IN THE SUPREME COURT OF THE STATE OF NEVADA



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| JAMES MARLIN COOPER,<br><br>Appellant,<br><br>vs.<br><br>THE STATE OF NEVADA,<br><br>Respondent. | ) | NO. 72091 |

# APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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# APPELLANT'S OPENING BRIEF

## ROUTING STATEMENT

James Cooper's appeal is not presumptively assigned to Court of Appeals because two of his convictions arise from a jury verdict involving a category B felonies (child abuse, neglect or endangerment – NRS 200.508(1)) and two convictions fall within category C felonies (battery constituting domestic violence– NRS 33.018, NRS 200.481, and NRS 200.4851C). James challenges more than sentence imposed or sufficiency of evidence. NRAP 17(b)(1).

As an issue of first impression, Court must decide if Double Jeopardy or the Unit of Prosecution test prohibit two convictions for battery domestic violence arising out of the same incident. Also, Court must clarify the first step in a *Batson* challenge. Case asks Court to contrast *Flores v. State*, 121

Nev. 706 (2005) with *Crowley v. State*, 120 Nev. 30(2004) which was decided before *Crawford v. Washington*, 541 U.S. 36 (2004).

## JURISDICTIONAL STATEMENT

NRS 177.015 gives Court jurisdiction to review this appeal of a jury verdict. District court filed judgment on 03/02/17. II:344-45. James filed the notice of appeal on 12/28/16 within the 30 day time limit established by NRAP 4(b). II:240-41. A second notice of appeal was filed on 03/22/17. II:356-49.

## ISSUES PRESENTED FOR REVIEW

I. EVIDENCE WAS INSUFFICIENT.

II. COURT COMMITTED REVERSIBLE ERROR BY INCORRECTLY CONCLUDING JAMES DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT AN INFERENCE OF DISCRIMINATION WHEN MAKING TWO *BATSON* CHALLENGES.

III. DOUBLE JEOPARDY AND THE UNIT OF PROSECUTION TEST BAR TWO CONVICTIONS FOR BATTERY DOMESTIC VIOLENCE.

IV. JAMES' RIGHT OF CONFRONTATION WAS VIOLATED WHEN COURT ADMITTED TESTIMONIAL HEARSAY AND THE ERROR WAS MAGNIFIED BY STATE NOT LAYING A PROPER FOUNDATION TO ADMIT STATEMENTS.

V. INADMISSIBLE BAD ACTS.

VI. STATE VIOLATED JAMES' RIGHT TO DUE PROCESS BY HIDING BRADY/GIGLIO MATERIAL.

VII. JURY INSTRUCTIONS.

VIII. PROSECUTORIAL MISCONDUCT IN CLOSING.

IX. CUMULATIVE ERROR.

## STATEMENT OF THE CASE

On 01/26/16, State filed a criminal complaint charging James Cooper with two counts of battery domestic violence arising on the same date, time, and with the same victim, Brittney Jensen. I:001-03. On 02/04/16, State amended the complaint by adding two additional counts of child abuse and neglect, naming victims JB and KJ. I:004-06.

Brittney Jensen, JB, and KJ did not attend the preliminary hearing held on 02/25/16. Over the objection of the defense, under NRS 171.196, State presented its case with hearsay testimony from Officer Pickens. I:011-21. Justice Court bound the case up to district court for trial.

On 03/01/16, State filed the Information. I:039-42. James entered a not guilty plea at his initial arraignment on 03/03/16 and invoked his right to a speedy trial. II:379-81; *Minutes*-II:350. After the 04/25/16 calendar call,

James's attorney requested a continuance due to a scheduling conflict which court granted.[1] Court reset the trial to begin on 06/27/16.

Subsequently, James' attorney filed a motion to withdraw from his case. I:131-35. At the 05/18/16 hearing, James' attorney withdrew his request.[2] The trial was vacated at the 06/20/16 calendar call when James missed his court date.[3] Thereafter, James' attorney withdrew.[4]

James was given a new attorney with a new trial date of 11/14/16. II:405-07;*Minutes*-II:361.

Several motions were litigated prior to trial and before jury selection the court held a *Petrocelli* Hearing.[5] State amended the Information on the first day of trial. II:296-98.

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1 Calendar Call on 04/25/16- II:282-86; *Minutes*-II:352-2; Hearing on 04/27/16-II:387-88; *Minutes*- II:353; Hearing on 04/28/16-II:387-88;*Minutes* II:354-5.

2 II:384-96;3987-98; *Minutes*-II:356; 357.

3 II:399-401; *Minutes*-II:358-9.

4 I:152-56; II:402-04: *Minutes*-II:360.

5 (1) State's Motion to admit other bad acts pursuant to NRS 48.045 and evidence of domestic violence under NRS 48.061 (I:059-103) and Defendant's Opposition (I:104-112) and Hearing at II:382-86-*Minutes*;II:351-2; and II:420-24; *Minutes*-II:364 and II:498-97:*Minutes*-II:366-67.

(2) State's Motion to admit medical records, 911 calls, and recorded jail calls (I:177-42) and Defendant's Opposition (II:243-51) and State's Reply (II:252-58) and Hearing at II:416-19;II:420-24-*Minutes* II:364.

(3) Defendant's Motion to dismiss Counts 1 and 2 (II:259-64) and State's Opposition (I:264-93) and Hearing at II:420-24-*Minutes*- II:364-65.

The four day trial began on 11/14/16 and ended on 11/17/16.[6] The jury found James guilty on Counts 1, 3, and 4; and, convicted him of a lesser charge on Count 2. II:338.

On 02/15/16, court sentenced James to an aggregate sentence of 48 to 120 months. VI:1181. VI:1162-81; *Minutes*-II:376-77. Court gave James 24 to 60 months on all counts but ran count 1 consecutive to count 3, count 1 concurrent to count 2, and counts 3 and 4 concurrent. II:343;IV:1181.

## STATEMENT OF THE FACTS

Brittany Jensen has a history of drinking and becoming violent. In 2012, after drinking heavily, she lost control and kicked in the apartment door where she was living, hit her friend Rambo, and ripped Rambo's clothing. IV:751-54;780-81. For this incident she was found guilty of battery domestic violence. IV:678-79;753.

On 01/22/16 Brittney Jensen drank a fifth of Bacardi rum. Brittney again became violent.

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[6] Day 1 – 11/14/16 at III:498-657; *Minutes* II:366-68.
Day 2 – 11/15/16 at IV:658-899;V:900-47; *Minutes* II:369-70.
Day 3 – 11/17/16 at V:948-1048; *Minutes* II:371-72.
Day 4 – 11/18/16 at VI:1041-61; *Minutes* II:373-74.

She was living with James and her two children 8 year old JB and 5 year old KJ when this incident occurred. Brittney testified that she had been drinking and talking to her friend Sasha over the telephone when she decided to confront James about something that happened between them weeks prior. IV:693-95. She was mad. IV:695.

Brittney said she went into the master bedroom and:

> ...I was talking to him and he was just trying to listen to me and telling me not to worry about it...I just remember being in his face, and I grabbed his hair...and I started tearing his hair out and hitting him...in our bedroom. IV: 695.
> ...
> [James] was standing up [and I was holding] his hair... IV:696.
> ...
> I was just all over him. Belligerent...I just remember attacking him and just kept going. I was so mad. IV:696.
> ...
> ...I was going crazy. IV:696.
> ...
> [I hit him on] his face, his chest... IV:696.
>
> [James was] trying to make me stop...I couldn't believe that I did that. IV:696.

Brittney estimated she pulled out 10-12 of James' dreadlocks. IV:791. Several of her dreadlocks were also pulled out. IV:791;800-01.

Brittney said James never hit her but was trying to get away from her. IV:698. He never wrapped anything around her neck. IV:699.

James testified similarly. James said Brittney was intoxicated when he came home from work, slurring her words and woozy. VI:1047-48. James works as a carpenter for Teamsters Union 6:31. VI:1044. They cooked dinner together and served the kids at the table. VI:1049. But then he took his food to the bedroom to eat while Brittney was on the telephone. VI:1050.

James heard Brittney crying and went to the kitchen to comfort her. VI:1051. After returning to the bedroom, Brittney came in and confronted him, talking about his phone, and she took his tool bag and threw his tools all over. VI:1051-52. She jumped on him while he was in the bed and began pulling his hair – his dreadlocks. VI:1052. When he tried to stop her she bit his finger. VI:1053. The fight that started on the bed, ended up on the floor because he was trying to untangle her from pulling his dreadlocks. VI:1054. Several of his dreadlocks were later found on the floor and pictures of his head showed missing hair. IV:878-79;881;V:935.

James testified that he never kicked, never punched, never stomped on, and never strangled Brittney. VI:1054-58. He said the struggle between them caused her injuries.

James said he left the apartment, wearing his boxers, to call 911. VI:1054. He returned to the apartment to grab some clothing and then went

back outside in the cold while talking to 911. Exhibit 3. James' 911 call was made at 6:48 p.m. IV:699-701.

James told 911 that Brittney pulled his hair out and bit him; he explained she had a mental illness and was bipolar; and she drank a whole bottle of alcohol that day. Brittney can be heard in the background crying and yelling. Exhibit 3.

When Brittney realized James was on the phone with 911, she told JB to call 911 for her. JB called at 6:51 p.m. IV:699-703; Exhibit 2. On the tape Brittney can be heard yelling that James hit her with his hands and choked her. At trial, Brittney acknowledged making these statements because she knew 911 was recorded and she did not want to get in trouble for her acts. IV:771.

Police Officers Kolarik, Sylvia, and Pickens responded to the calls. Kolarik was wearing a body cam. Exhibit 4. The cam shows Pickens speaking to James at a distance – the entire conversation was not captured. James told Pickens what occurred, similar to his trial testimony. IV:895-99;V:900-01. James denied ever kicking, stomping, or punching Brittney. Pickens documented the injuries to James: left hand with bite mark and blood, missing hair. IV:899;V:900-01.

James spoke to Det. Bragandy about the incident that night. VI:1082-85. He told Bragandy that "we rolled on the bed and we fell out of the bed and she still had my hair and she started going to her son to call the police, go call the police." VI:1082. James called 911 while still in the bedroom but did not talk to the operator until he was outside. VI:1083. He never grabbed a phone out of the hands of JB. IV:1084.

Brittney's behavior is well documented on the body cam. Exhibit 4. She is emotional and appears drunk or on drugs. Exhibit 4. Pickens and Sylvia said Brittney was intoxicated and unable to communicate what occurred. IV:844;863-66. Medical records indicate Brittney was so intoxicated that she was unable to communicate with staff. VII:1309. Yet when medics arrived they asked her if James had strangled her and she responded "Yes." IV:834-35.

Officers testified Brittney had multiple facial injuries, bruising, her eye was swollen, some of her hair was missing, and she had blood and scratches everywhere. IV:842-43; V:902-03.

CSI Amanda Wright photographed Brittney's injuries at the hospital. She also took photographs of the apartment, except for the children's room because she did not see anything out of order in that room. IV:868-89.

Brittney testified that no one asked her what happened. IV:706;797. Even while she was at the hospital, no one asked her. V:771. Medical records indicate she was not allowed to leave until she was clinically sober. VII:1240. Upon discharge, she refused to go to a shelter, refused to talk about the incident, and declined any community resources. VII:1309.

Although police did not question Brittney, they spoke to her children. According to Officer Sylvia, JB said his mom and James were arguing in the bedroom and then he heard her say something like "Don't do that." IV:853. James punched Brittney in the stomach, grabbed her and threw her on the ground, and was yelling. IV:853. Brittney ran to the kitchen and James chased her and grabbed her again and threw her to the floor and when she hit the floor her head hit the cabinets. James then kicked her all over her body and stepped on her face. IV:855. Brittney told him to call 911. IV:855.

Sylvia said that JB said that when he was trying to call 911, James ran after him and took the phone, throwing him on his bed knocking over the TV in the process. IV:855. James then argued with Brittney is the master bedroom and threw her to the ground again and they wrestled. IV:855. "She was grabbing at his hair while they were wrestling on the ground...[James] was continuously punching and hitting his mother...this went on for a while, [James] finally got up and left the apartment and

Brittney went to the bathroom and tried to lock herself in the bathroom." IV: 856. Officer Pickens also testified to what JB said. V:909-915.

At trial, JB remembered none of this. IV:805-822.

KJ remembered seeing James push JB on the bed and take the phone out of his hands. IV:823-26.

Brittney testified that the children were in their bedroom and did not see her start the fight and did not see her pulling out James hair. IV:771. When JB came out of his room, the fight had already started. IV:771-72. Brittney believed her behavior scared JB. IV:773.

When Brittney left the hospital, she returned home to James being in jail and her kids temporarily with CPS. IV:726;797. James called her several times and State introduced jail calls. See Exhibits 67, 68, 69, 70, 71, 72. Although Brittney did not remember her injuries the night of the incident, she admitted that the next day she had a black eye, a scrape, some missing hair, and a mark on her throat. IV:706-07;800.

On 01/26/15, Brittney authored a letter taking full responsibility for her actions. IV:723-24;VI:1183-4. In the letter she wrote:

> I had been drinking heavily throughout the day...I decided to speak with James about something that I was upset about that happened a couple weeks prior. When we were talking, I started getting upset and when James tried to remove himself from the situation, I followed him and then I attacked him and I proceeded to continue to attack him throughout the house and

> pulled a lot of his hair out and then he placed a call to 911, and then I started belligerently yelling profanities and yelled to my son to also call 911 when 911 did arrive, they just looked at my injuries and saw how intoxicated I was and told me you are going to the hospital and when I arrived there, they didn't ask me what happened or anything... IV:723-24; VI:1182-84.

Brittney appeared at James' first court date on 01/27/16 but did not attend his preliminary hearing even though she was subpoenaed. IV:724-25 At some point Brittney moved to Arizona because she claimed the D.A. did not want to listen to her. IV:726-27. She stayed there to avoid service of a subpoena. IV:727-28.

Brittney helped James bail out and hire an attorney. IV:726; Jail calls.

Brittany and James also testified to another battery domestic incident occurring on 07/03/15. IV:755-58; VI:1075-78;1063-64; See Issue V.

Elynee Green, LVMP victim witness manager testified to general observations of domestic violence victims and what she called the cycle. V:951-69. Her job at METRO is to direct individuals who are identified as victims by the police to community assistance programs. V:963. She has not maintained any certification for her counseling degree and does not counsel alleged victims. V:963-64. She never interviewed Brittney and did not read the police reports. V:964.

Dr. Lisa Gavin, pathologist in the Coroner's Office, testified about autopsies she conducted involving strangulation and strangulation in general. V:1009-35. She never interview and never examined Brittney but looked at a few pictures taken of Brittney by METRO. V:1021-27;1030a. She never reviewed Brittney's medical reports. V:1227. She never reviewed the police reports and never looked at photographs of James' injuries. V:1030a.

## SUMMARY OF THE ARGUMENT

This case is an example of the State proving its case entirely through hearsay – hearsay of an eight year old child. In deciding whether the hearsay was properly admitted Court must address *Flores v. State*, 121 Nev. 706 (2005) , *Crowley v. State*, 120 Nev. 30(2004), *Crawford v. Washington*, 541 U.S. 36 (2004), and the hearsay statutes. This case also contains an issue of first impression, Court must decide if Double Jeopardy or the Unit of Prosecution test prohibit two convictions for battery domestic violence arising out of the same incident. Issues involving a *Batson* challenge, prosecutorial misconduct with discovery and closing, inadmissible other bad acts, recorded recollection, cumulative error, and improper jury instructions are also addressed.

## ARGUMENT

## I. EVIDENCE WAS INSUFFICIENT.

### A. Facts.

James incorporates the Statement of Facts.

### B. Child abuse, neglect, or endangerment – counts 3 and 4.

In Counts 3 and 4, James was convicted of child abuse, neglect, or endangerment, a violation of NRS 200.508(1). Each count alleged James:

> ...willfully, unlawfully, and feloniously cause a child under the age of 18 years...to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect, *to-wit:* physical injury of a non-accidental nature and/or negligent treatment or maltreatment, and/or cause [child] to be placed in a situation where he might have suffered unjustifiable physical pain or mental suffering as a result of abuse or neglect, *to wit:* physical injury of a non-accidental nature and/or negligent treatment or maltreatment...

Amended Information-II:296-98; Jury Instruction 3-II:303-04.

In Count 3, State claimed James violated NRS 200.508(1) "by hitting and/or punching the mother of JB, while near JB and/or by chasing JB down the hallway to his room and preventing JB from calling the police." II:297;303.

In Count 4, State alleged James committed the crime "by hitting and/or punching the mother of KJ while near KJ." II:298;304.

As to Count 4, State presented no evidence that KJ saw Brittney being hit or punched by James. KJ saw nothing happen to Brittney. IV:823-26. Pickens said KJ stayed in her room the entire time. V:907. Thus, count 4 must be dismissed due to insufficient evidence.

As to both counts, State presented no evidence that JB and KJ were harmed physically or mentally by James – no counselors, no experts, no doctors, and no medical reports. No one from CPS testified that the kids were traumatized and Brittney received the children back in the home after a few days. IV:726.

Likewise State presented no evidence that JB or KJ were placed in a situation where they could be harmed by James hitting or punching Brittney. KJ never came out of her room. JB came out after the fight began and was not injured.

Nine year old JB was 8 years old at the time of the incident on 01/22/15 and he remembered nothing thus showing he was not traumatized by the alleged incident. IV:805-822. JB only remembered the police coming to his home but did not remember speaking to them.

Wright found no evidence of a disruption occurring in the children's bedroom and therefore took no pictures of that room. Thus, there is no

evidence that the TV was pushed. She also did not take pictures of the children. IV:868-889.

Pickens saw the incident to be solely a battery domestic violence involving Brittney. V:939-41. "As for the child himself...I didn't see personally, a need to go into any kind of child abuse..." V:940. None of the children sustained any injuries and they did not need medical attention. V:940.

If we accept the officer's statement that RB said James chased him down the hallway, pushed him on the bed, and grabbed the phone then the question is whether that is enough for a reasonable juror to find felony child abuse and neglect as to JB and KJ.

NRS 202.508(4)(a) defines "abuse or neglect" to mean:

> ...physical or mental injury of a nonaccidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child under the age of 18 years, as set forth in paragraph (d) and NRS 432B.070, 432B.100, 432B.110, 432B.140 and 432B.150, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

Under this definition, State needed to prove actual harm or that there was "*negligent treatment... under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.*" (Emphasis added). *See Clay v. Eighth Jud. Dist. Ct.*, 305 P.3d 898, 902-03 (Nev. 2013).

The State pled no facts regarding neglect or negligent treatment.

Here, neither child was physically harmed. Neither child required any medical intervention. Moreover, James called the police immediately to get help. Thus, even if he took the phone away from JB, he used a phone to call the police to come to the apartment to check on the welfare of all occupants and himself.

**C. Battery domestic violence – Counts 1 and 2.**

Officer Sylvia and Officer Pickens' account of what JB told them was the foundation of State's evidence proving the battery domestic violence charges. Although Sylvia and Pickens had the ability to record JB's statement through Officer Kolarik's body cam, they chose not to and at trial claimed they had no ability to record their conversations. IV:862;V:938; See State's Exhibit 4.

Court allowed police officers to testify to statements they claimed JB made that night regarding Brittney and James. Court allowed Pickens to say JB claimed he was pushed on the bed by James and James took the phone from him which KJ corroborated. However, Pickens did not separate the children when interviewing them, he did not record their statements, and he himself thought no child abuse was evidence. IV:907-08;38-42.

Accordingly, the evidence presented was not competent based on a multitude of problems. See Issue IV.

Even if we accept an eight year old and a five year old's statement about what occurred when they were questioned by the police, the medical records do not back up JB's alleged accounting of a brutal beating. The medical records Brittney had bruising on her forehead, left eye, swelling of left eye, a headache, VII:1234. She had no neck, abdomen, chest, or back injuries. VII:1235. She had no brain injury, no intracranial hemorrhage, nor facial bone fracture, and no skull fracture. VII:1237-38. She was diagnosed with alcohol intoxication and facial contusion. VII:1240. All of these medical findings support what James and Brittney said occurred and dispute what the police said RB said. Brittney would have had more injuries if James beat, kicked, and stomped on Brittney repeatedly.

**D. Standard of review**

"Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt..." NRS 175.201; *Hightower v. State*, 123 Nev. 55 (2007); U.S. Const. Amend. V; Amend. XIV; Nev. Const. Art. 1 § 8.

Under the sufficiency of the evidence test, Court decides "whether jury, acting reasonably could have been convinced to that certitude [of

beyond a reasonable doubt] by the [direct and circumstantial] evidence it had a right to consider." *Wilkins v. State*, 96 Nev. 367, 374 (1980). Court does not reweigh evidence but determines if *competent evidence* exists to prove each and "every element of a crime," and "every fact necessary to prove the crime" beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *In re Winship*, 397 U.S. 358, 364 (1970); NRS 175.191; NRS 175.201.[7] Court considers evidence in light most favorable to prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Here, State failed to present competent evidence to prove the charges beyond a reasonable doubt.

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[7] *Stephans v. State*, 262 P.3d 727 (Nev. 2011) incorrectly concluded Court need not distinguish competent from incompetent evidence by relying on federal habeas case. Insufficiency claims face "a high bar in federal habeas proceedings because they are subject to two layers of judicial deference" before federal habeas proceedings. *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012).

## II. COURT COMMITTED REVERSIBLE ERROR BY INCORRECTLY CONCLUDING JAMES DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT AN INFERENCE OF DISCRIMINATION WHEN MAKING TWO BATSON CHALLENGES.

Even if Court believes the evidence presented was sufficient to convict James of the charges, Court may reverse based on structural errors occurring during jury selection.

### A. Two *Batson* challenges.

The United States and Nevada Constitutions provide for the right to a trial by a fair and impartial jury in a criminal case. U.S. Const. Amend. VI, Amend. XIV; Nev. Const. Art. 1 Sec. 3; Art. 1 Sec. 8. The Constitution not only protects a defendant's rights to a fair trial, it also protects rights of prospective jurors to sit as jurors. *Batson v. Kentucky*, 476 U.S. 79, 85-88 (1986). An unbiased jury selection process is mandatory because "[j]ury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all people." *Powers v. Ohio*, 499 U.S. 400, 407(1991).

The *Batson* Court held that the Equal Protection Clause prohibits the use of a peremptory challenge based on the juror's race. *Diomampo v. State*, 124 Nev. 414, 422 (2008) *citing Batson*. Thus, a party may raise a *Batson* challenge when concern arises that the opposing party used a peremptory

challenge to remove a prospective juror based on their race. *See J.E.B. v. Alabama, ex. rel T.B.*, 511 U.S. 127, 128 (1994)(potential jurors and the parties have an Equal Protection right during the jury selection process which may be asserted by the parties); *also see Walker v. State*, 113 Nev. 853, 867 (1997). *Batson* challenges and accompanying *Batson* procedures serve to protect the public's confidence in the verdict, prospective juror's rights to sit on the jury, and a defendant's right to a fair and impartial jury. *See State v. McClear*, 11 Nev. 39 (1876); *Batson*.

Here, State used 2 of 5 peremptory challenges to remove 2 African-American prospective jurors from the jury: Juror #274, Ms. Clark, and Juror #217, Ms. Bethea. III:520;533;648. Only 1 African-American juror remained. Hence, James made a *Batson* challenge. III:647-51.

James argued:

> There are only two African-Americans on the panel, both of which the State challenged, used a challenge for. And the third individual who identifies themselves as African-American on this was left on, however, his appearance wise there are only two that appear to be African-American and the State excluded both of them.
> ...
> They both indicated that they could be fair, Ms. Clark and Ms. Bethea.
> ...
> I can't see any reason why – any reason – I know State will have to provide a (indecipherable) as to why they excluded them...

III:647-48.

**B. Test.**

When a party raises a *Batson* challenge during jury selection, the trial court uses a three part test to determine if the use of the peremptory challenge violated the Constitution. The test is as follows:

> (1) the opponent of the peremptory challenge must make out a prima facie case of discrimination; (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination.

*Ford v. State*, 122 Nev. 398, 403 (2006). Proper use of the test is important because the Constitution forbids the striking of even a single prospective juror for a discriminatory purpose. *United States v. Lorenzo*, 995 F.2d 1448, 1453-54 (9th Cir. 1993); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994).

**1. Step 1: prima facie case of discrimination.**

As noted above, James raised a *Batson* challenge, arguing both prospective jurors excluded by State through use of its peremptory challenges said they could be fair. State removed 2 of the 3 African-American prospective jurors from the panel. III:648.

State responded: "We only have to provide a race neutral reason after and if the court finds that a prima facie case has been shown that there was

been - - or that there has been discrimination." III:648-49. State contended James failed to make a prima facie case of discrimination. III:649.

The trial court agreed and asked James' attorney to elaborate, noting that his argument had to do with the percentage make-up of the jury. III:649.

James further argued:

> I think that that it is and has been taken consideration when there's only three individuals that identify or appear to be African-American and two of them are excluded...as well as the fact that both testified that they could...be a fair juror and weigh the evidence fairly...both sides have an opportunity to question more about things that may have caused each concern. And they both indicated upon further voir dire that they could be a fair juror. And so at this point, given the pattern and I'm making a *Batson* challenge. III:649-50 (emphasis added).

Court acknowledged James' challenge was based on a percentage issue but decided the court on its own could think of reasons for the State to want to preempt the two prospective African-American jurors. III:650. Court concluded James was not specific enough in his analysis under Step 1 and denied the motion. III:650.

However, the trial court clearly erred in finding James did not establish a prima facie case under Step 1 because he showed a pattern and an inference of discrimination by the State removing 2 of 3 African-American jurors when it only had 4 or 5 peremptory challenges available.

In *Watson*, this Court discussed what is needed for a prima facie showing under Step 1.

> To establish a prima facie case under step one, the opponent of the strike must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson,* 476 U.S. at 93–94, 106 S.Ct. 1712. This standard is not onerous and does not require the opponent of the strike to meet his or her ultimate burden of proof under *Batson. Johnson[v. California],* 545 U.S. 162 at 170, 125 S.Ct. 2410 (rejecting California's "more likely than not" standard to measure the sufficiency of a prima facie case). Rather, the opponent of the strike must provide sufficient evidence to permit the trier of fact to "draw an inference that discrimination has occurred." *Id.; see also State v. Martinez,* 131 N.M. 746, 42 P.3d 851, 857–58 (N.M.Ct.App.2002). "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.' " *Johnson,* 545 U.S. at 168 n. 4, 125 S.Ct. 2410 (quoting *Black's Law Dictionary* 781 (7th ed.1999)).

*Watson at* 166.

An inference of discrimination may be established by "compar[ing] the percentage of the *Batson* respondent's peremptory challenges used against the targeted-group members with the percentage of targeted-group members in the venire." *Watson at* 166;168. Other ways to establish an "inference of discrimination include, but are not limited to, the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." *Id. at*

166-67. A defendant need only show an inference of discrimination to fulfill Step 1. *Johnson v. California,* 545 U.S. 162 (2005).

Here James revealed an inference by specifically arguing there was a pattern. James noted State used 2 of its 4 or 5 challenges to remove 2 of the 3 African-Americans on the 23 person panel. In so arguing, James showed a pattern and a disproportionate effect.

The raw number of peremptory challenges used by the State to exclude African-Americans was almost 50% if State used 2 of its 4 peremptory challenges for removing jurors; and, 40% if the peremptory challenge for the alternate is included (2 of 5 peremptory challenges). However, African-Americans only consisted of 13.04% of the 23 person panel after for-cause challenges were resolved. Because State used a higher percentage of peremptory challenges than there were African-American's on the 23 person panel, this is prima facie evidence of racial discrimination.

Also there was disparate treatment. The percentage of African-Americans removed from the panel after for-cause challenges were resolved was 67% (2 of 3 on the panel) when African-Americans only consisted of 13.04% of the 23 person panel. Thus, State's use of peremptory challenges to remove African-Americans was out of proportion to the African-

American prospective jurors on the panel thereby showing disparate treatment and a pattern.

When a prosecutor disproportionately strikes minorities from the jury, an inference of discrimination is shown. *Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th 2002). In *Fernandez*:

> [t]he prosecutor struck four out of seven (57%) Hispanics thus supporting an inference of discrimination. While Hispanics constituted only about 12% of the venire, 21% (four out of nineteen) of the prospective juror challenges were made against Hispanics. At the time of the first *Wheeler* motion, after which the judge in effect warned the prosecutor not to strike any more Hispanics, the prosecutor had exercised 29% (four out of fourteen) of his challenges against Hispanics. Therefore, the prosecutor disproportionately struck Hispanics from the jury box, resulting in a statistical disparity... [and these] challenges, standing alone, are enough to raise an inference of racial discrimination.

*Id.*

Moreover, the Ninth Circuit recognizes that:

> The fact that a prosecutor peremptorily strikes all or most veniremembers of the defendant's race...is often sufficient on its own to make a *prima facie* case at Step One. *See Paulino v. Castro (Paulino I)*, 371 F.3d 1083, 1091 (9th Cir.2004) ("[A] defendant can make a prima facie showing based on statistical disparities alone."). In this case, two-thirds of the black veniremembers not removed for cause were struck by the prosecutor. We have found an inference of discrimination in cases where smaller percentages of minority veniremembers were peremptorily struck. *Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir.2002) (56%); *Turner v. Marshall (Turner I)*, 63 F.3d 807, 812 (9th Cir.1995) (56%), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir.1999)

(en banc); *accord United States v. Alvarado*, 923 F.2d 253, 255 (2d Cir.1991) (57%).

*Shirley v. Yates*, 807 F.3d 1090, 1101 (9th Cir. 2015), *as amended* (Mar. 21, 2016). Here, State removed 67% of the prospective jurors which is a higher percentage than in *Fernandez*, *Turner*, and *Alvarado*. Additionally, the two African-Americans struck were of the same race as James.

In *McCarty v. State*, 132 Nev. Adv. Op. 20, 371 P.3d 1002, 1006–08 (2016), *reh'g denied* (6/24/16), this Court allowed the district court's decision on Step 1 to stand when the State removed 2 of the 3 remaining African-American prospective jurors from the venire. The *McCarty* Court only focused on Step 3.

Finally, though not argued below, one of the prosecutor's questions brings into question State's discriminatory use of peremptory challenges. During questioning of the 23 juror panel, State asked if anyone of them was a sovereign citizen and then followed up by asking "How about the Black Lives Matter movement?" III:591-92. State used a peremptory challenge to remove Juror 274, Ms. Bethea, an African-American prospective juror who later responded to the Black Lives Matter question.

"The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law

given." *Whitlock v. Salmon*, 104 Nev. 24, 27 (1988). Asking jurors if they are a member of the Black Lives Matter movement does not identify the juror as being incapable of performing their duties as a juror but instead appears to be a racial type question.

Although Juror 274 did not initially answer the prosecutor's Black Lives Matter question, Juror 274 later said: "...in my experience and what I know about the justice system, [the prosecutor] touched on Black Lives Matter, and I have to say something." III:647. Juror 274 went on to say that she realized most cases pled out and it was unusual for a case to go to trial. Knowing that, she said she would stand by the Defendant's right to go to trial, listen to both sides, weigh the facts, she understood he had a right not to testify, and she understood there was something else to be heard. She said: "And that has to deal with a lot with Black Lives Matter." III:647.

While State never challenged Juror 274 for cause, it did challenge Juror 340, Jenny Leary. III:629. Court denied State's challenge. III:629. State did not use a peremptory challenge to remove Juror 340, Jenny Leary, and she later became a juror in this case. II:300; III:552;605-06;651.

State used a peremptory challenge to remove Juror 274 who was one of 3 African-Americans on the panel and who was one of the few who responded to her question about Black Lives Matter.

Based on the above, James established a prima facie case of racial discrimination.

**2. Step 2: reasons given and argument.**

Court never addressed Step 2.

**Step 3: trial court's decision.**

Court never addressed Step 3.

**D. Appellate review and district court's bias.**

A trial court's decision regarding the prosecutor's discriminatory use of peremptory challenges will not stand if Court finds district court clearly erred. *Synder v. Louisiana*, 552 U.S. 472, 474 (2008); *Connor v. State*, 327 P.3d 503,508 (Nev. 2014). *Vasquez-Lopez* at 903. Discriminatory use of peremptory challenges is structural error not subject to harmless error analysis. *Diomampo* at 423.

Here, the trial court clearly errored in three ways: (1) failing to acknowledge James fulfilled Step 1, (2) failing to require State to address Step 2, and (3) showing a possible bias before rending her decision.

**1. Clear error in decision.**

As noted above, James established a prima facie case under Step 1. James compared the number of peremptory challenges used by the prosecutor to the remaining targeted-group members on the jury panel when

arguing that the prosecutor violated *Batson* by using 2 of 4 or 5 peremptory challenges to remove 2 of the 3 African-American jurors on the 23 person panel.

**2. Step 2.**

Because James made a prima facie case under Step 1, trial court created reversible error in not requiring State to address Step 2.

**3. Trial court's bias.**

Due process requires a jury selection process structured to prevent prejudicial occurrences and a judge mindful of his duty to provide a defendant with a fair and impartial jury. U.S. Const. Amend. VI; XIV; *Oswald v. Bertrand*, 249 F. Supp. 2d 1078, 1090–91 (E.D. Wis. 2003), *aff'd*, 374 F.3d 475 (7th Cir. 2004) *citing Smith v. Phillips*, 455 U.S. 209, 217 (1982). "[D]ue process is denied by circumstances that create the likelihood or the appearance of bias. *Peters v. Kiff*, 407 U.S. 493, 502, 92 (1972)(grand jury and trial jury selection arbitrary excluded African-Americans).

Here, while acknowledging James' *Batson* challenge was based on a percentage issue, court disregarded this reason, requested more information from the Defense, and contended that she could: "think of a whole host of reasons for Counsel wanting to preempt either of those two particular individuals." III:650. Court said: "So unless you can be a little more

specific in your analysis, the court would have to deny your motion." III:650.

Trial court's announcement reflects the court's personal opinion on the State's removal of the 2 African-American prospective jurors rather than being an unbiased evaluation of the evidence presented by both parties during the *Batson* challenge. Court did not require State to supply reasons for removing the 2 African-American jurors under Step 2 but used her own personal belief instead. By asserting her own opinion into the matrix without explaining the analysis, court prohibited James from challenging the court's conclusions and showed that the court had made her decision without allowing full argument.

Additionally, by requiring James to provide more information, trial court indicated it would rather allow the trial to go forward with the State discriminating against jurors based on race than conduct a thorough investigation of the reasons for the State removing 67% of African-American prospective jurors from the jury.

The manner in which the court made its decision is similar to the structural error uncovered in *Brass v. State*, 291 P.3d 145 (Nev. 2012). In *Brass*, the trial court dismissed the challenged juror prior to holding a *Batson* hearing. The *Brass* Court found structural error because by dismissing the

juror prior to holding a hearing to decide the challenge the court denied the defendant an adequate opportunity to respond to the State's alleged race neutral reasons thereby having the same effect as allowing a racially discriminatory peremptory challenge to stand. *Id. at 149.* Conducting a *Batson* hearing in this fashion "may present the appearance of improper judicial bias." *Id.* fn. 4.

Likewise, here, by requiring James to provide more specific information and then deciding his objection was not specific enough, trial court's decision had the same effect as in *Brass* by allowing a racially discriminatory peremptory challenge to stand. Furthermore, by the court making its own decision on the reasons as to why the State may want to use a peremptory challenge to remove 2 African-American prospective juror prior to hearing any reasons from the State, the court failed to give James' an adequate opportunity to present his *Batson* challenge.

Based on the above, structural error occurred requiring reversal of James' convictions.

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## III. DOUBLE JEOPARDY AND THE UNIT OF PROSECUTION TEST BAR TWO CONVICTIONS FOR BATTERY DOMESTIC VIOLENCE.

### A. Two convictions for battery domestic violence.

State charged James with two counts of domestic battery arising on the same day out of the same incident, at the same time, on 01/22/16 with the same victim. II:296-98.

In Count 1, State alleged James punched Brittney Jensen in the stomach and/or threw her to the ground and/or kicked and/or stomped on her. II:297. In Count 2, State alleged James strangled Brittney Jensen. II:297.

The jury found James guilty of Count 1. II:338. But in Count 2, the jury found him not guilty of strangling but guilty of a second battery constituting domestic violence. III:338.

At sentencing, district court sentenced James on both battery domestic violence convictions ordering him to spend 24-60 months in prison with the counts running concurrent. III:343.

### B. Double Jeopardy.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the Nevada Constitution prohibits: "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for

the same offense after conviction, and (3) multiple punishments for the same offense. *Jackson v. State*, 291 P.3d 1274, 1278 (Nev. 2012); *also see* Nev. Const. art. 1 Sec. 8; *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Whalen v. United States*, 445 U.S., 688 (1980).

Here, the jury returned a verdict for a lesser offense in Count 2. In reaching this decision, the jury acquitted James of battery by strangulation. However, the Count 2 verdict is a second conviction for battery domestic violence under the same facts as Count 1. Thus, double jeopardy precludes a second conviction because it is a prosecution for the same offense and a conviction after an acquittal.

A similar situation occurred in *Olivard v. State*, 831 So. 2d 823, 823–24 (Fla. Dist. Ct. App. 2002). In *Olivard*, the jury found the defendant guilty as charged in count 2 – battery constituting great bodily harm and permanent disfigurement. But in count 1 – aggravated battery with a deadly weapon – the jury returned a lesser included verdict of battery.

Using the *Blockburger* test, the *Olivard* Court held that the Double Jeopardy Clause prohibited convictions and sentences on both offenses because battery was a lesser included of battery constituting great bodily harm and permanent disfigurement. *See Blockburger v. United States*, 284 U.S. 299 (1932). In reaching this decision, the *Olivard* Court also

considered whether the crimes involved the same victim, the same location, and whether it was one continuous course in conduct.

Like Florida, Nevada uses the *Blockburger* test to determine if two offenses are separate. *Estes v. Nevada*, 122 Nev. 1123 1143 (2006). Under *Blockburger*, if each offense requires proof of a fact that the other does not then the two offenses are separate. *Id.* Here, both offenses contain the same elements, the same victim, the same location, and involve one continuous course in conduct. Therefore, double jeopardy requires Count 2 to be dismissed.

**C. Unit of prosecution.**

Even if this Court believes this issue falls within the unit of prosecution test rather than Double Jeopardy, the results are the same.

Whether or not a person may receive multiple convictions based on the same facts occurring at the same time with the same victim may involve unit of prosecution analysis. "Determining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law." *Castaneda v. State*, 373 P.3d 108, 110 (2016) *citing Jackson v. State*, 128 Nev. 598, 612 (2012).

When interpreting the statute, Court first looks at the plain meaning of the statute to determine Legislative intent. *Castaneda at* 110(unit of

prosecution under NRS 700.230); *Casteel v. State*, 122 Nev. 356 (2006)(unit of prosecution under NRS 200.700); *Washington v. State*, 376 P.3d 802 (2016)(unit of prosecution for NRS 202.285(1)). Court uses de novo review. *Castaneda at* 110. .

Battery is the applicable statute. NRS 200.481(1)(a) defines a battery as: "any willful and unlawful use of force or violence upon the person of another. The unit of prosecution here is "use of force or violence." *Hobbs v. State*, 127 Nev. 234, 237–40 (2011). The words "use of force or violence" are preceded by the word "any" as modified by "willful and unlawful."

"The word 'any' has multiple, conflicting definitions, included (1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all." *Castaneda citing State v. Sutherby*, 165 wash.2d 870, 204 P.3d 916, 920 (2009) *citing Webster's Third New International Dictionary* 97 (1976). The *Castaneda* Court found the word "any" ambiguous and looked to the section of the NRS housing that statute for clarity. However, the *Hobbs* Court found the NRS 200.481 language clear without looking at the word "any."

The crime battery is housed in the crimes against a person, which provides no clarity because it contains numerous and different types of crimes against a person.

A review of the battery statute shows the definition has not changed since approved in 1971. *See* A.B. 301, 56th Leg. (Nev. 1971). There is nothing in the Legislative history to further explain the definition. *See* http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1971/AB301,1971.pdf

Throughout the years the Legislature amended the battery statute several times, increasing and differentiating the penalties by type of victim, severity of the injuries, and use of a weapon. But the definition remains the same. Thus, reviewing changes to the statute provides no further clarity.

However, if the Legislature wanted a person to be convicted of each and every hit, smack, or kick in a fight, they would have indicated such in the statute. The fact that the Legislature has not means the Legislature did not intend such punishment or a battery. "'[E]xpressio unius est exclusio alterius,' expression of one thing is the exclusion of another." *State v. Javier C.*, 289 P.3d 1194, 1197 (Nev. 2012) *citing Cramer v. State, DMV,* 240 P.3d 8, 12 (Nev. 2010).

Finally, under the rule of lenity, if the Court concludes NRS 200.481(1) is ambiguous then defining the crime or imposing the penalty must be resolved in James favor. *See State v. Lucero*, 127 Nev. 92, 95 (2011); Antonin Scalia & Bryan A. Garner, Reading Law: *The Interpretation of Legal Texts* 296 (Thomson/West 2012). "Under the rule of

lenity, 'the tie must go to the defendant.'" *State v. Javier C.*, 289 P.3d 1194, 1197 (Nev. 2012) *citing United States v. Santos*, 553 U.S. 507, 514 (2008).

**D. Reversal and re-sentencing.**

Based on the above, James' conviction under Count 2 must be reversed. James is entitled to a re-sentencing because a dismissal makes his aggregate number of convictions is lower than when his PSI was written. Thus a new PSI recommendation should be tabulated.

## IV. JAMES' RIGHT OF CONFRONTATION WAS VIOLATED WHEN COURT ADMITTED TESTIMONIAL HEARSAY AND ERROR WAS MAGNIFIED BY STATE NOT LAYING A PROPER FOUNDATION TO ADMIT STATEMENTS.

**A. Right of Confrontation.**

The Confrontation Clause prohibits the introduction of testimonial hearsay statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36 (2004); *Flores v. State*, 121 Nev. 706, 714 (2005).

Although JB was in court at trial, he was unavailable to testify to the alleged statements he made to the police because he said he did not remember, much like the child in *Flores* was unavailable.

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**B. Testimonial hearsay statements.**

Court relied on *Crowley v. State*, 120 Nev. 30, 34–35 (2004) and NRS 51.035(2)(b) to admit JB's statements through the police officers because State claimed testimony amounted to prior inconsistent statements.

James objected arguing hearsay under *Crawford.* IV:845-51.

*Crowley* was decided prior to *Crawford* while *Flores* was decided after *Crawford.*

The *Flores* Court found *Crawford* prohibits the admission of a child's hearsay statements when the child does not testify. In *Flores*, relying on NRS 51.315(1), the trial court decided the child – who was the only eye witness - need not testify due to her emotional state and because the child did not want to discuss the case. The *Flores* Court found the admission of the child's out-of-court statement not harmless and reversed the conviction.

Although *Crowley* and *Flores* are based on different statutes, the effect of *Crowley* is the same as *Flores* – admitting a child's out-of-court statements when the child is unable to testify.

Although JB took the stand in this case he was unable to testify to the statement he made to the police and the events that occurred between James and Brittney. Like *Flores,* JB was the only eye witness. Like *Flores*, JB

was unavailable to testify to the statements because he did not remember them.

Because the out-of-court statements attributed to JB were the sole basis for the charges and because *Flores* would appear to exclude these statements, James asks this Court to revisit *Crowley* and hold JB's statements should not have been admitted. The error is prejudicial due to the amount testimony introduced.

**1. Police officers testified to JB's responses when questioned.**

At trial, JB remembered almost nothing about the incident between James and Brittney. IV:805-822. He remembered the police arriving and speaking to them but he did not remember what he said in response. IV:809-15;821.

Court allowed State to introduce JB's statements through Sylvia and Pickens. IV:845-63;V:907-918;930-33. Sylvia said JB told him that:

> his mom was in an argument with Tuda...in their bedroom...Brittney, was mad...she said he was cheating on her...She had a small box in her hands...[she said] no, don't do that... Tuda punched his mom in the stomach... it caused her to drop the box...and then he ended up grabbing her and throwing her to the floor.... Tuda was standing above her yelling at her. IV:853.
>
> . . .
>
> "She got up and started running into the kitchen...she was running to the kitchen trying to shut a door. Tuda went through, slammed the door, chased after her in the kitchen, grabbed her again, threw her to the floor. She slammed into the

> ...cabinets before she hit the floor... Tuda kicked her all over the body with his foot and was stepping on her face... IV: 855.
>
> ...
>
> [Brittney told Cameron to call 911] IV:855
>
> ...he was trying to call the police when Tuda came after him, started coming down the hallway...Tuda came and grabbed him, brought him into his bedroom, the kids's bedroom and threw him on the bed...he took the phone, knocked over the TV and started leaving the bedroom. [Then he heard] his mom yelled to Tuda to just leave the house. She was in the back bedroom at this point. Tuda then went into the bedroom. They started arguing again. He grabbed her...she fell to the floor, she hit her head on a piece of furniture as she was falling. He said Tuda and his mother started wrestling on the ground. IV:855-56.
>
> ...
>
> She was grabbing at his hair while they were wrestling on the ground...Tuda was continuously punching and hitting his mother...this went on for a while, Tuda finally got up and left the apartment and Brittney went to the bathroom and tried to lock herself in the bathroom. IV:856.

Officer Pickens testified similarly. V:907-918;930-33.

**2. JB's statements to police in Brittney's medical records.**

JB's alleged statements were also introduced through Brittney's medical records. Records stated: "Per metro, patient was assaulted earlier today by her boyfriend. States patient's head was slammed into a wall and he stomped on her head/face multiple times with possible strangulation." VII:1233.

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### 3. Pickens testified to KJ's statement during questioning.

Pickens also testified to KJ's statements even though she answered "yes" when prosecutor asked her if James threw JB on the bed and took the phone. III:824-25. Pickens interviewed KJ and JB together and testified KJ told him she saw James throw BJ on the bed, take the phone, and knock the TV off the nightstand. V:907;940-42. Thus, Pickens' testimony should have been excluded because it was consistent statements and there was no allegation of recent fabrication. NRS 51.035(2)(b). Pickens' testimony regarding KL was not an inconsistent statement and thus amounted to inadmissible hearsay even under *Crowley*.

## C. Statements not admissible.

Hearsay is a witness' out-of- court statement offered into evidence to prove the truth of the matter asserted. NRS 51.035. However, a statement is not hearsay if: "the declarant testifies at the trial... and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony." NRS 51.035(2)(a).

In *Crowley*, the witness remembered a conversation she had with a Child and Family services investigator but not the details. Court allowed State to introduce the witness' out-of-court statements through the investigator as prior inconsistent statements under NRS 51.035(2)(b).

In contrast, here, JB was eight years old. Although he remembered the police arrived and that he spoke to them, he remembered nothing else. Although this instance may appear to be similar to *Crowley*, it actually is more like *Flores* due to the age of the child and the fact that the child was the eye witness. *Crowley* was decided prior to *Crawford*. Thus, prejudicial error occurred, mandating reversal of James' convictions. Although JB was in court he was unavailable to testify to the alleged statements much like the child in Flores was unavailable. This was James' only opportunity to question JB. Accordingly, James' Right of Confrontation was violated by the admission of JB's alleged statements to the police.

**D. State introduced JB's alleged prior written statements from 2015.**

When introducing other bad acts, court allowed State to enter Cameron's alleged voluntary statement as State's Exhibit 75 for the jury to review over James objection. IV:817-19. Exhibit 75 said:

> Todd chocked mom then he let go and mom said call 911 and he said give me the phone. he got the phone by thetning us with a nife he grabbed it out of my sisters hand mom was holding him off and tell on the dea and go this dack. (sribble) VI:1187-88.

The voluntary statement was signed by Brittany Jensen.

NRS 51.125 states:

> 1. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient

> recollection to enable the witness to testify fully and accurately is not inadmissible under the hearsay rule if it is shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.
> 2. The memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party.

Here, JB did not acknowledge he previously had knowledge about this incident and it was not signed by him. Thus, under NRS 51.125 the document was not admissible as an exhibit and should not have been read into the record.

**E. Prejudice.**

James was prejudiced by the admission of the hearsay evidence because State relied solely on JB's out-of-court statements to convict him of the charges and the consistent KJ statements. State used Exhibit 75 as other bad act evidence to argue increase the credibility of JB's out-of-court statements as testified to by two police officers. James' Right of Confrontation was violated.

## V. INADMISSIBLE OTHER BAD ACTS

**A. Admission of other bad acts is disfavored.**

State filed a motion seeking to admit other bad acts pursuant to NRS 48.045 and evidence of domestic violence under NRS 48.061. I:059-103. James Opposed. I:104-112. State sought to introduce evidence that on

07/02/15 James committed a battery domestic violence on Brittany and committed child abuse by using a knife to threaten JB when he went to call the police.

Generally, evidence of other crimes, wrongs or acts which are different crimes from those for which the defendant has been charged with will not be considered at trial unless they fall within an exception to the rule. *Fairman v. State*, 83 Nev. 137, 139 (1967); NRS 48.045(2). The exceptions to the general rule of prohibiting other bad acts at trial allow evidence of other crimes for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. NRS 48.045(2). Evidence of other crimes, wrongs, or acts is not admissible, however, "to prove the character of a person in order to show that he acted in conformity therewith." NRS 48.045(2).

Because of the serious prejudicial effect surrounding the introduction of other bad acts, State must seek the trial court's permission, before introducing such evidence at trial by requesting a pre-trial *Petrocelli* hearing. *Petrocelli v. State*, 101 Nev 46 (1985). Under *Petrocelli,* and its progeny, at the hearing, the court determines: (1) if state is able to prove the bad act by clear and convincing evidence (2) whether the evidence is relevant to the crime charged; and (3) if it is more probative than prejudicial. *Berner v.*

*State*, 104 Nev. 695, 697 (1988). In making its decision, court considers whether the evidence of other crimes, wrongs or acts falls within an exception to the rule against admissibility under NRS 48.045 and if the State has a substantial need for the evidence. *Tucker v. State*, 82 Nev. 127, 130 (1966).

The admission of prior bad acts at trial is disfavored. *Armstrong v. State*, 110 Nev. 1322, 1324 (1994). "Reference to prior criminal history is reversible error. *Witherow v. State*, 104 Nev. 721, 724 (1988) *citing Walker v. Fogliani*, 83 Nev. 154 (1967).

**B. Testimony**.

At trial, Brittney testified to another incident that on 07/02/15 she called the police to report an altercation with James the previous night. She had been drinking and she got into an altercation with James. IV:755-57. She read her voluntary statement dated 07/03/15 into the record. Brittney said James refused to give her the keys to the car after she had been drinking. James grabbed her arm and neck and took her to the ground and then threatened the kids with a kitchen knife when she told the kids to call 911. In the process of her wrestling the knife from James, James was stabbed. IV:755-58.

Brittney testified similarly at the *Petrocelli* hearing. III:431-69.

At the *Petrocelli* hearing, JB did not remember anything happening on 07/02/15. III:470; He did not remember speaking to the police or writing a statement. III:475. But he recognized his own handwriting on the statement. III470-79.

At trial, JB remembered seeing the police on 07/03/15 because his mom and James fought but he did not see the fight. IV:817. He spoke to the police but did not remember making a statement. IV:817. However, he recognized his handwriting on the statement. IV:817-19.

Over James objection, court allowed the prosecutor to read JB's statement into the record. See previous Issue.

**C. State failed to prove acts by clear and convincing evidence.**

State argued certified copies of the prior BADV conviction showed clear and convincing evidence of that BADV and child abuse. IV:487-88. But State is incorrect because State introduced testimony about a knife and James did not plead guilty to having a knife and assaults against JB and KJ were dismissed. VI:1199-1204.

Although Brittney testified to the events, JB did not remember. Thus, State should have been prohibited from allowing JB to testify.

Additionally, because JB never signed the voluntary statement, State should have been prohibited from introducing it. See prior Issue.

**D. More prejudicial than probative.**

Introduction of this evidence was more prejudicial than probative because JB had no memory of the event and the reason James tried to stop Brittney from taking the car keys is because she had been drinking and wanted to drive the kids to the store. VI:1190. Moreover, Brittney delayed calling the police, only doing so the next day after she realized James had been stabbed. Thus, there was minimal probative value and substantial prejudice in introducing this evidence at trial.

## VI. STATE VIOLATED JAMES' RIGHT TO DUE PROCESS BY HIDING BRADY/GIGLIO MATERIAL.

Prior to trial State filed a motion seeking to admit the 911 calls in this case which court granted over James' opposition.[8] Court ruled that the 911 calls were admissible as excited utterances and as a record made in the course of regular conducted activity..." II:422.

After obtaining this ruling, State decided to delete a portion of the 911 calls made by James wherein he mentioned Brittney was using marijuana that night without telling James. At trial, State claimed it was another bad act. IV:732;740-41.

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[8] Motion-I:177-42; Opposition II:243-51; Reply II:252-58. Hearing at II:416-19.

However, James argued that this information was relevant to show Brittney's state of mind – an important issue in a self-defense case. IV:740.

Although court allowed James to ask Brittney if she was under the influence of any other substances, the fact that the State deleted this evidence from the 911 call that touched on their victim's state of mind and did not tell the court this in its motion is troubling. Moreover, because State contended James and Brittney were not truth tellers, eliminating this information from the 911 call created false evidence and a false impression of what occurred.

Not only did the prosecutors purposely delete this information from James' 911 call, they purposely did not give him a copy or any information on Brittney's prior BADV conviction. IV:741-48. Prosecutor said that although she knew this was a self-defense case based on Brittney's 01/26/16 letter wherein she accepted all responsibility, the prosecutor claimed Brittany's prior BADV was not exculpatory and thus she did not need to advise James' attorney. IV:741-48.

James' attorney knew about the prior BADV, unsuccessfully tried to subpoena it, and only received it from the prosecutor on 11/15/16 on the second day of trial. IV:745-46. But for the fact that James mentioned

Brittney's prior conviction in his Opening Statement, the prosecutor may never have revealed this impeachment evidence.

Court uses de novo review to determine whether State adequately disclosed *Brady/Giglio* evidence. *Lay v. State*, 116 Nev. 1185, 1194-93 (1990); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

The Nevada Rules of Prof. Conduct, Rule 3.8 (d), "require[] prosecutors to disclose favorable evidence so that the defense can decide on its utility." *ABA Formal Opinion 09-454*, p. 2. (July 8, 2009). Failure to disclose sufficient information in a timely fashion may also warrant reversal of the conviction and amount to a violation of Due Process under *Brady*. *Mazzan v. Warden*, 116 Nev. 48, 68 (2000).

Impeachment evidence falls within the parameters of information that the government must disclose pursuant to *Brady* and *Giglio*. *United States v. Blanco*, 392 F.3d 382 (2004). "The law requires the prosecutor to produce *Brady* and *Giglio* material whether or not the defendant requests any such evidence." *Milke v. Ryan*, 711 F.3d 998, 1003 (9th Cir. 2013) *citing to Strickler v. Greene*, 527 U.S. 263 (1999); *United States v. Agurs*, 427 U.S. 97, 107 (1976).

Court engages in a two-step analysis when considering claims of prosecutorial misconduct occurring at trial, asking whether: (1) prosecutor's conduct was improper, and (2) if so, then if reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188 (2008).

Here, prosecutor's conduct was improper because she/he purposely removed information from the 911 call and purposely hid information on Brittney's prior BADV. Although prosecutor gave James the documents during trial, prosecutor also admitted purposely withholding the information thus indirectly acknowledging an attempt to sabotage James ability to receive a fair trial. Prosecutor's actions violated due process.

## VII. JURY INSTRUCTIONS

### A. Attempt to suppress evidence instruction.

State used the jail calls in an attempt to argue James convinced Brittney to testify falsely. But the calls do not depict this. See Exhibits #67, #68, #69, #70, #71, #72.

James did not offer Brittney a bribe as did the defendant in *Reese v. State*, 95 Nev. 419, 423 (1979). James did not tell anyone that he was going to get Brittney and the kids for turning State's evidence against him as did the defendant in *Abram v. State*, 95 Nev. 352, 356 (1979). There was no evidence James threatened Brittney as did the defendant in *Evans v. State*,

117 Nev. 609, 628 (2001). Yet, court relied on these cases when approving State proffered instruction. VI:1209; see V:982-83.

When confronted with the jail calls at trial, Brittney explained that she said that when James said "do what you gotta do" she understood this to mean to tell the truth and get an attorney. IV:792. Brittney said she was not afraid of James, she loved him, but she was not sure if she wanted a relationship with him. IV:792.

When she said to James something about not letting pressure get to him, she meant she did not want people to pressure him IV:788a-79. Brittney said: " I am a hundred percent, hundred percent to blame for at least the way it started, all of it, and I was very ashamed, and I didn't want anybody treating me like I was a battered woman. I did these thing to this man, not the other way around.." IV:789.

When Brittney asked James what happened on one call, she did so because she was slowly beginning to remember. IV:789-90;793;795.

Over the objection of the Defense, Court gave the following instruction:

> Evidence that the defendant attempted to suppress evidence against himself or to procure false testimony or evidence on his behalf from another person is not in itself sufficient to warrant a finding of guilt. It may be considered, however, as evidence of his consciousness of guilt and a circumstance tending to demonstrate his guilt, should you r first find that the defendant

> actually attempted to suppress evidence or procure false testimony or evidence on his behalf from another person. The significance to be accorded such a fact is solely for your consideration as jurors in your deliberations. II:325

A district court has broad discretion when settling jury instructions and the Supreme Court generally reviews the district court's decision under an abuse of discretion or judicial error standard. *Hoagland v. State*, 240 P.3d 1043 (Nev. 2010). Here, court abused its discretion because there was no evidence to support giving this instruction and it unfairly suggested to the jury that the court thought James tried to suppress Brittney and the children's testimony.

**B. Lesser included rejected.**

James offered an instruction for Child endangerment (Gross Misdemeanor) as a lesser included of Child abuse, Neglect, or Endangerment which the court rejected. V:1003;VI:1217. The record is unclear as to what previous argument court relied on.

District court has broad discretion in settling jury instructions and this Court reviews the district court's decision to refuse to give a particular jury instruction under an abuse of discretion standard or judicial error. *Jackson v. State*, 117 Nev. 116, 120 (2005); *Quanbengboune v. State*, 125 Nev. 763, 774 (2009).

The court erred because under NRS 200.508, section (2)(b)(1) allows for a gross misdemeanor conviction if James was not previously convicted of child abuse and the children did not suffer substantial bodily or mental harm.

Both crimes are listed within the **same statute** - NRS 202.508. NRS 202.508(1) lists the elements for the more serious crime while NRS 202.508(2) is slightly different and contains a lesser punishment thereby meaning it was a lesser crime. Because the Legislature defined both crimes in the same statute and gave different penalties, the Legislature intended for subsection (2) to be a lesser offense.

Additionally, James was entitled to present the jury with the option of the lesser gross-misdemeanor child abuse instruction, NRS 202.508(2) even if he intended to argue he did not commit the acts alleged. A defendant is entitled to a lesser included jury instruction on his theory of the case. *Rosas v. State*, 122 Nev. 1258, 1264–69, (2006). It is important that trial court advises the jury on the significance of the defense theory of the case. *Crawford v. State*, 121 Nev. 744, 746 (2005).

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**C. Two reasonable interpretations.**

Instructing jury on evidence capable of two reasonable interpretations was important because it is the duty of jury to consider evidence in light most favorable to Defendant. *People v. Bean*, 46 Cal.3d 919, 932-33 (1988).

James' proposed instruction at VI:1216 was structured on the presumption of innocence and two reasonable interpretations. See NRS 175.161, *Bails v. State*, 92 Nev. 95 (1976), *Mason v. State*, 118 Nev. 554 (2002), and *Crawford v. State*, 121 Nev. 744, 753-54 (2005). California uses a similar instructions. CALJIC 2.01; CALJIC 2.02.

Court previously held it is not error for court to refuse this instruction if jury is properly instructed on reasonable doubt. *Bails at* 96. But Court has also held court may give the two reasonable interpretations instruction in a burglary case. *Crane v. State*, 88 Nev. 684, 687 (1972). Under the evidence presented at trial, there were two reasonable interpretations and thus abused its discretion and erred in failing to give the offered instruction.

**D. Self-defense.**

James offered several instructions on self-defense which court rejected. VI:1213-1215. He presented legal authority in support of all. VI:1213-15. Instead, court gave instructions offered by State. II:326-28.

NRS 193.240 allows a person to use self-defense if they are about to be injured or assaulted. NRS 193.240 states: "Resistance sufficient to prevent the offense may be made by the party about to be injured: 1. To prevent an offense against his or her person. . ." (Emphasis added); also see NRS 193.250; *Davis v. State*, 321 P.3d 867 (Nev. 2014); *State v. Scott*, 37 Nev. 412 (1914). Thus, NRS 193.250 allows the use of self-defense to be based on how the party perceives the events. Accordingly, the instructions proffered by James were an accurate statement of the law.

Although court gave other self-defense instructions, James' instructions divided the directions in three parts thereby making them easier for the jury to understand.

**E. Standard of Review.**

Due Process forms the foundation for a defendant's right to jury instructions on his or her theory of defense. *State v. Lynch*, 287 Conn. 464, 471 (2008). Based on this principal, a defendant has a right to jury instructions on his or her "...theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Vallery v. State*, 118 Nev. 357, 372 (2002). Accordingly, trial courts must give complete and accurate theory of defense jury instructions when submitted. *Carter v. State*, 121 Nev. 759 (2005).

## VIII. PROSECUTORIAL MISCONDUCT IN CLOSING.

KB's testimony of the incident was to answer "yes" there times to prosecutor's leading questions during direct examination as follows:

> Q. ...On that day, when the police came to your house, do you remember being in your bedroom when Tuda pushed Cameron on the bed?
> A. Yes. IV:824-25.
> ...
> Q. ...did you see Tuda take the phone out of Cameron's hand?
> A. Yes.
> Q. Okay. Do you remember being scared that night?
> A. Yes. IV:825.

Even though there was no evidence that KB saw Brittney attacked by James and even though KB's testimony about that night was limited to the above, in closing the prosecutor argued KB saw the incident.

The prosecutor said James was:

> the type of person who would violently attach his girlfriend in front of an eight and five year old, and you saw them. Cameron told us he doesn't remember much, but he remembers being scared...Kaylee was there. She remembers seeing this. VI:1114.

In making this argument, prosecutor falsely stated the evidence.

Then in rebuttal closing, prosecutor argued: "Maybe Brittney came in, consistent with Cameron's story; maybe she came in at the end of it...;" thus suggesting KB saw James and Brittney fighting. VI:1146. She went on to argue that maybe KB "thought that Tuda punched Cameron when he

threw him on the bed. That's a possibility. But its not charged so we don't need to prove that." VI:1146. Again, there was no evidence that KB saw any fight between Brittney and James and no one ever testified that James punched RJ. Thus, in rebuttal, prosecutor put forth a new theory of the case, a theory she said then said she did not need to prove.

James did not object to this prosecutor misconduct. However, that does not preclude this Court from reviewing this issue based on plain error. NRS 178.602.

When a prosecutor's misstatements in closing, though presumably unintentional, directly contravene the defendant's defense reversal is warranted. *Anthony v. United States*, 935 A.2d 275 (D.C. 2007)(prosecutor twice misrepresented a witness's testimony, telling the jury that the witness said the defendant had a gun when in fact the witness said she never saw a gun). The reason for this is that the interest of the prosecutor "'is not that it shall win a case, but that justice shall be done,' and that 'the average jury has confidence that these obligations (of fairness and accuracy) will be faithfully observed.'" *Id. citing Berger v. United States*, 295 U.S. 78, 88 (1935). Therefore, "it is incumbent upon the prosecutor 'to take care to ensure that statements made in opening and closing arguments are supported by evidence introduced at trial.'" *Id. citing United States v. Small*, 74 F.3d 1276

(D.C. 1996). "'[I]mproper prosecutorial comments are looked upon with special disfavor when they appear in rebuttal because at that point the defense counsel has no opportunity to contest or clarify what the prosecutor has said.'" *Id. citing Hall v. United States*, 540 A.2d 442, 448 (D.C. 1988).

"Improper argument is presumed to be injurious." *Pacheco v. State*, 82 Nev. 172, 179 (1966). Prosecutorial misconduct is grounds for reversal *unless* the error is harmless beyond a reasonable doubt. *Brown v. United States*, 951 F.2d 1011, 1014 (9th Cir. 1991) *citing Chapman v. California*, 386 U.S. 18, 24 (1967).

Here, it is impossible to conclude that these errors were accidental. While the first prosecutor blatantly said KB was saw the fight, the second prosecutor said there was a possibility that KB saw the same thing JB saw. They knew what KB said because she was their witness.

The error is not harmless beyond a reasonable doubt because the evidence was minimal and prosecutor used this false argument to assure the jury that she had presented proof beyond a reasonable doubt of child abuse. Prosecutor also said;

> And she put her head down on the table for what looked like 30 seconds, but she told us that she remembers this. When you violently attack your girlfriend, when you commit domestic abuse on your girlfriend in front of a five and eight year old, when you attack their mother in front of the, when you throw them on the bed, when your prevent them from being able to

> call for held, from being able to help their mother, what you['ve committed child abuse...that is putting them in a situation where they are without proper care, control, or supervision...putting them in a situation where their health or welfare is in danger, or threatened of being in danger...where they may suffer physical pain or mental suffering. Attacking their mother in front of them, that's child abuse. VI:1114.

Yet, there was no evidence KB saw anything related to Brittney and James.

State also misstated the facts when objecting during James' closing. VI:1135-37.

During his closing, James argued that whatever conversation Pickens had with BJ was very brief. VI:1135-36. James asked the jury to review the body cam video which was only about 16 minutes long. During the 16 minutes, Pickens spoke to James and Brittney and then decided to place James in handcuffs and arrest him. Because Pickens said he did not make the decision to place James under arrest until he spoke to BJ, James argued in closing that based on the body cam video, Pickens could have only spoken to BJ briefly. VI:1136.

State objected and said the officer with the body cam was not there the entire time. IV:1136. However, State was wrong because a review of the body cam shows Pickens and the other officers arriving and then when Pickens placed James in handcuffs. Exhibit 4. Pickens testified that he first thought James was a victim of a battery and then he spoke to BJ and

saw Brittney. V:901-04. Thus, it was fair for James to argue that the conversation Pickens had with JB was brief because the video shows Pickens handcuffing him.

The error was amplified because State's objection, James' response, and court's decision occurred in front the jury. Court incorrectly sustained the objection, telling the jury to "disregard Counsel's last statement." VI:1136.

Jurors tend to take hold of a trial judge's remarks, which they often 'interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved.'" *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App. 2006) *citing Bachus v. State*, 803 S.W.2d 402, 405 (Tex.App.-Dallas 1991). Thus, prejudicial error occurred when court sustained State's improper objection to the facts.

In rebuttal, prosecutor also incorrectly argued that Pickens spoke to JB after Brittney left the scene. VI:1146. She said Pickens was there for a long time after Brittney left. However, Pickens never said this. This was the prosecutor's further attempt to refute James' argument regarding how much time Pickens spent talking to RB before he placed James in handcuffs.

Court engages in a two-step analysis when considering claims of prosecutorial misconduct occurring at trial, asking whether: (1) prosecutor's

conduct was improper, and (2) if so, then if reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188 (2008). As shown above, the prosecutor's conduct was improper and reversal is warranted because she misstated the evidence to favor a conviction.

## IX. CUMULATIVE ERROR.

Other than the Issue I and II which require reversal and dismissal, if Court finds no singular issue sufficient for reversal then Court analyzes collective effect of other errors. *Big Pond v. State*, 101 Nev. 1, 3 (1985); *Dechant v. State*, 116 Nev. 918, 927-28 (2000); *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008). Reversal is warranted because the evidence presented was not overwhelming, the crimes of BADV and child abuse are grave serious crimes, and the quality and character of errors substantial. *See Valdez citing Hernandez v. State*, 118 Nev. 513, 535 (2002).

## CONCLUSION

In view of the above, James asks this Court to reverse his convictions.

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 Times New Roman in 14 size font.

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Proportionately spaced, has a typeface of 14 points or more and contains 13,053 words which does not exceed the 14,000 word limit.

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 23 day of January, 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 23 day of January, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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