or document that is privileged. Multiple provisions of the Nevada Revised Statutes govern the privileged nature of treatment information. Under NRS 49.209:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and his *psychologist* or any other person who is participating in the diagnosis or treatment under the direction of the psychologist, including a member of the patient's family.

(emphasis added). Similarly, NRS 49.225 provides that:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among himself, his doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family

Finally, under NRS 49.252:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing confidential communications among himself, his social worker or any other person who is participating in the diagnosis or treatment under the direction of the social worker.

Thus, pursuant to the above statutes, neither the State nor Langford were entitled to the treatment records as they were in the presence of a third party *and* were privileged and confidential. There is no evidence that privilege was waived at any point by H.H. Therefore, the district court did not abuse its discretion in denying Langford's Motion to Compel.

Despite the clear statutory prohibitions barring his request, Langford nonetheless claims that the State had an obligation, pursuant to Brady, to provide the victim's mental health treatment records because the records were exculpatory. Brady disclosures are distinct from statutory discovery obligations. See Weatherford v. Bursy, 429 U.S. 545, 559, 97 S. Ct. 837, 846 (1977) ("There is no general constitutional right to discovery in a criminal case, and Brady did not create one… 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded…'" (internal citations omitted)). As such, determining

whether the state adequately disclosed information under Brady requires consideration of both factual circumstances and legal issues; thus, this Court reviews *de novo* the district court's decision. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. See Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996); Mazzan, 116 Nev. at 66, 993 P.2d at 36. To establish a Brady violation, a defendant must demonstrate that: (1) the prosecution suppressed evidence in its possession; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. See, e.g., Mazzan, 116 Nev. at 67, 993 P.2d at 37. An accused cannot complain that exculpatory evidence has been suppressed by the prosecution when the information is known to him or could have been discovered through reasonable diligence. Rippo v. State, 113 Nev. 1239, 1258, 946 P.2d 1017, 1029 (1997). Conclusory allegations of Brady violations, unsupported by specific facts, are insufficient to justify extraordinary relief. Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995).

> [E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. 667, 683, 105 S. Ct. 3375, 3383 (1985). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 111, 96 S. Ct. 2392, 2400 (1976).

The State accepted, and accepts, its continuing disclosure obligation as defined in Brady and its progeny. The rule in Brady requires the State to disclose to the defendant exculpatory evidence and is founded on the constitutional requirement of a fair trial. Brady is not a rule of discovery, however. As the United State Supreme Court held in Weatherford, there is no general constitutional right to discovery in a criminal case, and Brady did not create one. 429 U.S. at 559, 97 S. Ct. at 846.

Brady has been interpreted to require prosecutors, in the absence of any specific request, to turn over all obviously exculpatory material. Agurs, 427 U.S. 97, 96 S. Ct. 2392. However, Brady does not require the State to conduct an investigation on behalf of the defense in order to obtain records that it does not possess and then disclose them. Langford moved to compel production of the victim's mental health records from Mojave Mental Health and Psychologist Lisa

Schaeffer. 1 AA 035. These records were not within the State's possession.[1] The State had no burden to obtain and produce records that it never had.

While the fact that the records are not, and never were, in the State's possession is sufficient to make his claim of a Brady violation meritless, Langford's claim further fails because he does not make a showing under the remaining two prongs of Brady. He fails to address the second prong as he has not shown that the records would have been favorable to the defense. Given that the counseling records exist only because H.H. sought treatment after Langford's sexual abuse, logic would dictate that they are more likely to be harmful than helpful, as their very existence is predicated on his assault of his stepdaughter.

Likewise, Langford fails to meet his burden of demonstrating that the records would have changed the outcome of the trial. Steese v. State, 114 Nev. 479, 492, 960 P.2d 321, 330 (1998) ("Evidence is material when there is a reasonable probability that had the evidence been available to the defense, the result of the proceeding would have been different."). Langford offers no explanation for why or how records of treatment the victim received as a result of his abuse would have changed the outcome of the trial, particularly given that the State presented DNA evidence (including semen stains) that corroborated the victim's story. The evidence Langford

[1] Nor could they be without overcoming the statutory privileges.

demanded was neither in the possession of the State nor was it material, and the district court properly denied the Motion to Compel.

Having failed to show that the State had an obligation to obtain and provide the records pursuant to Brady, Langford cites Giglio to support his claim that the district court should have compelled discovery of the records from the mental health provider because they could be used to impeach the victim. AOB at 11. Under Giglio, the State must disclose evidence that affects the credibility of prosecution witnesses. Giglio v. United States, 405 U.S. 150, 153-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Mazzan, 116 Nev. at 67, 993 P.2d at 37. Giglio did not create a constitutional right to pretrial discovery of all potential witnesses from any source. As with Brady, in order to be entitled to disclosure of information under Giglio, a defendant must show that (1) the prosecution suppressed evidence *in its possession*; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. See Smith v. Secretary Dept. of Corrections, 50 F.3d 801, 824-26 (10th Cir. 1995).

Langford's claim that he "is entitled to all relevant discovery regarding H.H.'s psychological records because these records are a source of material for cross-examination and impeachment" misstates the obligations of the State. FTS at 12. As discussed *supra*, the State was not, and is not, in possession of the treatment records, and could not have obtained them because they are privileged by statute.

Additionally, Langford has failed to meet his burden of any showing whatsoever that the treatment records would have been exculpatory. The very nature of the treatment – counseling sought by H.H. because of Langford's sexual abuse – makes them more likely to be harmful than exculpatory.

Moreover, the nondisclosed information must be material if a defendant is to be entitled to relief under Giglio. Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). In Giglio, for example, the government's case depended almost entirely on the alleged co-conspirator's testimony. Giglio, 405 U.S. at 154, 92 S. Ct. at 766. Therefore, the United States Supreme Court reasoned, nondisclosure by the government of evidence relevant to the co-conspirator's credibility would have affected the outcome of the trial. Id. In contrast, the State's case against Langford was not built solely on H.H.'s testimony. Instead, the evidence introduced by the State included testimony of other witnesses and corroborating DNA evidence. Like his claim of an alleged Brady violation by the State, Langford has failed to make even a cursory showing of how the treatment records, which exist only because H.H. sought counseling as a result of the sexual abuse she suffered, would have been favorable and could have changed the outcome of a trial in which physical evidence confirmed H.H.'s testimony.

Langford also asserts that he was entitled to the treatment records because he has the right to confront his accusers. AOB at 12. However, the United States

Supreme Court has held that the Confrontation Clause is *not* "a constitutionally compelled right of pretrial discovery." United States v. Ritchie, 480 U.S. 39, 52, 107 S. Ct. 989, 999 (1987). Instead, the right to confrontation is a trial right, "designed to prevent improper restrictions on the types of questions that defense may ask during cross-examination." Id. It "does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Id. It guarantees the opportunity for effective cross-examination, "not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. at 53, 107 S. Ct. 999, *citing* Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985). Here, H.H. testified and was subject to cross-examination. Thus, Langford's constitutional right to confront her was honored and this claim is without merit.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL.

Langford claims that the district court abused its discretion in denying his motion for mistrial, and cites four instances that he maintains should have led the district court to declare a mistrial. This claim is without merit.

A mistrial should only be granted when the "ends of justice" make it a manifest necessity. Glover v. Eighth Judicial District Court, 125 Nev. 691, 701-02, 220 P.3d 684, 692 (2009). A "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal

in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Moreover, "[a] witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." Ledbetter v. State, 122 Nev. 252, 264-5, 129 P.3d 671, 680 (2006) (quoting Carter v. State, 121 Nev. __, __, 121 Nev. 759, 121 P.3d 592, 599 (2005)).

The first incident cited by Langford happened during direct examination of the victim's mother, Shay Coon. Shay testified that her relationship with Langford eventually became rocky and that "some things happened," but that the situation improved when he began taking medication:

> MR. BURTON: In fact, let me – I'm sorry to cut you off. Let's do this, okay. Let me start it in California. What was your relationship like with the defendant in California?
> THE WITNESS: It was good.
> MR. BURTON: Were you living together?
> THE WITNESS: Yes.
> MR. BURTON: Obviously you had a child together; correct?
> THE WITNESS: Yes.
> MR. BURTON: Did he appear to care for Kaylie?
> THE WITNESS: Yes.
> MR. BURTON: And he appeared to care for you?
> THE WITNESS: Yes.
> MR. BURTON: Now let's go to Searchlight. Was it still a good relationship in Searchlight, or describe if it changed.

> THE WITNESS: It was rocky. And then some things happened and he got on medication and it got better for a while.

2 AA 323-24.

Defense counsel objected to the mention of medication. 2 AA 324. The statement had not been solicited by the prosecution, because the question had asked only whether the relationship was still good after Langford and Shay moved back to Searchlight. Following a brief bench conference, the district court immediately instructed the jury to disregard the comment about medication. 2 AA 325. When questioning continued, the prosecution did not follow up on this issue of medication, about which the State was not trying to elicit information, but instead continued with the line of questioning that focused on Langford's relationship with the family, including H.H.; his biological daughter, Kaylie; and his wife:

> MR. BURTON: Now, Ms. Coon – Ms. Coon, when [H.H.] was doing her home schooling online or on the computer did she have supervision, or were there parental controls on that computer?
> THE WITNESS: She usually had supervision.
> MR. BURTON: Okay. Who would provide that supervision?
> THE WITNESS: Both of us.
> MR. BURTON: Meaning you and the defendant?
> THE WITNESS: Justin, yeah.
> MR. BURTON: Thank you. Now, fair to say that when you were in California your relationship with the defendant was good or you cared about each other?
> THE WITNESS: Yes.

> MR. BURTON: And when you moved to Searchlight it started becoming more and more difficult or more and more of an unhappy relationship?
> THE WITNESS: Yes.
> MR. BURTON: Okay. Fair to say that Justin, the defendant, would on occasion verbally abuse you?
> THE WITNESS: Yes.
> MR. BURTON: Fair to say that on occasion Justin would call you names?
> THE WITNESS: Yes.
> MR. BURTON: And fair to say, without going into any details, Justin on occasion would physically abuse you?
> THE WITNESS: Yes.
> MR. BURTON: And we're talking about in the Searchlight; correct?
> THE WITNESS: Yes.
> MR. BURTON: Now let's talk about what you observed of the defendant's relationship with [H.H.]. Fair to say that they also had a rocky or unhappy relationship?
> THE WITNESS: Yes.
> MR. BURTON: Fair to say that he called her names?
> THE WITNESS: Yes.
> MR. BURTON: Fair to say that he physically abused her?
> THE WITNESS: He did hit her once or twice.
> MR. BURTON: We're talking about – okay. Was there a difference in how the defendant treated [H.H.] versus how he treated Kaylie?
> THE WITNESS: Definitely.

2 AA 326-27.

In the context of Shay's testimony, which spanned approximately 45 pages and laid out Langford's abusive relationship with his stepdaughter, one brief mention of medication – cured by the court when the jury was immediately instructed to disregard it – was not sufficient to irretrievably bias the jury.

The next incident that Langford asserts should have led to a mistrial happened during the testimony of Leslie Coon, the victim's grandmother. During direct examination, Leslie mentioned a voicemail she had received from Langford several years ago, which she characterized as threatening. 2 AA 367-68. The statement was not solicited by the prosecution, as the prosecution had no prior knowledge of the voicemail or phone call either. 2 AA 368.

The district court held a hearing on the admissibility of the phone call/message outside the presence of the jury. During voir dire, Leslie clarified that the voicemail demanded that H.H. return to live with Shay and Langford, but did not threaten violence or harm. 2 AA 371-72. The parties agreed that the voicemail did not constitute a prior bad act, and the State would question the witness further to clarify the nature of the voicemail:

> MS MCNEILL: Your Honor, my objection was that she used the words "threats" and then started talking about some sort of phone message. And my concern was what she was going to be on that phone message, because the bad – I think a threat is potentially a bad act, and our bad acts motion was limited to things that we had agreed on. And that was not one of them. At this point based on what she said it doesn't sound like he actually made a threat.
> THE COURT: That's what I'm thinking.
> MS MCNEILL: That's why I would just maybe ask the District Attorney to clarify that, you know, it wasn't actually a threat, what he said was just bring her over to there [*sic*] house and maybe there was some tension.
> MS JOBE: [Inaudible] characterize it more of a demand [inaudible] rather than waiting for some things to get –

> THE COURT: Okay. I think – if we do that, I think that will clarify it. Then I don't need to instruct the jury?
> MS. JOBE: Correct.
> MS. MCNEILL: Correct.
> MS. JOBE: [Inaudible.] So I don't imagine Ms. McNeill's going to object to that.
> MS. MCNEILL: No.

2 AA 372-73.

At the bench conference, defense counsel suggested that clarifying the testimony through a series of questions would make it clear that there was no threat. Id. Immediately after, the State addressed the statements by leading Leslie through testimony to clarify what she meant. She testified that the "threats" were in fact demands that H.H. live with Langford and Shay instead of with Leslie. 2 AA 375. Leslie then testified that Langford did not make any threats that she would suffer harm if she did not follow his demands. Id. When taken in total, Leslie's testimony on the subject of the phone call was not prejudicial to Langford because she clarified that he did not threaten her.

The third incident also occurred during Leslie's testimony. Leslie was shown pictures of H.H. taken around the time the abuse occurred. 2 AA 380, 384. Prior to trial, Langford had objected to the photographs, claiming that the pictures were not relevant and more prejudicial than probative because H.H. looked younger in them. 1 AA 165. The State argued that the pictures were relevant because they showed H.H. at the time of the crime. 1 AA 165-66. The district court agreed, and also

allowed Langford to admit more recent photographs taken from H.H.'s Facebook page. 1 AA 168.

When shown one of the photographs of H.H. when she was younger, Leslie said that H.H. was "so cute" under her breath. 2 AA 389. Langford moved for a mistrial. Id. At a bench conference, defense counsel expanded upon her objection and presented argument. The district court explained its reasoning in denying the motion for mistrial.

> THE COURT: Okay. Your motion for mistrial is denied. The jury is going to see the photograph. They're going to know that it is some sort of springtime event. I don't think saying it's an Easter egg hunt is going to prey on any emotions, I mean, that way. I mean, kids go on Easter egg hunts. She's a grandmother. She said, she's so cute, or she muttered it. But I don't – I don't want to highlight it. But she shouldn't – she was toeing the line.

2 AA 390.

The statement was a spontaneous one from a loving grandmother muttered under Leslie's breath and not directly into the microphone. 2 AA 390-91. In fact, the statement was not captured on the transcript and some of the attorneys in the courtroom did not even hear the comment. 2 AA 380, 384, 390. As a result, the court decided not to draw attention to it. 2 AA 390. Moreover, even assuming that the jury heard the comment, the show of emotion by the witness cannot be said to have influenced the jury in a manner that was prejudicial to Langford. See Evans v. State, 112 Nev. 1172, 1200, 926 P.2d 265, 283 (1996). Leslie was H.H.'s grandmother and

testified that she raised her from birth to eight years old. 2 AA 381, 390. Her affection for her grandchild would not prejudice the jurors because they would understand that she is a relative of the victim. The court ultimately found that the muttered statement did not prejudice Langford and denied the motion for mistrial. 2 AA 390.

The court's denial of Langford's motion following Leslie's spontaneous utterance was not arbitrary or capricious. The district court considered the nature of the statement and heard argument before explaining its reasons for denying the motion. 2 AA 390-91.

Finally, Langford claims that the district court abused its discretion in denying his second motion for mistrial because H.H.'s middle school counselor "testified that H.H. told her that Langford almost broke her mom's arm." AOB at 14. This is a misstatement of the witness's testimony. At trial, the middle school counselor testified as follows:

> MR. BURTON: Okay. So what – how long had [H.H.] been there from the time of January 21st?
> THE WITNESS: I guess that year. She just started that year.
> MR. BURTON: And you said you followed up on this information. You called [H.H.] into the office?
> THE WITNESS: Yes.
> MR. BURTON: Did you talk to her?
> THE WITNESS: Yes.
> MR. BURTON: Without telling me anything that she said right now just can you remember anything about her demeanor, her appearance?

> THE WITNESS: I think she was sad.
> MR. BURTON: Do you recall talking to her specifically about why she was sad?
> THE WITNESS: Yes.
> MR. BURTON: Do you recall her saying anything about physical abuse?
> THE WITNESS: Yes.
> MR. BURTON: What did she say about physical abuse?
> THE WITNESS: Her head was hit and ***that someone almost broke her mom's arm***.

2 AA 397-98 (emphasis added).

The statement was not solicited by the prosecution. Rather, it was made in response to a question that asked about physical abuse to the victim, not about physical abuse to the victim's mother. Further, the witness did not say who almost broke the mother's arm, and she did not refer to or name Langford. After a bench conference, the court immediately cured the reference by admonishing the jury to disregard any comments about a broken arm. 2 AA 399. Accordingly, the error was cured and Langford was not prejudiced by the mention of the broken arm.

Langford again moved for a mistrial, this time based on the statement from the school counselor. The district court considered arguments from both sides before ultimately ruling on the second motion for mistrial. 2 AA 411-14. The record reflects that, in denying the second motion for mistrial, the district court did not act in an arbitrary or capricious manner. Indeed, after denying the motion for mistrial, the district court noted that, although the spontaneous statements that had come out were not sufficient to grant a mistrial, the district court would revisit the issue if defense

counsel felt the need to object again. 2 AA 414-15. The State agreed that it would admonish witnesses once again not to speak about anything but H.H. 2 AA 414-15.

The district court denied Langford's motion based on careful consideration of arguments and testimony, not as an arbitrary and capricious act. In contrast to Langford's claim that the district court abused its discretion when it denied his motion for mistrial, the record reflects that the court carefully considered arguments from both sides, and was open to revisiting the issue in the future should Langford feel the need to bring another such motion. Id. As such, the district court's determination should not be disturbed on appeal. Parker, 109 Nev. at 388-89, 849 P.2d at 1066. Therefore, Langford's claim should be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Langford's Judgment of Conviction and sentence.

Dated this 15th day of December, 2016.

Respectfully submitted,

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Clark County District Attorney
Nevada Bar #001565

BY */s/ Chris Burton*
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Office of the Clark County District Attorney

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 5,162 words and 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 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 15th day of December, 2016.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 15, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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