IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MARLIN COOPER,	)	NO. 72091
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

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ROUTING STATEMENT

State agrees this appeal is appropriately retained by Supreme Court.

ARGUMENT

I. EVIDENCE INSUFFICIENT.

A. Child abuse, neglect, or endangerment – Counts 3 and 4.

Regardless of the theory of prosecution under NRS 200.508, State must establish "abuse or neglect." *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. 445, 452 (2013). Abuse or neglect require proof of either: "(1) nonaccidental physical injury, (2) nonaccidental mental injury, (3) sexual abuse, (4) sexual exploitation, [or] (5) negligent treatment or maltreatment." *Id.*

State does not argue James physically harmed JB and KJ or committed sexual acts. RAB:10-11. State contends "NRS 200.508(1) does not require...State prove that JB and KJ were in fact physically or mentally harmed" or that a victim provide specific details. RAB:10-11. Instead, State claims James placed KJ and JB in a situation where they *may* suffer unjustifiable physical pain or mental suffering – calling it negligent and/or maltreatment.[1] RAB:10.

In Count 4, State alleged James violated NRS 200.508(1), the child abuse statute, by abusing KJ "by hitting and/or punching the mother of KJ while near KJ." II:304. However, State presented no evidence this occurred.

State indirectly admits failing to prove Count 4 by not pointing to any evidence indicating KJ was near Brittney when James allegedly hit Brittney.

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[1] State recites following facts as proof of charges:

- "KJ...remembered being in the room while Appellant threw JB onto the bed...By being in the small apartment the same time the abuse against JB and Brittney occurred, KJ was also victimized." RAB:11. Jury saw pictures of the 800 square foot apartment. RAB:12.
- JB told officers he felt sore after Appellant threw him on the bed. RAB:11.
- They said they were scared. RAB:11.
- JB called 911. RAB:12.
- Officers said JB and KJ were crying when they arrived. RAB:11.

RAB:9-12. Therefore, Count 4 must be dismissed because no rational jury would find proof beyond a reasonable doubt for this count. II:304.

Yet State clamors James committed child abuse against KJ *in other ways*: (1) KJ *saw* James push JB one time and thus was victimized; and/or (2) James placed KJ in a situation where she "*may* have suffered physical pain or mental suffering..." RAB:10-11.

But James was *never* charged with traumatizing KJ by pushing JB. Moreover, as a matter of law, James may not be convicted of a violation of NRS 200.508(1) by KJ *seeing* James push another child and taking a cell phone because she was not the victim of the alleged act. KJ was not the *subject* of or *subjected to harmful behavior* as required by NRS 432B.140. II:310.

However, State claims it only needed to prove KJ and JB *may* have suffered. RAB:10-12. State asserts the words within NRS 200.508(1) "[t]o be placed in a situation where the child *may* suffer..." mean James is guilty of child abuse because KJ and JB *may have suffered* even though *the children did not suffer*. RAB:9-10.

There are two reasons State's argument is incorrect. First, whether KJ or JB "*may* have suffered" is speculative without expert testimony concluding the children were mentally or physically harmed. KJ and JB

only said they were scared. Thus, State failed to prove they "*may* have suffered."

Second, to read NRS 200.508 to mean James is guilty if KJ and JB *may have suffered* even though *the children did not suffer* makes the statute unconstitutionally vague because the word *may* allows for unlimited possibilities.

The word "*may*," "criminalizes *any* act which presents a 'possibility' of physical or moral harm to the child." *Com. v. Carter*, 462 S.E.2d 582, 585 (1995) *citing Webster's Ninth New Collegiate Dictionary* 734 (1989). To allow for punishment even if the children did not suffer renders the child abuse statute vague because it fails to adequately inform law enforcement of the specific conduct prohibited and allows for arbitrary enforcement. *Id.*

Proof of arbitrary enforcement and lack of notice is seen by the facts in this case. The police officers did not believe child abuse occurred and thus CSI Wright took no pictures of the children's room. V:940. Yet, the prosecutor brought forth child abuse charges. V:940. This scenario shows NRS 200.508 is not sufficiently specific to adequately inform the prosecutor, law enforcement, and CSI Wright as to the elements of the crime. Because different people in this case came to different conclusions, the words ""*may* have suffered physical pain or mental suffering…" within NRS 200.508 lead

to a "standardless crime that authorizes and encourages discriminatory enforcement." *See State v. Castaneda*, 126 Nev. 478, 481–83 (2010), *opinion modified on denial of reh'g*, 52911, 2010 WL 5559401 (Nev. 12/22/10).

While this Court previously found this section of NRS 200.508 constitutional, it limited its decision to the facts of that particular case challenging the vagueness of the "any act" language. *Rimer v. State*, 351 P.3d 697, 710–11 (Nev. 2015)(child was left in care of mother, home was routinely messy, child sent to bed without dinner, use of profanity towards child, lice, and spanking). In *Rimer*, there was a pattern of neglect. Here, State alleged one instance rather than a pattern of abuse. In *Rimer* one child died. Here, there were no injuries to KJ or JB.

However, State compares the facts in this case to those of a drunk driver with a child in the back seat of the car, an example referenced in *Clay*. RAB:10-11; *Clay at* 454. Under this example, State contends the driver is guilty of child abuse. The prosecutor used this example in closing argument. VI:1111-12.

State is incorrect. The Legislature placed the penalty for driving while intoxicated with a child in the car within the DUI statues - NRS 484C.400(5). Under NRS 484C.400(5) driving intoxicated with a child

under 15 in the car is an aggravating circumstance. In contrast to NRS 484C.400(5), NRS 200.508 does not require State prove any specific behaviors (such as intoxication) for a defendant to be guilty of the crime of child abuse. Accordingly, the Legislature never considered NRS 200.508 to apply to acts of driving while intoxicated with a child in the car.

Statutes must be given their plain meaning and construed as a whole so "not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Mangarella v. State*, 117 Nev. 130, 133 (2001) *quoting Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502 (1990). Court presumes legislature enacts a statute "with full knowledge of existing statutes relating to the same subject.'" *Berkus at* 631.

Additionally, in contrast to the drunk driver example, here, KJ and JB were in their own home. KJ was not in the same room when the alleged acts occurred with Brittney. KJ was not a victim or potential victim.

However, State claims because the apartment was small, KJ *may* have suffered and asks court to look at the pictures of the apartment. There are no overall pictures and no pictures of the children's room; State only introduced a hand drawing of the layout of the apartment. IV:868-889;VI:1185. Also, there is no evidence that KJ was close to JB when this occurred. Accordingly, State failed to prove Count 4.

Under Count 3, State alleged James committed child abuse against JB "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:303.

As noted previously, Brittney testified the kids were in their room when the altercation occurred; she hit James first, pulling his dreadlocks. IV:695-97;771. JB did not remember what occurred. IV:810-14. Officer Sylvia testified to JB's out-of-court statements, suggesting JB saw James hit Brittney. IV:853-56. As with KJ, because JB was not the subject of harmful behavior when James allegedly hit Brittney, State failed to prove child abuse as required by NRS 432B.140 as a matter of law. Accordingly, Court 3 must be dismissed.

Equally, as to James chasing JB, pushing him on the bed, and taking the cell phone, as a matter of law, this too would be insufficient because JB was not injured. It amounts to one single act rather than a pattern of abuse or neglect, and it is not negligent treatment or maltreatment as discussed in *Clay at* 452 or in *Rimer*.

Furthermore, Officer Pickens testified he did not see any need to book James for child abuse – the children were not injured. V:940. CSI Wright took no pictures of the children or their room where the alleged push

occurred. IV:868-89. State presented no expert testimony as to mental injuries. Accordingly, State also failed to prove Count 3.

B. Battery domestic violence – Counts 1 and 2.

Brittney testified she was the aggressor; James hit her in self-defense. IV:695-97. But State claims the pictures tell a different story with blood on furniture throughout the apartment and dripping from Brittney's face thus showing James was the aggressor. RAB:13. Not so.

Pictures show a small amount of blood by Brittney's nose, the bathroom floor, one door knob, and the ottoman in the master bedroom. VIII:1315-16. There are no pictures or physical evidence showing an attack occurred in the kitchen – only two bags and a pillow on the floor. VIII:1311-14. Nothing occurred in the living room. Thus, the pictures show a minor amount of blood.

As to Brittney's injuries, medical records indicate she had moderate head pain; some soft tissue swelling, no fractures. VII:1233;1240; 1289; VIII:1319-21. She was released within hours of admittance after being found to be medically sober. VII:1222;1307. James injuries consisted of a bite mark on his finger and a significant portion of his hair pulled out. VIII:1323-24. Accordingly, the injuries do not show James was the aggressor.

The 911 calls support James not being the aggressor because he called 911 first. Brittney was highly intoxicated and admitted she asked JB to call 911 because she realized James called the police to report her. IV:697.

State asks Court to rely on the police officer's hearsay testimony as to what JB told him to find sufficient evidence. However, James was unable to cross-examine JB on those statements because he did not remember. The hearsay testimony was incompetent as addressed in Issue VI. Because on review the Court may only rely on competent evidence, Counts 1 and 2 must be dismissed.

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.

State notes trial court excused 2 African-American jurors for cause, prosecutor removed 2 more through peremptory challenges, and 1 African-American remained on the panel. RAB:15. How many African-American jurors were removed through for-cause challenges is irrelevant because a *Batson* challenge only focuses on the prosecutor's removal of minority jurors through *peremptory challenges*. *Batson v. Kentucky*, 476 U.S. 79 (1986). Only jurors remaining "after all for-cause challenges [are] resolved"

are subject to *Batson* challenges. *Watson v. State*, 335 P.3d 157, 168 (Nev. 2014).

Under the test for a *Batson* challenge, the standard for establishing a prima facie case under Step 1 is not a high one and merely requires a defendant point to evidence raising an *inference* discrimination occurred. *Johnson v. California*, 125 S. Ct. 2410, 2417 (2005). An inference arises when the removal of a minority juror "looks suspicious." *Id. at* 2419.

Johnson is instructive because it discusses standards for the trial court to use in Step 1. In *Johnson*, an African-American defendant, challenged the prosecutor's removal of 2 of 3 African-American prospective jurors on the 43 person panel, arguing the prosecutor had no apparent reason for removing the minority jurors. Trial court did not require the government to respond, ruling Johnson failed to establish a prima facie case of discrimination.

Later, when the prosecutor removed the last remaining African-American juror, Johnson made another *Batson* challenge. Again, the trial court did not ask State to respond and found insufficient evidence of a prima facie case of discrimination, contending the court could think of several reasons why the prosecutor would remove the African-American juror.

The United States Supreme Court disagreed, saying:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge-on the basis of all

> the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Upon review, the *Johnson* Court found sufficient reason to conclude there was an inference of discrimination based on the removal of 2 or all African-American jurors.

The *Johnson* Court further found the *Batson* framework was designed for the court to conduct all 3 steps before making a decision on discriminatory intent. Rather than engaging in needless speculation after the defendant makes a *Batson* challenge, court could simply direct the prosecutor to respond. *Id. at* 2418-19. The complete three step process supports the constitutional interests *Batson* was designed to protect: "the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race." *Id.*

Thus, *Johnson* disputes State's argument that using 2 peremptory challenges to remove 2 of 3 African-Americans[2] is not an inference under Step 1. RAB:15-16.

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[2] Remaining juror was light-skinned but identified as African-American. II:647-48.

Watson also disputes State's argument. In establishing a prima facie case in Nevada, a defendant must show: (1) a pattern or (2) other evidence. *Watson*. "Where there is no pattern of strikes against members of the targeted group to give rise to an inference of discrimination, the opponent of the strike must provide other evidence sufficient to permit an inference of discrimination based on membership in the targeted group." *Watson at* 166.

Watson discussed gender and racial discrimination. In *Watson*, the jury panel was predominately female - consisting of 18 women (56% of the panel) and 14 men (44% of the panel). Based on the gender make-up of the panel, the *Watson* Court found it was not unexpected State would use more peremptory challenges for women than for men. Thus, when State used 67% of its peremptory challenges (6 of 9 challenges) to remove 6 females, the *Watson* Court concluded that percentage was insufficient to show a pattern.

While in *Watson*, females were in the majority, here African-Americans were the minority with 3 within the 23 person panel. Using the same comparison as used in *Watson* shows State used a higher percentage of peremptory challenges (50% or 40%) than there were African-Americans

(13.04%) on the 23 person panel.[3] Thus, statistics in this case show a pattern and an inference of racial discrimination because State's use of peremptory challenges to remove 2 African-Americans was significantly out of proportion to the overall percentage of African-American prospective jurors on the panel. Under *Watson*, James established an inference under Step 1.

The *Watson* Court also addressed racial discrimination finding the removal of 1 African-American insufficient to show a pattern under Step 1. *Watson at* 169. In doing so, *Watson* Court said:

> This is not a case where the State used all of its strikes to remove African Americans, used a percentage of its strikes to remove African Americans that was significantly greater than the percentage of African Americans in the venire, or used its strikes to remove all African-Americans...State used one peremptory challenge to remove an African–American veniremember, leaving three African-Americans on the venire after the State exercised its strikes... Although Watson was not required to establish a pattern, he was required to establish facts or circumstances sufficient to support an inference of discrimination based on race.

Watson at 169. Thus, while no "magical number" makes a pattern, Court looks at the number stricken, percentages, and circumstances to find an inference of discrimination.

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[3] State used 50% of its peremptory challenges (2 out of 4) to remove 67% of the African-Americans or 40% if alternate is included. African-Americans made up 13.04% of panel.

Here, unlike in *Watson*, James showed a pattern and an inference of racial discrimination because State removed 67% of African-Americans when African-Americans amounted to 13.04 % of the panel; and, State used 50% or 40% of its peremptory challenges in doing so. By noting the number of African-Americans on the panel and the number stricken by the State and the fact there was no obvious reason for removing these jurors, James provide a clear and specific inference under Step 1.

Yet, State repeatedly misstates the law suggesting James must show more. State claims "[t]he mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under *Batson*'s first step." RAB:17;19.

State's argument is unfair because State did not use <u>one</u> peremptory challenge. State used 2 peremptory challenges to remove 67% of the jurors (2 of 3 African-Americans) who were the same race as James and there was no apparent reason indicating the jurors could not be fair.

As noted in the Opening Brief, 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.

Id.

Moreover, Ninth Circuit recognizes:

> ...[when] a prosecutor peremptorily strikes all or most veniremembers of the defendant's race...[this] 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)...). 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*...(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* 03/21/15. Here, State's removal of 67% of the prospective jurors that were the same race as James is a higher percentage than in *Fernandez, Turner,* and *Alvarado*. State's omission in discussing these cases cited in James' brief is a concession error occurred. *Polk v. State*, 233 P.3d 357, 359 (Nev. Sup. Ct. 2010).

It appears State also contends no error occurred if one African-American remained because his one vote amounted to 8.3% of the jury's decision. RAB:18. In making this argument, State seems to say by not

striking all African-Americans the prosecutors did not discriminate. This is not a test for *Batson.*

As to the standard of review, State contends clear error applies and district court's factual findings are entitled to great deference. RAB:17;19. Initially, James also thought clear error applied. *See Rimer v. State*, 351 P.3d 697, 712 (Nev. 2015)(using clear error standard for Step 1). However, upon further review and based on *Johnson*, de novo review is the correct standard for this Court to use.

Standards of review are generally divided into three areas: (1) questions of law are reviewable de novo, (2) questions of fact reviewable for clear error, and (3) matters for which court uses discretion reviewable for an abuse of discretion. *Pierce v. Underwood*, 108 S. Ct. 2541, 2546 (1988). Also, structural errors allowing for automatic reversal are subject to de novo review. *Brass v. State*, 128 Nev. 748, 752 (2012).

While Court uses clear error when reviewing matters under *Batson*'s Step 3, Court has yet to specifically determine if the same standard of review applies when the trial court does not go beyond Step 1.

For Step 1, Court should adopt de novo review because whether or not a party has made a prima facie case involves an evaluation of law. *Valdez v. People*, 966 P.2d 587, 591 (Colo 1998). The *Valdez* Court came to this

conclusion by comparing the prima facie standard used in Title VII cases to the prima facie requirement for Step 1 in a *Batson* challenge. The *Valdez* Court noted that in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978), the United States Supreme Court held that whether a plaintiff made a prima facie showing in a Title VII case was a question of law subject to de novo review.

The *Valdez* decision makes sense. Under Step 1, district court is not making factual determinations for this Court to give deference to as it does in Step 3. It also appears to be the standard used in *Johnson*.

Here, using de novo review and based on *Johnson* and *Watson*, James made a prima facie case of racial discrimination under Step 1. By not going through all three steps, trial court created structural error requiring reversal as occurred in *Brass* (dismissal of juror before holding a hearing to determine State's reasons for its peremptory challenge is structural error).

Not only was there sufficient evidence to support an inference under Step 1 based on the removal of 2 of 3 African-American jurors, the questions the prosecutor asked about Black Lives Matter and whether any jurors were a sovereign citizen show a discriminatory purpose.

On appeal, State contends it did not strike Juror 274 because of her response to the Black Lives Matter question but because she was biased in

favor of the Defendant. RAB:19-20. At trial, State gave no reason for striking her.

State bases its conclusion that Juror 274 was biased on her statement that she was willing to stand by the Defendant's decision to have a jury decide his fate. However, Juror 274's statement indicates she was willing to follow the law and respect James' right to a trial by jury; and, she understood the presumption of innocence. III:627;RAB:19-20. Thus, Juror 274 was not biased.

State also claims James has the burden of persuasion for the *Batson* challenge under Step 1, citing *McCarty v. State*, 371 P.3d 1002, 1006–08 (Nev. 2016). RAB:20. However, the burden of persuasion encompasses analysis of all three steps. Here, court stopped at Step 1.

State's argument about a handpicked jury based on percentages is irrelevant because *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) discusses a challenge to a jury venire - not a *Batson* challenge. RAB:17-18.

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

A. Double Jeopardy.

State argues James may be convicted of two counts of NRS 200.481(1) arising on the same day out of the same incident, at the same

time, with the same victim based on different injuries as occurred in the unpublished decision Vergara-Martinez, 2016 WL 1375648 (Nev. 2016). State contends Brittney not only had injuries to her face; she also had bruising or a cut on her arm. RAB:24;IV:709.

However, Vergara-Martinez allowed for dual convictions under *two different criminal statutes:* battery with substantial bodily harm (NRS 200.481) and mayhem (NRS 200.280). James raised a Double Jeopardy violation based on two convictions under the *same statute* with the *same elements* of the crime - NRS 200.481(1)(a).

While the Vergara-Martinez Court said "each machete stabbing to [victim's] person constituted its own distinct act of violence," it actually only allowed two convictions under two different criminal statutes based on numerous stabbings. The battery with substantial bodily harm conviction involved injuries to the victim's head, neck, and/or chest, while the mayhem conviction involved injuries to the victim's arms and/or hands.

Here, State never pled Brittney's injuries differently in the Information. Count 1 encompassed all injuries whereas Count 2 only alleged James strangled Brittney. II:297. Accordingly, while the Vergara-Martinez complaint pled the counts by injuries under two different statutes, here, State pled the changes by the manner in which the injuries occurred:

Count 1 – punch, thrown, kicked, and/or stomped; and Count 2 – strangulation. And the jury found James not guilty of strangulation in Count 2.

The two convictions for the same BADV crime resulted from court giving two proposed *jury instructions offered by State* explaining lesser included crimes. III:315-16;V:978-79.

State argues that because James did not object to the lesser included jury instructions, the verdict, or at sentencing, Double Jeopardy was waived. RAB:24-26. Any error in the jury returning verdicts for two battery domestic violence crimes is not waived because constitutional issues may be raised for the first time on appeal. *McCullough v. State*, 99 Nev. 72, 74 (1983).

B. Unit of prosecution.

State pled and entitled Counts 1 and 2 as BADV (battery constituting domestic violence), a violation of NRS 200.481, NRS 200.485, and NRS 33.018(1)(a). II:296-97. State now argues the unit of prosecution for Counts 1 and 2 is only NRS 33.018 which states: "Domestic violence occurs when a person commits one of the following acts…battery…" RAB:25-26.

However, the unit of prosecution test involves an examination of the crime of battery as defined by NRS 200.481 because the criminal act being penalized is the battery. State's failure to address James' unit of prosecution test examining NRS 200.481 at OB:35-37 and cases cited is a concession that error occurred. *Polk*.

C. Reversal and resentencing.

State claims no error occurred. RAB:26. However, if one count is dismissed then the pre-sentence report and recommendation by the Division of Parole and Probation are inaccurate. Therefore, James seeks correction of the PSI report and re-sentencing. *Stockmeier v. State, Bd. of Parole Com'rs*, 127 Nev. 243, 250 (2011).

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.

The quotes State cites in *Pantano v. State*, 122 Nev. 782, 790–91 (2006) suggesting confrontation is not denied if the witness is forgetful are cases decided before *Crawford v. Washington*, 541 U.S. 36 (2004). RAB:26-27.

State misrepresents the *Pantano* facts RAB:28. In *Pantano*, the child testified at the preliminary hearing, in a pre-trial hearing, and at trial that the

defendant digitally penetrating her vagina but she did not acknowledge the underlying facts for the lewdness charge. There were no audio tapes. The trial court allowed her mother, her father, and one of the detectives to say what she told them. *Id. at* 786.

On appeal, Pantano argued that his right to confront the child was violated because she was nonresponsive to several questions asked during cross-examination. *Id. at* 789. This Court disagreed, finding: "The fact that she answered negatively or "I don't know" *when asked on cross-examination to identify to whom she spoke regarding the incident* does not render the cross-examination ineffective." *Id. at* 790(emphasis added). Although the statements she gave to law enforcement were testimonial, Court found the trial court did not error in introducing them after finding statements reliable under NRS 51.385.

The *Pantano* Court clarified the admission of a child's out-of-court statements in a sex case under NRS 51.385, holding that:

- court may admit a child's out-of-court testimonial and non-testimonial hearsay statements if the child is competent and testifies.
- court may use discretion to admit non-testimonial hearsay if a child does not testify.
- "per *Crawford* and *Flores*, when testimonial hearsay is at issue, admission of a child-victim's hearsay statement under NRS 51.385 violates confrontation rights when the victim is unavailable and the defendant has not had a prior opportunity to cross-examine."

While JB and KJ's testimony did not involve sexual acts as addressed in NRS 51.385, the rules used in *Pantano* are instructive because both involve instances of child witnesses and out-of-court statements testified to by others.

In *Pantano* the child was unable to answer a few questions during cross-examination. Here, the children remembered little or nothing during direct examination and cross-examination. There was no pre-trial reliability hearing as in *Pantano*. A person may be unavailable even if they testify at trial when they have a complete lapse of memory regarding the incident. *United States v. Shillingstad*, 632 F.3d 1031, 1037 (8th Cir. 2011)(no error when trial court excluded witness' statements to paramedic when witness had no memory of what she said).

State admits that prior to introducing a child's out-of-court statements, the court must find child competent. RAB:29. State never satisfied this underlying foundational, thereby suggesting error.

In three cases State cites, the court held a competency hearing prior to admitting out-of-court statements from a child. *See State v. Howell*, 226 S.W.3d 892 (Mo. App. S.D. 2007)(Child Advocacy Center's video interview of child admitted at trial when eight year old child could not remember all details of sexual abuse and court found she understood the difference

between the truth and a lie); *State v. Sullivan*, 217 Or. App. 208 (2007)(twelve year old found competent to testify thereby allowing State to introduce child's out-of-court statements when child said she did not remember); *State v. Price*, 158 Wn.2d 630, 637 (2006)(child was competent and child's taped statement to police admitted without objection when she did not remember; court found no right of confrontation violation because child was in court and subject to cross-examination).

Here, State did not seek a pretrial competency determination and did not seek a ruling on whether JB and KJ's out-of-court statements were admissible. State asked few competency questions on direct examination and did not seek a trial competency determination. Thus, State's failure to fulfill foundational requirements amounts to a violation of James' right of confrontation.

Not only did error occur due to a lack of competency findings, the prosecutor's questioning created error. In *Washington v. Kinzle*, 18 Wash. App. 774 (2014), when the prosecutor did not ask a child direct questions about the alleged incident and instead relied on hearsay statements, the Court found the defendant's right of confrontation was violated.

Similarly, here, during direct examination of JB, prosecutor repeatedly told him it was alright if he did not remember and then phrased

questions by asking if he *specifically* remembered making certain statements to police officers. IV:810-14. The prosecutor's choice of words included insufficient direct questions, such as: "Did you tell the police officer ...." or "Did you see...". Thus, the prosecutor's questioning deprived James of his right of confrontation as in *Kinzle*.

State disputes JB was the sole eyewitness. RAB:30-31. But Brittney testified James hit her in self-defense and KJ did not see the alleged fight. The medical records and pictures do not indicate who hit a blow first. Therefore, JB was the sole eye witness as to the alleged fight as was the child in *Flores v. State*, 121 Nev. 706 (2005). The *Flores* Court held when a witness does not testify at trial because the witness does not want to discuss the incident, State may not admit the witness' prior hearsay statements.

State disagrees that Brittney's medical records contained hearsay statements from JB, contending Brittney made similar statements on the 911 call and to medical personal on the body camera. RAB:31-32. However, Officer Sylvia's testimony about what JB said to him at IV:853-56 corresponds with the statements in the medical records. VII:1233. And, there is no evidence Metro Officers were privy to hearing the 911 call. Because there is no evidence that Officer Kolarick, the officer wearing the

body cam, went to the hospital, it is unlikely he told medical staff Brittney's prior statements.

State argues James waived admission of KJ's consistent statements as testified to by Pickens because he did not object. RAB:32. Alternatively, State claims KJ's consistent statements were excited utterances. RAB:32.

Prior consistent statements are not admissible unless "offered to rebut an express or implied charge...of recent fabrication or improper influence or motive. NRS 51.035(2)(b). State indirectly acknowledges these reasons were not used for admitting KJ's statements by arguing the statements were an excited utterance. An excited utterance is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter..." NRS 51.095. However, KJ's statements were made in response to Pickens' questioning rather than spontaneous and the event was the alleged fight between Brittney and James rather than what occurred with James and JB.

Using plain error analysis, the admission of KJ's statements through Pickens coupled with the leading questions asked of KJ by the prosecutor deprived James of the Right of Confrontation and prejudiced his ability to obtain a fair trial by allowing the jury to convict based on incompetent evidence.

State's reliance on *State v. Pierre*, 277 Conn 42 (2006) is unpersuasive. *Pierre* does not involve a child witness with a lapse of memory. In *Pierre*, the government sought to introduce the adult defendant's statements as written in a voluntary statement for the police with the assistance of his attorney. Here, JB's written statement to police regarding the prior bad act evidence was not reviewed by his attorney, was not signed by him, and was signed by his mother. VI:1188.

Yet State argues JB's written statement was admissible as a prior inconsistent statement. RAB:34. However, court never made such a ruling. IV:817-18. Court never made a competency determination which is the predicate for admitting a child's hearsay statements under *Pantano*.

State does not address the error in admitting Exhibit 75 for the jury to review when NRS 51.125 prohibits court from allowing the jury to review the document. *Polk*. State incorrectly says Exhibit 75 was not admitted at trial. RAB:34.

V. INADMISSIBLE OTHER BAD ACTS

Court reviews trial court's admission of other bad acts under abuse of discretion standard. *Newman v. State*, 129 Nev. 222, 231 (2013). Court begins by acknowledging a presumption of inadmissibility attaches to prior bad act evidence. *Rosky v. State*, 121 Nev. 184, 195 (2005). *Rosky* Court

used an abuse of discretion standard without applying a manifestly wrong test as State cites from *Canada v. State*, 104 Nev. 288, 291-293 (1988).

Here, trial court abused its discretion because NRS 48.061, entitled "Effects of Domestic Violence," does not provide solace for the admissibility of other bad acts. NRS 48.061 merely describes procedures for allowing testimony as to the effect of domestic violence on a victim. Accordingly, NRS 48.061 is inapplicable and State's argument incorrect. RAB:36-37.

Likewise, NRS 48.045(2) does not support trial court's decision to allow the introduction of other bad acts nor State's argument that the bad acts showed intent. James did not argue lack of intent or a mistake or lack of motive. He argued self-defense.

Furthermore, the prior bad act testimony and voluntary statements made by Brittney and JB were insufficient to prove the events occurred by clear and convincing evidence because JB did not remember and did not sign the voluntary statement. The certified copy of James' BADV conviction was sufficient to show a prior altercation between James and Brittney but insufficient to allow the introduction of evidence regarding a knife or child abuse because James did not plead to those facts.

State's argument that a 20 year old conviction was found relevant in *Bolin v. State*, 114 Nev. 503 (1998) is not helpful because it involved two different victims and two separate cases. Here, Brittney is the same victim in each instance thereby making the likelihood of prejudice with similar charges substantial. There was no common plan but two separate instances with the same person.

State used the bad acts in closing to argue intent. VI:1112. State compared the other bad acts with the facts of this case and told the jury they were dealing with the type of person who would violently attack his girlfriend thus suggesting he did it before and he did it again. VI:1112-114. Therefore, the admission of the other bad acts was harmful.

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

State contends it was not required to litigate redactions it made after obtaining an order admitting James' 911 call. RAB:39-41. State argues the bad act statement about Brittney using marijuana the night of the incident was properly removed because James failed to prove the act by clear and convincing evidence.

However, once State obtained an order admitting the tapes, James had no reason to file a motion seeking admission of a portion of the tapes that court already agreed to admit. Thus, State's maneuvering prohibited James

from preparing a pre-trial bad act motion arguing the statements were admissible to show Brittney used marijuana that night, her state of mind. Brittney did not mention using marijuana during her testimony.

State also argues that it was not required to give James information regarding Brittney's prior battery conviction, contending it was not exculpatory and James had a duty to request or obtain the evidence himself. RAB:41-42. State's argument is improper because "[t]he 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)(other cites omitted); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

Information regarding Brittney's prior conviction was relevant for impeachment and for James' self-defense. IV:740. State knew James was presenting a self-defense case because they had the 911 tapes and he called 911 first seeking help from the police after Brittney attacked him. James was unable to obtain information regarding Brittney's prior battery domestic violence conviction prior to trial thus making State's omission a violation of *Brady*.

Prosecutor's conduct was improper because she/he purposely removed information from the 911 call and purposely hid information on Brittney's prior BADV.

VII. JURY INSTRUCTIONS.

A. Attempt to suppress evidence.

State presents no case law justifying Jury Instruction 24. II:325.

State presents no specific facts indicating James attempted to suppress evidence or procure false testimony. RAB:43-44. Brittney acknowledged she understood James was talking about wanting bail on the jail calls and she did not show up for court because she sought to support him. The fact Brittney refused counseling means nothing. RAB:44-45.

State claims any error in giving this instruction was mitigated by Brittney's testimony. RAB:45. However, in rebuttal argument, prosecutor discussed Jury Instruction 24 and mentioned statements James made on the jail tapes to argue consciousness of guilt. VI:1150. Therefore, the error in giving this instruction was not harmless.

B. Lesser included.

State incorrectly applies the *Blockburger* elements test.

In applying the elements test for Double Jeopardy purposes, Nevada first looks to legislative intent and if none, follows the elements test in

Blockburger v. U.S., 284 U.S. 299(1932); *Jackson v. State*, 117 Nev. 116, 120 (2005). Thus, the elements test is not used first.

Here, Legislative intent shows NRS 200.508(2)(b)(1) is a lesser included because the Legislature listed it within the same statute as it did felony child abuse NRS 205.508(1) and provided for a lower penalty. There would be different punishments if one section of NRS 200.508 includes a lesser. It makes sense the gross-misdemeanor would not apply to felony-murder because the injury to the child would be less than death. RAB:46.

Rather than looking at Legislative intent, State goes to the elements tests and contends NRS 200.508(1) only applies if a person directly commits child abuse while NRS 200.508(2) applies to the passive commission of child endangerment. RAB:47. But both require a direct act. In subsection (1) Legislature used the word "willfully" and in (2) the words "permits or allows." More importantly, both subsections contain language allowing for punishment based on the defendant placing a child in a situation where the child *may* suffer even though the child does not suffer and *that was the theory State proceeded under.* Therefore, the gross-misdemeanor was a lesser included.

C. Two reasonable interpretations.

As noted in Opening Brief, court erred in refusing offered instruction.

D. Self-defense.

James should be allowed to select his own version of self-defense jury instruction because he presented valid legal authority. VI:1213-1215. Court did not say Defense proposed instructions were incorrect. V:995-1000.

VIII. PROSECUTORIAL MISCONDUCT.

"Leading questions may not be used on the direct examination of a witness without the permission of the court" thus error in direct examination of KJ was plain. NRS 50.115(3)(a). Asking improper leading questions amounts to prosecutorial misconduct. *Rowland v. State*, 118 Nev. 31, 40 (2002)(improper to ask witness "When did [the gang] stop beating the witnesses in this case?").

Leading KJ during direct examination affected James' substantial rights because prosecutor put words in KJ's mouth that gave credence to JB's alleged statements to police thereby enhancing the credibility of State's theory of the case and prejudicing James. State used this testimony to improperly argue in closing Kaylee was there and remembered seeing James attack Brittney. VI:1114;RAB:55. However, KJ never saw the alleged fight which means prosecutor argued untrue facts.

State also argues court properly sustained prosecutor's objection during closing argument about the amount of time Pickens took to interview

JB when saying it was brief because the interview was not captured on the the body camera. RAB:53-54.

State misunderstands. James argued the body camera indicated time police arrived and the time they handcuffed James 16 minutes later. Because Pickens testified he placed James in handcuffs after talking to JB, after talking to James and after talking to Brittney, Pickens could only speak to JB briefly within the 16 minutes timeframe. Accordingly James argument was correct and court created error by telling the jury to ignore James' argument.

State further claims prosecutor correctly argued in rebuttal that James may have punched JB even though there was no testimony this occurred because State responded to James' argument regarding Brittney's 911 call. RAB:54-56. However, Brittney and JB never testified James hit JB thus the argument was false.

IX. CUMULATIVE ERROR.

Contrary to State's assertions, the issue of guilt was not close as shown in Issue I and III. While the body camera and pictures taken give a glimpse inside the events that night, they do not say who started the altercation. Errors were grave and guilt not overwhelming.

CONCLUSION

Reversal warranted.

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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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20 day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20 day of April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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