

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

JOHN THOMAS KEPHART,

Respondent.

Electronically Filed
Apr 19 2017 11:39 a.m.
No. 72481 Elizabeth A. Brown
Clerk of Supreme Court

**State's Appeal from Order in Case Number CR16-0298
The Second Judicial District Court of the State of Nevada
Honorable William A. Maddox, Senior District Judge**

RESPONDENT'S APPENDIX (OSC)

JEREMY T. BOSLER
Washoe County Public Defender

CHRISTOPHER J. HICKS
Washoe County District Attorney

JOHN REESE PETTY
Chief Deputy

TERRENCE P. McCARTHY
Chief Appellate Deputy

350 South Center Street, 5th Floor
P.O. Box 11130
Reno, Nevada 89520

One South Sierra Street, 7th Floor
P.O. Box 11130
Reno, Nevada 89520

Attorneys for Respondent

Attorneys for Appellant

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1 CODE NO. 2630
2 WASHOE COUNTY PUBLIC DEFENDER
3 CHRISTINE BRADY, BAR #11065
4 P. O. BOX 11130
5 RENO, NV 89520-0027
6 (775) 337-4800
7 ATTORNEY FOR DEFENDANT

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10
11 IN AND FOR THE COUNTY OF WASHOE

12 THE STATE OF NEVADA,

13 Plaintiff,

14 v.

Case No. CR16-0298

15 JOHN THOMAS KEPHART,

Dept. No. 7

16 Defendant.
17 _____/

18 **OBJECTION TO ADMISSION OF PRIOR CONVICTIONS AS A FELONY**
19 **ENHANCEMENT AND MOTION TO DISMISS**

20 COMES NOW JOHN THOMAS KEPHART, by and through counsel, Washoe County
21 Public Defender, JEREMY T. BOSLER, and Deputy Public Defender CHRISTINE BRADY,
22 and hereby submits its OBJECTION TO ADMISSION OF PRIOR CONVICTIONS AS A
23 FELONY ENHANCEMENT and hereby requests that the Court deny the admission of the
24 prior domestic battery convictions from Union Justice Court, Humboldt, Nevada, dated July 29,
25 2010 and May 19, 2010, as a felony enhancement.

26 This Objection is made and based upon the Constitutional rights to Due Process, the
record of the proceedings to date, the following points and authorities, and any oral arguments
and/or documentary evidence as may be presented at a hearing on this matter.

///

1 POINTS AND AUTHORITIES

2 I. STATEMENT OF THE CASE

3 JOHN THOMAS KEPHART (hereinafter "Mr. Kephart") has been charged via
4 Indictment with the offense of domestic battery. The case is charged as a felony, based upon
5 alleged prior convictions within the seven-year period preceding the Defendant's current case

6 II. STATEMENT OF THE FACTS

7 Mr. Kephart was convicted of a first offense misdemeanor domestic battery on May 19,
8 2010. The *Judgment of Conviction and Order of the Court*, entered on May 19, 2010, indicates
9 the May 19, 2010 conviction was Mr. Kephart's First Domestic Battery Offense for an incident
10 occurring on or about November 28, 2009. Exhibit 1, p. 3, l. 28. Five months prior to entering
11 his plea in May 2010, Mr. Kephart signed an *Admonishment of Rights* wherein he appears to
12 have been represented by Jack Bullock, II. Exhibit 1, p 16.

13 Mr. Kephart was convicted of another domestic battery on July 29, 2010. The
14 *Judgment of Conviction and Order of the Court*, which was signed by Mr. Kephart, indicates
15 Mr. Kephart represented himself as a proper person. Exhibit 2, p.1. both the *Judgment of*
16 *Conviction* and *Criminal Complaint* indicate Mr. Kephart was pleading to a First Domestic
17 Battery. Exhibit 2. Nowhere in the second conviction is it clear that Mr. Kephart is knowingly
18 pleading to a Second Domestic Battery for enhancement purposes.

19 Mr. Kephart was convicted of two first offense domestic battery offenses. In fact, it
20 appears that Mr. Kephart was specifically told the second conviction would count as a first
21 conviction. Additionally, there is no indication in the written record that the City Attorney
22 objected to the conviction as a first offense domestic battery, or retaining the right to use the
23 conviction as a second offense enhancement.

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III. ARGUMENT

A. The prior Domestic Battery convictions should not be admissible as an enhancement to increase the severity of the current charge to a felony.

The felony allegation in this case relies upon the prior “convictions.” However, the Court paperwork discloses deficiencies that disqualify them from consideration in this case.

In Smith v. State, 105 Nev. 293 (1989), the defendant’s prior DUI conviction could not be used to enhance her current DUI to a felony because she had pled to a first offense DUI pursuant to negotiations. The Smith court’s rationale for this decision was that the spirit of constitutional principles do not support the subsequent use of the conviction. Id. at 298. Speer v. State, 116 Nev. 677, 680 (2000), clarifies this reasoning by stating that Smith and other like cases were based “solely on the necessity of upholding the integrity of plea bargains and the reasonable expectations of the parties relating thereto.” In the current case, it is unknown whether Mr. Kephart’s plea was a result of negotiations or whether the Court took it upon itself to convict him of a first offense domestic battery. However, the record shows evidence that the prosecutor in both cases intended the convictions to be first offenses for enhancement purposes, even though they had knowledge of the prior conviction. This is tantamount to a negotiation because the prosecutor was made aware of the prior conviction, and allowed the plea to go forward as a first offense, thus waiving the State’s ability to use these convictions as felony enhancements in the continuing seven years.

Additionally, the Speer case clearly states that one of the reasons a prior conviction should not be used as an enhancement is because of the “reasonable expectations of the parties relating thereto.” Id. at 680. Mr. Kephart pled to a first offense and was sentenced for a first offense domestic battery. Mr. Kephart had also been informed that he was being convicted of a first offense domestic battery. Mr. Kephart has a reasonable belief that the prior convictions would not be used for felony enhancement purposes, in light of the Court’s knowledge of his

///

1 prior domestic battery. Furthermore, there is nothing in the written record to suggest that the
2 prosecutor preserved the right to use the conviction as an enhancement.

3 **B. Lack of Notice and Lack of Due Process**

4 At the time Mr. Kephart entered his respective pleas in Humboldt County, he was not
5 on notice that together the two convictions could be used to enhance the next domestic battery
6 to a felony. In the second proceeding he was not represented by counsel. The vagueness and
7 confusion surrounding the prior convictions make the instant felony prosecution
8 unconstitutional according to both the United States and Nevada Constitutions.

9 **CONCLUSION**

10 All evidence suggests that the prior convictions resulted from plea negotiations. Mr.
11 Kephart should not be charged with a felony domestic battery when both convictions were
12 specifically treated as, and pled to as a first offense domestic battery.

13 **AFFIRMATION PURSUANT TO NRS 239B.030**

14 The undersigned does hereby affirm that the preceding document does not contain the
15 social security number of any person.

16 DATED this 12th day of January, 2017.

17 JEREMY T. BOSLER
18 Washoe County Public Defender

19 By /s/CHRISTINE BRADY
20 CHRISTINE BRADY
21 Deputy Public Defender
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CERTIFICATE OF SERVICE

I, LINDA GRAY, hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I served a true copy of the foregoing document through electronic filing:

Michael Bolenbaker, Deputy District Attorney
District Attorney's Office

DATED this 12th day of January, 2017

/s/ LINDA GRAY
LINDA GRAY

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INDEX OF EXHIBITS

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entered on May 19, 2010 | 17 |
| 2. Judgment of Conviction and Order of the Court
entered on July 29, 2010 | 14 |

FILED
Electronically
CR16-0298
2017-01-12 04:23:22 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5896136 : pmsewell

EXHIBIT 1

EXHIBIT 1

FILED

MAY 13 2010

Case No. 09-CR-01144

IN THE JUSTICE COURT OF UNION TOWNSHIP IN AND FOR THE COUNTY OF HUMBOLDT, STATE OF NEVADA

JUDGMENT OF CONVICTION AND ORDER OF THE COURT

Defendant's Name John Thomas Kephart

- ☒ Represented by Jack Bullock
☒ Waived right to be represented by counsel.
☒ Deputy District Attorney Brian Williams present
☒ Defendant entered No Contest plea on May 19, 2010
☒ Defendant was canvassed on plea.
☐ Defendant was found guilty by court.

Good cause appearing, IT IS SO ORDERED, that the Defendant's plea be accepted into the minutes of the Court. The Defendant is hereby adjudged guilty of.

COUNT I: A violation of NRS 200.481
200.485
33.018

Domestic Battery - 1st offense, a misdemeanor

COUNT II: A violation of NRS _____

_____, a misdemeanor

COUNT III: A violation of NRS _____

_____, a misdemeanor

COUNT I: Fined \$ 100.00 and \$ 77.00 Administrative assessment - 2 days jail credit for \$100.00

COUNT II: Fined \$ _____ and \$ _____ Administrative assessment

COUNT III: Fined \$ _____ and \$ _____ Administrative assessment

- ☐ Defendant ordered to pay \$35.00 Special assessment fee for programs for domestic violence
Defendant to reimburse this court \$ _____ for the service of the Public Defender
Defendant ordered to pay \$60.00 Forensic fee
Defendant ordered to pay \$ _____ restitution through the court.
Said fine(s), administrative assessment(s) and additional fees imposed total the sum of \$177.00 to be
Paid at Union Justice Court by May 19, 2010
Defendant sentenced to 30 day(s) Humboldt County jail; suspended all but 38 day(s) for
1 year
Defendant to serve a term of 8 days in the Humboldt County jail with credit for any time served.
Defendant to report to Humboldt County jail on _____ at the hour of _____ M.
Defendant, filed Notice of Election on _____. Defendant's fine and jail sentence for DUI conviction are
suspended for a period of one to three years on the condition that the defendant satisfactorily completed
Notice of Election Program.
Defendant ordered to attend and pay for DUI workshop and complete by _____
Defendant ordered to attend and pay for Victim Impact Panel on/by _____
Defendant ordered to attend Alcoholics Anonymous Meetings _____ times per week with monthly
signature to the court _____

original on file in this office.

Date 6-01-15

Shirley H. H. Court Clerk

Letty Norcutt, Justice of the Peace
Union Township, County of Humboldt,
State of Nevada

- ☒ Defendant ordered to complete 24 hour's community service work with completion report to the court by June 19, 2010 - 2 days jail credit for at home community service
- ☐ Defendant ordered to attend and pay for counseling as outlined by a certified counselor with monthly report to the court.
- ☒ Batters Intervention counseling for a minimum of 1 1/2 hours per week for a minimum of 6 months
- ☐ Substance Abuse counseling (Alcohol and/or drug) 26 sessions - monthly reports
- ☐ Bad check counseling
- ☐ Mental Health counseling
- ☐ Anger Management
- ☐ Other
- ☐ Obtain and pay for an alcohol/drug evaluation by _____ from a certified counselor and follow recommendations of the counselor with monthly reports to this court.
- ☐ NO FURTHER RELATED PROBLEMS
- ☐ NO ALCOHOL, NO BARS OR DRINKING ESTABLISHMENTS
- ☐ SUBJECT TO SEARCH AND SEIZURE
- ☐ NO CONTROLLED SUBSTANCE
- ☒ OTHER Random Alcohol & Drug Test until February 19, 2011

IT IS FURTHER ORDERED THAT THE DEFENDANT APPEAR ALCOHOL/DRUG FREE TO ASSIGNED PROGRAMS AND COUNTY JAIL.

DATED THIS 19th DAY OF May, 2010

Gene Wambolt
GENE WAMBOLT
Justice of the Peace

I hereby understand and agree to follow the above conditions of my sentence. I understand that if I am unable to pay my fines or comply with any COURT ORDER I shall appear in court prior to the due date to request an extension. I understand that I could be sent to collection and a \$100.00 FTP fee will be added to the fine and possible drivers license being suspended. Failure to comply with any COURT ORDER will result in the issuance of a BENCH WARRANT for my immediate arrest.

John Keph [REDACTED]
Defendants Signature DOB Social Security No.

Street Address 4085 Linn Ave Winnemucca State NV Zip 89445

Mailing Address _____
City _____ State _____ Zip _____

UNION TOWNSHIP JUSTICE COURT
Box 1218
Winnemucca, Nevada 89446
(775) 623-6059
(775) 623-6439 Fax

Phone _____

NO. 09-CR-01144

2009 DEC -3 AM 9:57

Meek

IN THE JUSTICE'S COURT OF UNION TOWNSHIP

COUNTY OF HUMBOLDT, STATE OF NEVADA

-000-

COUNTY OF HUMBOLDT,

Plaintiff,

CRIMINAL COMPLAINT

vs.

JOHN THOMAS KEPHART
528 1/2 HANSON STREET
WINNEMUCCA, NV 89445
DOB: [REDACTED]

Defendant. /

PERSONALLY APPEARED BEFORE ME, BRIAN WILLIAMS, Chief Deputy District Attorney, who first being duly sworn, complains and says that the Defendant above-named has within the County of Humboldt, State of Nevada, committed a certain crime which is described as follows:

COUNT I

DOMESTIC BATTERY,
A MISDEMEANOR

AS DEFINED BY NRS 200.485, 33.018 AND 200.481

That the Defendant did knowingly, willfully and unlawfully use force and violence upon a person, in the following manner, to-wit: that on or about the 28th day of November, 2009, at or near the location of

1 1062 S. Grass Valley Road, Winnemucca, County of
2 Humboldt, State of Nevada, the Defendant grabbed Shyla
3 Spealman forcibly by the arm and squeezed, then
4 followed that by grabbing her around the neck.

5 That complainant knows that said crime occurred and
6 that the Defendant, JOHN THOMAS KEPHART, committed the
7 same based upon the following: because complainant is
8 the Chief Deputy District Attorney, and is in the
9 possession of a crime report or report of
10 investigation written by DAN DEBORD, known to
11 complainant to be an Officer with the WINNEMUCCA
12 POLICE DEPARTMENT.

13 All of which is contrary to the form of the Statute in such
14 cases made and provided, and against the peace and dignity of
15 the State of Nevada. Said Complainant, therefore, prays that a
16 warrant and/or summons may be issued in the name of said
17 Defendant above-named and dealt with according to law.

18 Furthermore, pursuant to NRS 239B.030., the undersigned
19 hereby affirms this document does not contain the social
20 security number of any person.

21 
22 BRIAN WILLIAMS
23 Chief Deputy District Attorney

24 SUBSCRIBED AND SWORN to before me this 2nd day of
25 December, 2009.

26 
27 NOTARY PUBLIC

28 LORETTA M. NORCUTT
Notary Public - State of Nevada
My Comm. Expires 12/31/2011

Case No. 09-CR-01144

2009 DEC -3 AM 9:57

Smack

IN THE JUSTICE'S COURT OF UNION TOWNSHIP,
COUNTY OF HUMBOLDT, STATE OF NEVADA.

-000-

IN THE MATTER OF AN APPLICATION
FOR AN ARREST WARRANT
FOR JOHN THOMAS KEPHART,

AFFIDAVIT IN SUPPORT OF COMPLAINT AND
ARREST WARRANT

STATE OF NEVADA)
COUNTY OF HUMBOLDT) ss.

BRIAN WILLIAMS, Humboldt County Chief Deputy District Attorney, does hereby swear under information and belief and penalty of perjury that the assertions of this affidavit are true.

1. That your Affiant is the Chief Deputy District Attorney of Humboldt County and in that capacity is in the possession of probable cause reports from the Winnemucca Police Department; that further your Affiant is informed and believes and thereupon alleges the following to be a sufficient representation of facts to establish probable cause to believe that JOHN THOMAS KEPHART has committed the crime of DOMESTIC BATTERY, and that said crime

1 occurred on or about the 28th day of November, 2009 in Humboldt
2 County, Nevada.

3 2. That the criminal investigation includes conversations
4 and contacts through written reports submitted by Officer DeBord
5 of the Winnemucca Police Department. The reports indicate that
6 on or about November 28, 2009 at or near the location of 1062 S.
7 Grass Valley Road, Winnemucca, County of Humboldt, State of
8 Nevada, the Defendant grabbed Shyla Spealman, his girlfriend,
9 forcibly by the arm and squeezed, then followed that by grabbing
10 her around the neck.
11

12 3. That based upon the foregoing information, your Affiant
13 has probable cause to believe that JOHN THOMAS KEPHART has
14 committed the crime of DOMESTIC BATTERY.
15

16 Wherefore, your Affiant prays that a Warrant of Arrest
17 issue for JOHN THOMAS KEPHART.

18 Furthermore, pursuant to NRS 239.B.030., the undersigned
19 hereby affirms this document does not contain the social
20 security number of any person.
21

22 
23 BRIAN WILLIAMS
CHIEF DEPUTY DISTRICT ATTORNEY

24 Subscribed and sworn before me
25 this 2nd day of December, 2009.

26 
27 Refae M. Norcott
28 NOTARY PUBLIC

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

NO. 09-CR-01244

2009 DEC -7 PM 3:05

IN THE JUSTICE'S COURT OF UNION TOWNSHIP
COUNTY OF HUMBOLDT, STATE OF NEVADA

-oOo-

COUNTY OF HUMBOLDT,

Plaintiff,

vs.

WARRANT OF ARREST
(DAY OR NIGHT)

JOHN THOMAS KEPHART

SS [REDACTED]

Defendant. /

STATE OF NEVADA)
) ss.
COUNTY OF HUMBOLDT}

THE COUNTY OF HUMBOLDT to any Sheriff, Constable,
Marshal, Policeman, or other Peace officer of this State:

IT APPEARING upon the complaint on oath or citation
issued pursuant to law or from an affidavit or affidavits filed
with the complaint or citation that there is probable cause to
believe that an offense triable within the county has been
committed, to-wit: the crime of DOMESTIC BATTERY, A MISDEMEANOR
IN VIOLATION OF NRS 200.485, 33.018 AND 200.481; and that the
above named Defendant has committed it, you are therefore

1 commanded forthwith to arrest the above-named Defendant and to
2 bring said Defendant before me at my office in the City of
3 Winnemucca, Union Township, Humboldt County, Nevada, or before
4 the nearest or most accessible magistrate without unreasonable
5 delay, that the said defendant may give bail in the sum of
6 \$ 3,122⁰⁰ to answer the charge.

7
8 DATED THIS 3rd DAY OF December, 2009.

9
10 *Sam Wamsted*
11 JUSTICE OF THE PEACE

12 Furthermore, pursuant to NRS 239B.030., the undersigned hereby
13 affirms this document contains the social security number of a
14 person as required by NRS 171.108.

15 *Brian Wetters*
16 CHIEF DEPUTY DISTRICT ATTORNEY

17 RETURN OF WARRANT

18 I hereby certify that I received the foregoing warrant on
19 the 4 day of DEC, 2009, and
20 served the same by arresting the above-named defendant on the
21 day of DEC 4, 2009.

22 *V. L. L. 11/22*
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Date: 10/01/2015 14:09:37.8
MTJR5925

Docket Sheet

Page: 1

Judge: WAMBOLT, GENE

Case No. 09 CR 01144 6P
Ticket No.
CTN:

STATE OF NEVADA VS

By:

KEPHART, JOHN T
528 1/2 HANSON ST
WINNEMUCCA, NV 89445
Dob: [REDACTED]
Lic:

DFNDT

Sex: M
Sid:

By: BULLOCK II, JACK T
115 W 5TH ST #2
WINNEMUCCA, NV 89445

Plate#:

Make:

Year:

Type:

Venue:

Location: HU

Accident:

HUMBOLDT COUNTY DISTRICT
ATTORNEY'S OFFICE
WILLIAMS, BRIAN

CPLNT

PTY CPLNT

Bond:
Type:

Set:
Posted:

Charges:

Ct.	200.485.2	DOMESTIC BATTERY BY STRANGULATION	GUILTY PLEA W/SENT BEFORE PRELIM
Offense Dt: 11/28/2009 Cvr:			
Arrest Dt: 11/28/2009			
Comments:			

Sentencing:	Sentence	Suspended	Credit
Ct.			
Jail (Days)			
Fines			
Costs			
Restitution			
Probation(Mo)		Expires	
Comm Svc (Hr)			
REMARKS:			

No.	Filed	Action	Operator	Fine/Cost	Due
1	12/03/09	ALERT ISSUED: ACTIVE WARRANT issued on: 12/03/2009 For: KEPHART, JOHN T Bond Amt:	SHOCK	0.00	0.00
2	12/07/09	ALERT SERVED: ACTIVE WARRANT served on: 12/04/2009 For: KEPHART, JOHN T	CGOMEZ	0.00	0.00
3	12/07/09	WARRANT SERVED	SHOCK	0.00	0.00
4	12/07/09	ARRAIGNMENT HEARING HELD	CGOMEZ	0.00	0.00
5	12/07/09	DEFENDANT ADVISED OF RIGHTS, AND HIS RIGHT TO COUNSEL THE DEFENDANT PLED NOT GUILTY HE ALSO INFORMED THE COURT THAT HE WOULD RETAIN HIS OWN ATTORNEY JACK BULLOCK A TRIAL HEARING DATE OF DECEMBER 22, 2009 AT 1:15 PM	CGOMEZ	0.00	0.00
6	12/08/09	BENCH TRIAL SCHEDULED Event: BENCH TRIALS (UNION) Date: 12/22/2009 Time: 1:15 pm Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT Result: TRIAL CONTINUED - DEFENSE SSQ REQUEST	CGOMEZ	0.00	0.00
7	12/22/09	STIPULATION TO CONTINUE AND ORDER SIGNED BY THE JUDGE	SHOCK	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
8	12/29/09	TRIAL CONTINUED - DEFENSE ESQ REQUEST The following event: BENCH TRIALS (UNION) scheduled for 12/22/2009 at 1:15 pm has been resulted as follows: Result: TRIAL CONTINUED - DEFENSE ESQ REQUEST Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT	SMOCK	0.00	0.00
9	12/28/09	BENCH TRIAL SCHEDULED Event: BENCH TRIALS (UNION) Date: 03/03/2010 Time: 1:15 pm Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT Result: TRIAL CONTINUED - DEFENSE ESQ REQUEST	SMOCK	0.00	0.00
10	03/02/10	STIPULATION TO CONTINUE AND ORDER SIGNED BY THE JUDGE	GGABIOLA	0.00	0.00
11	03/03/10	TRIAL CONTINUED - DEFENSE ESQ REQUEST The following event: BENCH TRIALS (UNION) scheduled for 03/03/2010 at 1:15 pm has been resulted as follows: Result: TRIAL CONTINUED - DEFENSE ESQ REQUEST Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT	GGABIOLA	0.00	0.00
12	03/03/10	BENCH TRIAL SCHEDULED Event: BENCH TRIALS (UNION) Date: 07/14/2010 Time: 1:15 pm Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT	GGABIOLA	0.00	0.00
13	03/03/10	BENCH TRIAL SCHEDULED Event: BENCH TRIALS (UNION) Date: 07/14/2010 Time: 1:15 pm Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT Result: HEARING HELD	GGABIOLA	0.00	0.00
14	05/19/10	COUNTY FINE \$100 - 199.99 Charge #1: DOMESTIC BATTERY BY STRANGULATION Receipt: 49703 Date: 05/19/2010	HJONES	100.00	0.00
15	05/19/10	\$70.00 ADMINISTRATIVE ASSESSMENT FEE (PRIOR TO MARCH 12, 2010) Charge #1: DOMESTIC BATTERY BY STRANGULATION Receipt: 49703 Date: 05/19/2010	HJONES	70.00	0.00
16	05/19/10	SPECIALTY COURT FEE Charge #1: DOMESTIC BATTERY BY STRANGULATION Receipt: 49703 Date: 05/19/2010	HJONES	7.00	0.00
17	05/19/10	CREDIT CARD FEE Receipt: 49703 Date: 05/19/2010	HJONES	3.00	0.00
18	05/20/10	ORDER FOR RANDOM ALCOHOL & DRUG TESTING UNTIL FEBRUARY 19, 2011 WAS SIGNED AND FILED.	GGABIOLA	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
19	05/24/10	HEARING HELD: The following event: BENCH TRIALS (UNION) scheduled for 07/14/2010 at 1:15 pm has been resulted as follows: Result: HEARING HELD. THE DEFENDANT CHANGED HIS PLEA TO NO CONTEST TO DOMESTIC BATTERY-1ST OFFENSE. HE WAS SENTENCED TO 90 DAYS JAIL WITH 38 DAYS JAIL STAYED 8 DAYS JAIL CREDIT TIME SERVED; PER THE DIVISION PROGRAM HE WAS \$100.00 + \$77.00 A A AND 2 DAYS JAIL CREDIT FOR \$100.00 FINE; 24 HOURS COMMUNITY SERVICE WITH 24 HOURS CREDIT BY JUNE 19, 2010; 26 SESSION OF OUTPATIENT TREATMENT WITH MONTHLY REPORTS AND RANDOM ALCOHOL AND DRUG TESTING UNTIL FEBRUARY 19, 2011. Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT	GGABIOLA	0.00	0.00
20	05/24/10	GUILTY PLEA W/SENT BEFORE TRIAL	GGABIOLA	0.00	0.00
21	06/22/10	COMMUNITY SERVICE COMPLETED	SMOCK	0.00	0.00
22	07/29/10	DOMESTIC VIOLENCE COUNSELING REPORT RECEIVED (UNION)	SMOCK	0.00	0.00
23	08/21/10	DOMESTIC VIOLENCE COUNSELING REPORT RECEIVED (UNION) UNABLE TO EVALUATE DUE TO NO SHOW APPOINTMENT	SMOCK	0.00	0.00
24	02/02/11	DOMESTIC VIOLENCE COUNSELING REPORT RECEIVED (UNION) DEFENDANT HAS ONLY ATTENDED 1 SESSION AS OF THIS DATE	SMOCK	0.00	0.00
Total:				180.00	0.00
Totals By: AA FEE				70.00	0.00
COST				3.00	0.00
FINE				100.00	0.00
INFORMATION				0.00	0.00
SPECIALTY COURT				7.00	0.00
FEE					

*** End of Report ***

1 No. 09-CR-01144

2019 DEC -7 PM 4:33

3 IN THE JUSTICE'S COURT OF UNION TOWNSHIP
4 COUNTY OF HUMBOLDT, STATE OF NEVADA

5 THE COUNTY OF HUMBOLDT,
6 Plaintiff,

7 vs.

8 JOHN THOMAS KEPHART JK
9 Defendant.

11 Charge: MISDEMEANOR; DOMESTIC BATTERY JK

13 I, the Defendant in the above-entitled action do hereby state that I have been
14 informed of my constitutional Rights as follows: JK

15 That I am entitled to an attorney at all stages of the proceedings against me. That
16 if I cannot afford an attorney, one will be appointed to represent me at no cost to
17 me. I understand that if the Court previously determines that I will not be given a
18 jail sentence if found guilty of the charged offenses, I may not be appointed an
19 attorney; JK

20 That I am entitled to a public trial; JK

21 That I am entitled to a speedy trial, within sixty days of the arraignment on the
22 complaint filed against me, unless for good cause a trial date cannot be set within
23 this sixty day period; JK

24 That I am entitled to face and hear all the witnesses who may testify against me
25 and to cross examine each witness; JK

26 That I have the right to present evidence in my own behalf; JK

27 That I may have the Court subpoena witnesses to testify in my behalf, or compel
28 records to be brought to Court in my behalf at no expense to me; JK

That I may be a witness at my own trial if I choose to testify. However, I
understand that I cannot be compelled to testify against myself. If I decide to
testify, I will be subject to cross examination by the prosecutor; JK

That I am entitled to be released on reasonable bail; JK \$3,122

1 That the maximum penalty for the offense with which I am charged is up to six
2 months in the County Jail or a fine of up to \$1,000.00 or both such fine and
3 imprisonment; 18-1

4 That anything I say, can and will be used against me in a Court of law; JK

5 By placing my signature below, I acknowledge that I have read and understood
6 the above mentioned rights. Further, that I acknowledge that these rights have been
7 read aloud to me in open court and I was given the opportunity to ask questions
8 concerning these rights.

9 Dec, 7, 09
Date

JK
Defendant

10 PLEA OPTIONS

11 GUILTY: I did commit the offense/ offenses as charged.

12 NOT GUILTY: I did not commit the offense/ offenses as charged.

13 NOLO CONTENDRE (NO CONTEST): I do not wish to contest the offense/offenses
14 as charged.

15 I have had the above Plea Options explained to me and I acknowledge that I understand
16 these options. JK

17 Therefore: I hereby

18 / waive (give up) my right to be represented by a court appointed attorney;

19 / request my right to an attorney, because I cannot afford one;

20 JK will retain an attorney;

21 I do hereby enter a plea of Not Guilty; freely, knowingly and voluntarily.

22 Dec, 7, 09
Date

JK
Defendant

J. P. D. H-353
Witness

1 ATTEST:

2 THIS IS TO CERTIFY that the foregoing wherein the above-named
3 Defendant was charged with a Misdemeanor, to-wit: the crime of _____

4 DOMESTIC BATTERY

5 was voluntarily signed by the said defendant in the presence of
6 Judge GENE WAMBOLT at Winnemucca, Nevada, on
7 this 7 day of December 2009

8 Gene Wambolt
9 JUSTICE OF THE PEACE,
10 Union Township, County of Humboldt,
11 State of Nevada

IN THE JUSTICE COURT OF UNION TOWNSHIP
COUNTY OF HUMBOLT, STATE OF NEVADA.

THE STATE OF NEVADA,
Plaintiff,

VS.

2010 MAY 18 PM 2:00:00 09-CR-01144

JOHN THOMAS KEPHART

Defendant.

DOMESTIC BATTERY 1ST OFFENSE

CLERK

Battery/Domestic Violence: ADMONISHMENT OF RIGHTS

(For offenses committed on or after October 1, 2007)

I am the Defendant in this case. I am charged with battery constituting domestic violence in having willfully and unlawfully committed an act of force or violence upon my spouse, former spouse, a person to whom I am related by blood or marriage, a person with whom I am or was actually residing, a person with whom I have had or am having a dating relationship, a person with whom I have a child in common, my minor child, or the minor child of one of those persons (in violation of NRS 33.018/NRS 200.485).

I AM AWARE THAT I HAVE EACH OF THE FOLLOWING RIGHTS AND THAT I WILL BE WAIVING THESE RIGHTS IF I PLEAD GUILTY OR NOLO CONTENDERE:

1. The right to a speedy trial;
2. The right to require the State to prove the charge(s) against me beyond a reasonable doubt;
3. The right to confront and question all witnesses against me;
4. The right to subpoena witnesses on my behalf and compel their attendance;
5. The right to remain silent and not be compelled to testify if there were a trial; and
6. The right to appeal my conviction except on constitutional or jurisdictional grounds.

I AM ALSO AWARE THAT BY PLEADING GUILTY OR NOLO CONTENDERE I AM ADMITTING THE STATE COULD FACTUALLY PROVE THE CHARGE(S) AGAINST ME. I AM ALSO AWARE THAT MY PLEA OF GUILTY OR NOLO CONTENDERE MAY HAVE THE FOLLOWING CONSEQUENCES:

1. I understand the State will use this conviction, and any other prior conviction from this or any other state which prohibits the same or similar conduct, to enhance the penalty for any subsequent offense.
2. I understand that as a consequence of my plea of guilty or nolo contendere, if I am not a citizen of the United States, I may, in addition to other consequences provided for by federal law, be removed, deported, excluded from entry into the United States, or denied naturalization.
3. I understand that if I am convicted of a misdemeanor or felony that constitutes domestic violence pursuant to NRS 33.018, my possession, shipment, transportation, or receipt of a firearm or ammunition may constitute a felony pursuant to NRS 202.360 or federal law.
4. I understand that sentencing is entirely up to the court and the following range of penalties for committing the offense described above will apply (unless a greater penalty is provided pursuant to NRS 200.481):

DEFENDANT'S INITIALS:

DEFENDANT'S ATTORNEY'S INITIALS (if applicable):

PAGE 1 of 2

FIRST OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 2 days in jail but not more than 6 months; at least 48 hours but not more than 120 hours, of community service; a fine of not less than \$200, but not more than \$1,000, in addition to certain fees and assessments that are required by statute; mandatory participation in weekly counseling sessions of not less than 1 1/2 hours per week (or bi-weekly counseling sessions for an equivalent number of hours if I reside more than 70 miles from the nearest location at which counseling services are available) for not less than 6 months, but not more than 12 months, at my expense; in the Court's discretion, the Court may order me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay.

SECOND OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 10 days in jail but not more than 6 months; at least 100 hours, but not more than 200 hours, of community service; a fine of not less than \$500, but not more than \$1,000, in addition to certain fees and assessments that are required by statute; mandatory participation in weekly counseling sessions of not less than 1 1/2 hours per week (or bi-weekly counseling sessions for an equivalent number of hours if I reside more than 70 miles from the nearest location at which counseling services are available) for 12 months, at my expense; in the Court's discretion, the Court may order me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay.

THIRD OFFENSE OR ANY SUBSEQUENT OFFENSE WITHIN 7 YEARS (CATEGORY C FELONY):

A category C felony punishable by a sentence of imprisonment in the Nevada State Prison for at least 1 year but not more than 5 years; a possible fine of not more than \$10,000, in addition to certain fees and assessments that are required by statute; in the Court's discretion, the Court may require me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay. A third or subsequent offense is not probationable.

ALL DEFENDANTS MUST INITIAL EITHER #1 or #2 BELOW-DO NOT INITIAL BOTH:

1. JK I am represented by an attorney in this case. My attorney has fully discussed these matters with me and advised me about my legal rights. My attorney is JACK BULLOCK II
2. I have declined to have an attorney represent me and I have chosen to represent myself. I have made this decision even though there are dangers and disadvantages in self-representation in a criminal case, including but not limited to, the following:
 - (a) Self-representation is often unwise, and a defendant may conduct a defense to his or her own detriment;
 - (b) a defendant who represents himself is responsible for knowing and complying with the same procedural rules as lawyers, and cannot expect help from the judge in complying with those procedural rules;
 - (c) a defendant representing himself will not be allowed to complain on appeal about the competency or effectiveness of his or her representation;
 - (d) the state is represented by experienced professional attorneys who have the advantage of skill, training and ability;
 - (e) a defendant unfamiliar with legal procedures may allow the prosecutor an advantage, may not make effective use of legal rights, and may make tactical decisions that produce unintended consequences; and
 - (f) the effectiveness of the defense may well be diminished by defendant's dual role as attorney and accused.

<u>[Signature]</u>	<u>5/19/10</u>
DEFENDANT'S SIGNATURE	DATE OF BIRTH DATE

I HAVE REVIEWED THIS ADMONISHMENT WITH MY CLIENT AND WE HAVE DISCUSSED THE RIGHTS HE/SHE IS WAIVING AND THE CONSEQUENCES OF HIS/HER PLEA OF GUILTY/NOLO CONTENDERE TO THE BATTERY/DOMESTIC VIOLENCE CHARGE.

[Signature]
DEFENDANT'S ATTORNEY (IF APPLICABLE)

483
BAR NUMBER

[Signature]
Justice of the Peace

May 19, 2010
Date

Certified to be a true and correct copy of the
original on file in this office.

Date 10-01-15

Arnette R. Fie, clerk
Lelly Norcutt, Justice of the Peace
Union Township, County of Humboldt,
State of Nevada

FILED
Electronically
CR16-0298
2017-01-12 04:23:22 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5896136 : pmsewell

EXHIBIT 2

EXHIBIT 2

FILED

JUL 29 2010

Case No. 10-CR-00452

IN THE JUSTICE COURT OF UNION TOWNSHIP IN AND FOR THE COUNTY OF HUMBOLDT, STATE OF NEVADA

JUDGMENT OF CONVICTION AND ORDER OF THE COURT

Defendant's Name John Thomas Kephart

- ☒ Represented by Self
☒ Waived right to be represented by counsel.
☒ Deputy District Attorney Russell Smith present
☐ Defendant entered Guilty plea on July 29, 2010
☒ Defendant was canvassed on plea.
☐ Defendant was found guilty by court.

Good cause appearing, IT IS SO ORDERED, that the Defendant's plea be accepted into the minutes of the Court. The Defendant is hereby adjudged guilty of.

COUNT I: A violation of NRS 360.481
360.483
33.018

Domestic Battery - 1st offense, a misdemeanor

COUNT II: A violation of NRS _____

_____ a misdemeanor

COUNT III: A violation of NRS _____

_____ a misdemeanor

COUNT I: Fined \$ 200.00 and \$ 87.00 Administrative assessment

COUNT II: Fined \$ _____ and \$ _____ Administrative assessment

COUNT III: Fined \$ _____ and \$ _____ Administrative assessment

- ☒ Defendant ordered to pay \$35.00 Special assessment fee for programs for domestic violence
Defendant to reimburse this court \$ _____ for the service of the Public Defender
Defendant ordered to pay \$60.00 Forensic fee
Defendant ordered to pay \$ _____ restitution through the court.
Said fine(s), administrative assessment(s) and additional fees imposed total the sum of \$422.00 to be
Paid at Union Justice Court by January 30, 2011
Defendant sentenced to 30 day(s) Humboldt County jail; suspended all but 28 day(s) for
1 year
Defendant to serve a term of 2 day(s) in the Humboldt County jail with credit for any time served.
Defendant to report to Humboldt County jail on _____ at the hour of _____ M.
Defendant, filed Notice of Election on _____ Defendant's fine and jail sentence for DUI conviction are
suspended for a period of one to three years on the condition that the defendant satisfactorily completed
Notice of Election Program.
Defendant ordered to attend and pay for DUI workshop and complete by _____
Defendant ordered to attend and pay for Victim Impact Panel on by _____
Defendant ordered to attend Alcoholics Anonymous Meetings _____ times per week with monthly
signature to the court _____

☒ Certified to be a true and correct copy of the original on file in this office.

Date 10-01-15

Shirley L. Latta, Court Clerk
Latty Norcutt, Justice of the Peace
Union Township, County of Humboldt,
State of Nevada

- ☒ Defendant ordered to complete 48 hour's community service work with completion report to the court by August 29, 2010
- ☐ Defendant ordered to attend and pay for counseling as outlined by a certified counselor with monthly report to the court.
- ☒ Batters Intervention counseling for a minimum of 1 1/2 hours per week for a minimum of 6 months - monthly Report
- ☐ Substance Abuse counseling (Alcohol and/or drug) Enrolled by Aug 6, 2010 - 26 sessions
- ☐ Bad check counseling
- ☐ Mental Health counseling
- ☐ Anger Management
- ☐ Other
- ☐ Obtain and pay for an alcohol/drug evaluation by _____ from a certified counselor and follow recommendations of the counselor with monthly reports to this court.
- ☐ NO FURTHER RELATED PROBLEMS
- ☒ NO ALCOHOL, NO BARS OR DRINKING ESTABLISHMENTS for 1 year
- ☐ SUBJECT TO SEARCH AND SEIZURE
- ☒ NO CONTROLLED SUBSTANCE for 1 year
- ☐ OTHER _____

IT IS FURTHER ORDERED THAT THE DEFENDANT APPEAR ALCOHOL/DRUG FREE TO ASSIGNED PROGRAMS AND COUNTY JAIL.

DATED THIS 29 DAY OF July, 2010

Gene Wambolt
GENE WAMBOLT
Justice of the Peace

I hereby understand and agree to follow the above conditions of my sentence. I understand that if I am unable to pay my fines or comply with any COURT ORDER I shall appear in court prior to the due date to request an extension. I understand that I could be sent to collection and a \$100.00 FTP fee will be added to the fine and possible drivers license being suspended. Failure to comply with any COURT ORDER will result in the issuance of a BENCH WARRANT for my immediate arrest.

John Kephart [Redacted] _____
Defendants Signature DOD Social Security No. _____

Street Address 1616 Loring City Winnemucca State NV Zip 89445

Mailing Address 1616 Loring City Winnemucca State NV Zip 89445

UNION TOWNSHIP JUSTICE COURT
Box 1218
Winnemucca, Nevada 89446
(775) 623-6059
(775) 623-6439 Fax

Phone 723-2088

NO. 10-CR-00452

FILED

2010 JUN -4 PM 2:59

JUSTICE OF THE PEACE
MUNICIPAL JUDGE

BY *C. Gomez* CLERK

IN THE JUSTICE'S COURT OF UNION TOWNSHIP

COUNTY OF HUMBOLDT, STATE OF NEVADA

-ooo-

COUNTY OF HUMBOLDT,

Plaintiff,

CRIMINAL COMPLAINT

VS.

JOHN THOMAS KEPHART
4085 GOLDEN CIRCLE
WINNEMUCCA, NV 89445
DOB: [REDACTED]

Defendant. /

PERSONALLY APPEARED BEFORE ME, BRIAN WILLIAMS, Chief Deputy District Attorney, who first being duly sworn, complains and says that the Defendant above-named has within the County of Humboldt, State of Nevada, committed a certain crime which is described as follows:

COUNT I

1st offence

DOMESTIC BATTERY WITH ONE PRIOR CONVICTION
WITHIN THE LAST SEVEN YEARS,

PS

A MISDEMEANOR

AS DEFINED BY NRS 200.485, 33.018 AND 200.481

That the Defendant did knowingly, willfully and unlawfully use force and violence upon a person, in the following manner, to-wit: that on or about the 3rd day of June, 2010, at or near the location of Golden

1 Circle, Winnemucca, County of Humboldt, State of
2 Nevada, the Defendant grabbed Shyla Haberly, with whom
3 he co-habits, by the shoulders and pushed her onto the
4 couch, causing her to hit her head,

5 Further, that said Defendant has committed a like
6 offense within the last seven (7) years, and that said
7 offense resulted in a conviction, as follows:

8 DATE OF OFFENSE/
9 DATE OF CONVICTION

COURT, COUNTY, STATE

11/28/2009

Union Township Justice Court

05/19/2010

Humboldt County, Nevada

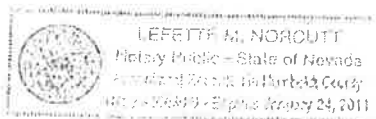
10 That complainant knows that said crime occurred and
11 that the Defendant, JOHN THOMAS KEPHART, committed the
12 same based upon the following: because complainant is
13 the Chief Deputy District Attorney, and is in the
14 possession of a crime report or report of
15 investigation written by DAMON KUSKIE, known to
16 complainant to be a Deputy with the HUMBOLDT COUNTY
17 SHERIFF'S OFFICE.

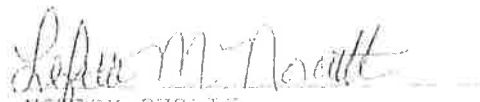
18 All of which is contrary to the form of the Statute in such
19 cases made and provided, and against the peace and dignity of
20 the State of Nevada. Said Complainant, therefore, prays that a
21 warrant and/or summons may be issued in the name of said
22 Defendant above-named and dealt with according to law.

23 Furthermore, pursuant to NRS 239B.030., the undersigned
24 hereby affirms this document does not contain the social
25 security number of any person.

26 
27 BRIAN WILLIAMS
28 Chief Deputy District Attorney

SUBSCRIBED AND SWORN to before me this 4th day of
June, 2010.




NOTARY PUBLIC

Date: 10/01/2015 14:09:57.9
MIR5925

Docket Sheet

Page: 1

Judge: NORCUTT, LETTY

Case No. 10 CR 00452 6F
Ticket No.
CTN:

STATE OF NEVADA VS

By:

KEPHART, JOHN T
938 MELARKEY ST
WINNEMUCCA, NV 89445
4083 GOLDEN CIRCLE
WINNEMUCCA, NV 89445
528 1/2 HANSON ST
WINNEMUCCA, NV 89445
Dob: [REDACTED]
Lic: [REDACTED]

DFNDT

By:

Sex: M
Sid:

Place:

Make:

Year:

Accident:

Type:

Venue:

Location: HU

Bond:
Type:

Set:
Posted:

HUMBOLDT COUNTY DISTRICT
ATTORNEY'S OFFICE
WILLIAMS, BRIAN

CPLNT

PTY, CPLNT

Charges:

Ct.1 200.405 DOMESTIC BATTERY SECOND OFFENSE GUILTY PLEA W/SENT BEFORE TRIAL

Offense Dt: 06/03/2010 Cvt:

Arrest Dt: 06/03/2010

Comments: D.A. ROSSELL SMITH AMENDED THIS CHARGE TO A FIRST OFFENSE IN OPEN COURT.

Sentencing:
Ct.1 Sentence Suspended Credit:
Jail (Days)
Fines
Costs
Restitution
Probation(Mo) Expires:
Comm Svc (M)
REMARKS:

No.	Filed	Action	Operator	Fine/Cost	Due
1	06/04/10	ARRAIGNMENT HEARING HELD	CGOMEZ	0.00	0.00
2	06/04/10	DEFENDANT ADVISED OF RIGHTS, AND HIS RIGHT TO COUNSEL THE DEFENDANT PLED NOT GUILTY HE INFORMED THE COURT HE WOULD RETAIN HIS OWN ATTORNEY A TRIAL DATE OF JULY 29, 2010 AT 9:AM WAS SET	CGOMEZ	0.00	0.00
3	06/07/10	BENCH TRIAL SCHEDULED Event: BENCH TRIALS (UNION) Date: 07/29/2010 Time: 9:00 am Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT Result: HEARING HELD Result: HEARING HELD	CGOMEZ		0.00
4	06/07/10	ARREST BOND INFORMATION Arrest Bond Added to Case with: Action Code: DOMESTIC BATTERY SECOND OFFENSE Arrest Date: 06/07/2010 Bond Status: ACTIVE BOND Status Date: 06/07/2010 Blanket Bond: Yes Okay to Apply: No Bond Type: SURETY BOND Bond Amount: 5000 Bond/Pwr No : SS-5 07553 Bonding Co.: E-Z CUT BAIL BONDS Insurance Co.: AMERICAN CONTRACTORS INDEMNITY CO	CGOMEZ		0.00

Date: 10/01/2015 14:09:58.0
MJKRS925

Docket Sheet

Page: 2

No.	Filed	Action	Operator	Fine/Court	Oue
5	06/07/10	RAIL BOND PROCESSING FEE Receipt: 50083 Date: 06/07/2010	HJONES	40.00	0.00
6	06/25/10	NOTICE OF WITNESSES FILED:DAMON KUSKIE, SHAYLA HABERLE, TONY CANTWELL	SMOCK	0.00	0.00
7	07/29/10	COUNTY FINE \$200 - 299.99 Charge #1: DOMESTIC BATTERY SECOND OFFENSE Receipt: 54156 Date: 11/19/2010 Receipt: 54917 Date: 12/23/2010	DLOHR	200.00	54.00
8	07/29/10	\$80.00 ADMINISTRATIVE ASSESSMENT FEE (PRIOR TO MARCH 12, 2010) Charge #1: DOMESTIC BATTERY SECOND OFFENSE Receipt: 52820 Date: 09/27/2010	DLOHR	80.00	0.00
9	07/29/10	SPECIALTY COURT FEE Charge #1: DOMESTIC BATTERY SECOND OFFENSE Receipt: 52820 Date: 09/27/2010	DLOHR	7.00	0.00
10	07/29/10	DOMESTIC VIOLENCE FEE Charge #1: DOMESTIC BATTERY SECOND OFFENSE Receipt: 52820 Date: 09/27/2010 Receipt: 54156 Date: 11/19/2010	DLOHR	35.00	0.00
11	07/30/10	HEARING HELD. D.A. RUSSELL SMITH AMENDED THE CHARGE TO DOMESTIC BATTERY -1ST OFFENSE AS HE COULDN'T PROVE THE PRIOR DOMESTIC BATTERY. THE PRIOR IS LISTED IN COMPLAINT AND WE GAVE THE D.A.'S OFFICE A CERTIFIED COPY OF IT. THE DEFENDANT PLED GUILTY TO DOMESTIC BATTERY - 1ST OFFENSE. HE WAS SENTENCED TO 30 DAYS JAIL WITH 28 DAYS JAIL STAYED AND 2 DAYS JAIL TO DO BY AUGUST 29, 2010; 48 HOURS COMMUNITY SERVICE BY AUGUST 29, 2010; 26 SESSION OF COUNSELING WITH MONTHLY REPORTS, TO ENROLL ON AUGUST 6, 2010; TO PAY A FINE OF \$200.00 + \$87.00 A A + \$35.00 SPECIAL ASSESSMENT FEE; AND NO ALCOHOL OR DRUG FOR 1 YEAR.	GGABIOLA	0.00	0.00
12	09/14/10	LOI LETTER SENT KEPHART, JOHN T was sent notice for \$ 54.00 Printed on 09/14/2010 09:21:49	DLOHR	0.00	0.00
13	10/26/10	DOMESTIC VIOLENCE COUNSELING REPORT OF NON-COMPLIANCE HIS RECORDS WILL BE CLOSED. HE WILL NEED TO START ALL OVER AND PAY THE BACK FEES	SMOCK	0.00	0.00
14	11/03/10	DOMESTIC VIOLENCE COUNSELING REPORT RECEIVED (ONION) NO SHOW FOR 4 SESSIONS, NEEDS SHOW CAUSE	SMOCK	0.00	0.00
15	11/16/10	LOI LETTER SENT KEPHART, JOHN T was sent notice for \$ 64.00 Printed on 11/16/2010 08:59:27	DLOHR	0.00	0.00
16	12/14/10	LOI LETTER SENT KEPHART, JOHN T was sent notice for \$ 8.00 Printed on 12/14/2010 08:06:11	DLOHR	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
17	12/23/10	CREDIT CARD FEE Receipt: 54917 Date: 12/23/2010	DLOHR	3.00	0.00
18	12/27/10	DOMESTIC VIOLENCE COUNSELING REPORT RECEIVED (UNION)/DEFENDANT HAS ATTENDED 1 MEETING	SMOCK	0.00	0.00
19	02/22/11	LOI LETTER SENT KEPHART, JOHN T was sent notice for \$ 53.00 Printed on 02/22/2011 09:14:56.	DLOHR	0.00	0.00
20	02/25/11	DOMESTIC VIOLENCE COUNSELING REPORT RECEIVED (UNION)UNABLE TO EVALUATE	SMOCK	0.00	0.00
21	03/31/11	WINNEHUCCA BATTERER'S INTERVENTION REPORT - UNABLE TO EVALUATE - HE HAS SCHEDULED AN INDIVIDUAL SESSION IN APRIL	GGABIOLA	0.00	0.00
22	04/12/11	ORDER TO SHOW CAUSE HEARING SET Event: ORDRR TO SHOW CAUSE (UNION) Date: 05/16/2011 Time: 1:15 pm Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT Result: HEARING VACATED	HJONES	0.00	0.00
23	05/02/11	DOMESTIC BATTERY COUNSELING REPORT - FAIR	HJONES	0.00	0.00
24	05/09/11	COMMUNITY SERVICE COMPLETED ON 6/22/10	HJONES	0.00	0.00
25	05/16/11	HEARING VACATED The following event: ORDER TO SHOW CAUSE (UNION) scheduled for 05/16/2011 at 1:15 pm has been resulted as follows: Result: HEARING VACATED Judge: WAMBOLT, GENE Location: UNION TOWNSHIP JUSTICE COURT	HJONES	0.00	0.00
26	05/31/11	DOMESTIC BATTERY COUNSELING REPORT RECEIVED - MEETINGS ATTENDED TO DATE: 6	HJONES	0.00	0.00
27	07/06/11	DOMESTIC BATTERY REPORT - FAIR	GGABIOLA	0.00	0.00
28	07/29/11	PROGRESS REPORT FROM BATERER'S INTERVENTION - NEED SHOW CAUSE HEARING	GGABIOLA	0.00	0.00
29	09/09/11	REPORT FROM DOMESTIC VIOLENCE COUNSELING - GOOD - OWES \$135.00	GGABIOLA	0.00	0.00
30	10/04/11	REPORT FROM DOMESTIC VIOLENCE COUNSELING - POOR-FAIR - EVERYTHING CURRENT	GGABIOLA	0.00	0.00
31	12/12/11	OCTOBER MONTHLY REPORT FROM DOMESTIC BATTERY COUNSELING - HASN'T ATTENDED/	GGABIOLA	0.00	0.00
32	12/12/11	NOVEMBER DOMESTIC VIOLENCE COUNSELING REPORT - FAIR-	GGABIOLA	0.00	0.00
33	01/26/12	BATTERS INTERVENTION MONTHLY PROGRESS REPORT RECEIVED FAIR	HJONES	0.00	0.00
34	04/02/12	REPORT FROM PAH BROWN TO DATE HAS ATTENDED 19 SESSIONS FAIR/GOOD	COOPER	0.00	0.00

Date: 10/01/2015 14:09:58.0
MJRS5925

Docket Sheet

Page: 4

No.	Filed	Action	Operator	Fine/Cost	Due
35	04/26/12	REPORT FROM DOMESTIC BATTERERS COUNSELING- FAIR/ GOOD MEETINGS ATTENDED 22	CGOMEZ	0.00	0.00
36	06/08/12	DOMESTIC BATTERERS INTERVENTION COUNSELING HAS ATTENDED 24 SESSIONS	CGOMEZ	0.00	0.00
37	06/21/12	DOMESTIC VIOLENCE COUNSELING COMPLETED (UNION)	CGOMEZ	0.00	0.00
38	01/07/13	JUDGE CASELOAD TRANSFER FOR SPECIFIC JUDGE DETAILS, SEE JUDGE DEVIATION DISPLAY SCREEN PATH: SELECT THE CASE DISPOSITION (DISP.) BUTTON> OPEN THE CASE DISPOSITION> SELECT THE JUDGE DEVIATION (JUDGE DEV.) BUTTON	LHUB	0.00	0.00
39	04/23/13	PHONE CALL - CASSIE FORM THE DA'S OFFICE CALLED. THE DEFENDANT HAS PAID \$1,000 TOWARD RESTITUTION AND WILL CONTINUE TO MAKE MONTHLY PAYMENTS. IF HE FAILS TO MAKE PAYMENTS CASSIE WILL REQUEST A SHOW CAUSE HEARING AT THAT POINT.	HJONES	0.00	0.00

Total: 365.00 54.00

Totals By:	AA FEE	80.00	0.00
	BOND FEE	40.00	0.00
	COST	3.00	0.00
	DOMESTIC VIOLENCE	35.00	0.00
	FEE		
	FINE	200.00	54.00
	INFORMATION	0.00	0.00
	SPECIALTY COURT	7.00	0.00
	FEE		

*** End of Report ***

FILED

JUN 04 2010

No. 10-CR-00452

JUSTICE OF THE PEACE
MUNICIPAL JUDGE

BY Agnes J CLERK

IN THE JUSTICE'S COURT OF UNION TOWNSHIP
COUNTY OF HUMBOLDT, STATE OF NEVADA

THE COUNTY OF HUMBOLDT,
Plaintiff,

vs.

JOHN THOMAS KEPHART JK
Defendant.

Charge: MISDEMEANOR DOMESTIC BATTERY 2nd offense

I, the Defendant in the above-entitled action do hereby state that I have been informed of my constitutional Rights as follows:

That I am entitled to an attorney at all stages of the proceedings against me. That if I cannot afford an attorney, one will be appointed to represent me at no cost to me. I understand that if the Court previously determines that I will not be given a jail sentence if found guilty of the charged offenses, I may not be appointed an attorney; JK

That I am entitled to a public trial; JK

That I am entitled to a speedy trial, within sixty days of the arraignment on the complaint filed against me, unless for good cause a trial date cannot be set within this sixty day period; JK

That I am entitled to face and hear all the witnesses who may testify against me and to cross examine each witness; JK

That I have the right to present evidence in my own behalf; JK

That I may have the Court subpoena witnesses to testify in my behalf or compel records to be brought to Court in my behalf at no expense to me; JK

That I may be a witness at my own trial if I choose to testify. However, I understand that I cannot be compelled to testify against myself. If I decide to testify, I will be subject to cross examination by the prosecutor; JK

That I am entitled to be released on reasonable bail; JK \$5000

1 That the maximum penalty for the offense with which I am charged is up to six
2 months in the County Jail or a fine of up to \$1,000.00 or both such fine and
3 imprisonment; JK

4 That anything I say, can and will be used against me in a Court of law; JK

5 By placing my signature below, I acknowledge that I have read and understood
6 the above mentioned rights. Further, that I acknowledge that these rights have been
7 read aloud to me in open court and I was given the opportunity to ask questions
8 concerning these rights.

9 June 4th 10
Date

John [Signature]
Defendant

10 PLEA OPTIONS

11 GUILTY: I did commit the offense/ offenses as charged.

12 NOT GUILTY: I did not commit the offense/ offenses as charged.

13 NOLO CONTENDRE (NO CONTEST): I do not wish to contest the offense/offenses
as charged.

14 I have had the above Plea Options explained to me and I acknowledge that I understand
15 these options. JK

16 Therefore: I hereby

17 JK waive (give up) my right to be represented by a court appointed attorney;

18 JK request my right to an attorney, because I cannot afford one;

19 JK will retain an attorney; _____

20 I do hereby enter a plea of Not Guilty; freely, knowingly and voluntarily.

21 June 4th 10
22 Date

John [Signature]
23 Defendant

[Signature] 11/17
24 Witness

1 ATTEST:

2 THIS IS TO CERTIFY that the foregoing wherein the above-named
3 Defendant was charged with a Misdemeanor, to-wit: the crime of
4 DOMESTIC BATTERY 2nd offense

5 was voluntarily signed by the said defendant in the presence of
6 Judge GENE WAMBOLT at Winnemucca, Nevada, on
7 this 4 day of June, 2010.

8 Gene Wambolt
9 JUSTICE OF THE PEACE,
10 Union Township, County of Humboldt,
11 State of Nevada

IN THE JUSTICE COURT OF UNION TOWNSHIP
COUNTY OF HUMBOLT, STATE OF NEVADA.

THE STATE OF NEVADA,
Plaintiff,

vs.

JOHN THOMAS KEPHART JK
Defendant.

CASE NO.: 10-CR-00452

DOMESTIC BATTERY ~~offense~~ offense

Battery/Domestic Violence: ADMONISHMENT OF RIGHTS

(For offenses committed on or after October 1, 2007)

I am the Defendant in this case. I am charged with battery constituting domestic violence in having willfully and unlawfully committed an act of force or violence upon my spouse, former spouse, a person to whom I am related by blood or marriage, a person with whom I am or was actually residing, a person with whom I have had or am having a dating relationship, a person with whom I have a child in common, my minor child, or the minor child of one of these persons (in violation of NRS 33.018/NRS 200.485).

I AM AWARE THAT I HAVE EACH OF THE FOLLOWING RIGHTS AND THAT I WILL BE WAIVING THESE RIGHTS IF I PLEAD GUILTY OR NOLO CONTENDERE:

1. The right to a speedy trial;
2. The right to require the State to prove the charge(s) against me beyond a reasonable doubt;
3. The right to confront and question all witnesses against me;
4. The right to subpoena witnesses on my behalf and compel their attendance;
5. The right to remain silent and not be compelled to testify if there were a trial; and
6. The right to appeal my conviction except on constitutional or jurisdictional grounds.

I AM ALSO AWARE THAT BY PLEADING GUILTY OR NOLO CONTENDERE I AM ADMITTING THE STATE COULD FACTUALLY PROVE THE CHARGE(S) AGAINST ME. I AM ALSO AWARE THAT MY PLEA OF GUILTY OR NOLO CONTENDERE MAY HAVE THE FOLLOWING CONSEQUENCES:

1. I understand the State will use this conviction, and any other prior conviction from this or any other state which prohibits the same or similar conduct, to enhance the penalty for any subsequent offense.
2. I understand that as a consequence of my plea of guilty or nolo contendere, if I am not a citizen of the United States, I may, in addition to other consequences provided for by federal law, be removed, deported, excluded from entry into the United States, or denied naturalization.
3. I understand that if I am convicted of a misdemeanor or felony that constitutes domestic violence pursuant to NRS 33.018, my possession, shipment, transportation, or receipt of a firearm or ammunition may constitute a felony pursuant to NRS 202.360 or federal law.
4. I understand that sentencing is entirely up to the court and the following range of penalties for committing the offense described above will apply (unless a greater penalty is provided pursuant to NRS 200.481):

DEFENDANT'S INITIALS: JK

DEFENDANT'S ATTORNEY'S INITIALS (if applicable):

FIRST OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 2 days in jail but not more than 6 months; at least 48 hours but not more than 120 hours, of community service; a fine of not less than \$200, but not more than \$1,000, in addition to certain fees and assessments that are required by statute; mandatory participation in weekly counseling sessions of not less than 1 1/2 hours per week (or bi-weekly counseling sessions for an equivalent number of hours if I reside more than 70 miles from the nearest location at which counseling services are available) for not less than 6 months, but not more than 12 months, at my expense; in the Court's discretion, the Court may order me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay.

SECOND OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 10 days in jail but not more than 6 months; at least 100 hours, but not more than 200 hours, of community service; a fine of not less than \$500, but not more than \$1,000, in addition to certain fees and assessments that are required by statute; mandatory participation in weekly counseling sessions of not less than 1 1/2 hours per week (or bi-weekly counseling sessions for an equivalent number of hours if I reside more than 70 miles from the nearest location at which counseling services are available) for 12 months, at my expense; in the Court's discretion, the Court may order me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay.

THIRD OFFENSE OR ANY SUBSEQUENT OFFENSE WITHIN 7 YEARS (CATEGORY C FELONY):

A category C felony punishable by a sentence of imprisonment in the Nevada State Prison for at least 1 year but not more than 5 years; a possible fine of not more than \$10,000, in addition to certain fees and assessments that are required by statute; in the Court's discretion, the Court may require me to participate in an alcohol or drug treatment program at my expense; and, in the Court's discretion, if it appears from information presented to the Court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence, the Court may refer the child to an agency which provides protective services, and, if that occurs, the Court will require me to reimburse the agency for the costs of any services provided, to the extent of my ability to pay. A third or subsequent offense is not probationable.

ALL DEFENDANTS MUST INITIAL EITHER #1 or #2 BELOW-DO NOT INITIAL BOTH:

1

I am represented by an attorney in this case. My attorney has fully discussed these matters with me and advised me about my legal rights. My attorney is _____.

2

I have declined to have an attorney represent me and I have chosen to represent myself. I have made this decision even though there are dangers and disadvantages in self-representation in a criminal case, including but not limited to, the following:

- (a) Self-representation is often unwise, and a defendant may conduct a defense to his or her own detriment;
- (b) a defendant who represents himself is responsible for knowing and complying with the same procedural rules as lawyers, and cannot expect help from the judge in complying with those procedural rules;
- (c) a defendant representing himself will not be allowed to complain on appeal about the competency or effectiveness of his or her representation;
- (d) the state is represented by experienced professional attorneys who have the advantage of skill, training and ability;
- (e) a defendant unfamiliar with legal procedures may allow the prosecutor an advantage, may not make effective use of legal rights, and may make tactical decisions that produce unintended consequences; and
- (f) the effectiveness of the defense may well be diminished by defendant's dual role as attorney and accused.

<u>[Signature]</u> DEFENDANT'S SIGNATURE	<u>Feb 29 2010</u> DATE OF BIRTH	<u>Feb 29 2010</u> DATE
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I HAVE REVIEWED THIS ADMONISHMENT WITH MY CLIENT AND WE HAVE DISCUSSED THE RIGHTS HE/SHE IS WAIVING AND THE CONSEQUENCES OF HIS/HER PLEA OF GUILTY/NOLO CONTENDERE TO THE BATTERY/DOMESTIC VIOLENCE CHARGE.

DEFENDANTS ATTORNEY (IF APPLICABLE)

[Signature]
Justice of the Peace

BAR NUMBER

July 27, 2010
Date

Certified to be a true and correct copy of the
original on file in this office.

Date 10-01-15

Annette Pita, court clerk
Letty Norcutt, Justice of the Peace
Union Township, County of Humboldt,
State of Nevada

1 CODE
Christopher J. Hicks
2 #7747
P.O. Box 11130
3 Reno, NV 89520-3083
(775) 328-3200
4 Attorney for Plaintiff

5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR16-0298

11 v.

Dept. No. 7

12 JOHN THOMAS KEPHART,

13 Defendant.

14 _____ /
15
16 RESPONSE TO OBJECTION TO ADMISSION OF PRIOR CONVICTIONS AS A FELONY
17 ENHANCEMENT AND MOTION TO DISMISS

18 COMES NOW, the State of Nevada, by and through CHRISTOPHER J.
19 HICKS, District Attorney of Washoe County, and MICHAEL BOLENBAKER,
20 Deputy District Attorney, and hereby files its Response to Objection to
21 Admission of Prior Convictions as a Felony Enhancement and Motion to
22 Dismiss, which is made and based upon the attached Points and
23 Authorities

24 CASE PROCEDURE

25 On February 24, 2016, an Indictment was filed charging John
26 Kephart (hereinafter "Defendant") with one count of Battery Domestic

1 Violence by Strangulation and one count of felony Battery
2 Constituting Domestic Violence. On January 11, 2017, the State filed
3 an Information Superseding Indictment removing the Battery Domestic
4 Violence by Strangulation count with the felony Battery Domestic
5 Violence charge remaining.

6 The State alleged two prior offenses in the Information
7 Superseding Indictment; one from May 19, 2010 and one from July 29,
8 2010, both in Humboldt County, Nevada. On January 12, 2017,
9 Defendant filed the instant objection. The State would note this
10 filing is almost 11 months after the filing of the original
11 indictment. Defendant does not contest the May 19, 2010 prior.

12 FACTS

13 On June 4, 2010, Defendant was charged by way of Criminal
14 Complaint with one count of Domestic Battery with One Prior
15 Conviction within the last Seven Years in Humboldt County Nevada.
16 The complaint alleged a prior conviction from May 19, 2010, which is
17 the same prior offense the State has alleged in the instant case.

18 On July 29, 2010, Defendant entered a plea of guilty to Domestic
19 Battery, 1st Offense. Defendant signed and initialed a
20 Battery/Domestic Violence: Admonishment of Rights and was sentenced
21 to 2 days in jail, 48 hours community service, a total of \$322 in
22 fines and administrative assessment fees and a 26 session Anger
23 Management course.

24 On January 18, 2017, Defendant was convicted of Domestic Battery
25 after a two day jury trial.

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In Speer v. State, Speer pled guilty to a DUI third offense with the State using a prior felony DUI conviction as a prior. 116 Nev. 677 (2000). Speer argued that because the prior used was not a "first" or "second" offense that it could not be used as an enhancement. Id. The Court disagreed with Speer holding that any two prior offenses may be used to enhance a subsequent DUI so long as they occurred within seven years of the principal offense. Id. at 679-680. The Court noted that in previous cases including Smith, it has held that a second DUI conviction may not be used to enhance a conviction for a third DUI arrest where the second conviction was obtained pursuant to a guilty plea agreement specifically permitting the defendant to enter a plea of guilty to a first offense DUI and limiting the use of the conviction for enhancement purposes. Id. at 680. That rule is not applicable when there is no plea agreement

1 limiting the use of the prior conviction for enhancement purposes.

2 Id.

3 Here, we have two considerations clearly showing that Defendant
4 falls under the Speer analysis and not the Smith analysis. First,
5 Defendant signed an Admonishment of Rights form that in bold language
6 states "I understand the State will use this conviction, and any
7 other prior conviction from this or any other state which prohibits
8 the same or similar conduct, to enhance the penalty for any
9 subsequent offense." Therefore, Defendant was put on notice that his
10 July 29, 2010 conviction would be used for enhancement purposes.

11 Additionally, nowhere in the court minutes does it state that
12 the plea agreement limited the use of the conviction for enhancement
13 purposes. The court minutes state that the assigned prosecutor simply
14 did not have the certified copy of the first offense from May 19,
15 2010 despite the court minutes reflecting that the court had given
16 the prosecutor a copy of it. Therefore, it is clear from the minutes
17 that the charge was reduced simply because at the time of the
18 sentencing, the State could not prove the May 19, 2010 prior offense
19 to enhance it to a second offense resulting in the reduction to a
20 first offense. Nothing suggests that this was done with the specific
21 idea of limiting the use of the conviction for future allegations of
22 domestic violence.

23 CONCLUSION

24 For the foregoing reasons, the State asks the Court admit both
25 prior convictions and sentence Defendant on a felony charge.

26 //

1 AFFIRMATION PURSUANT TO NRS 239B.030

2 The undersigned does hereby affirm that the preceding
3 document does not contain the social security number of any person.

4 Dated this 25th day of January, 2017.

5 CHRISTOPHER J. HICKS
6 District Attorney
7 Washoe County, Nevada

8
9 By /s/ Michael Bolenbaker
10 MICHAEL BOLENBAKER
11 10520
12 Deputy District Attorney

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DATED this 25th day of January, 2017.

/s/ Kim Pace
KIM PACE

1 CODE #3795
2 WASHOE COUNTY PUBLIC DEFENDER
3 CHRISTINE BRADY, BAR #11065
4 P. O. BOX 11130
5 RENO, NV 89520-0027
6 (775) 337-4800
7 ATTORNEY FOR DEFENDANT

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10
11 IN AND FOR THE COUNTY OF WASHOE

12 THE STATE OF NEVADA,

13 Plaintiff,

14 v.

Case No. CR16-0298

15 JOHN THOMAS KEPHART,

Dept. No. 7

16 Defendant.
17 _____/

18 **REPLY IN SUPPORT OF OBJECTION TO ADMISSION OF PRIOR CONVICTION**
19 **AS A FELONY ENHANCEMENT**

20 COMES NOW JOHN THOMAS KEPHART, by and through counsel, Washoe County
21 Public Defender, JEREMY T. BOSLER, and Deputy Public Defender CHRISTINE BRADY,
22 and hereby serves this Reply in Support of his earlier-filed OBJECTION TO ADMISSION OF
23 PRIOR CONVICTION AS A FELONY ENHANCEMENT. This Reply is made and based
24 upon the Constitutional rights to Due Process, Fair Trial and Effective Assistance of Counsel,
25 the record of proceedings to date, the Objection on file herein and the following. U.S. Const.
26 Fifth and Sixth Amendments, Nev. Const. Art. 1, Section 8.

ARGUMENT

The United States Supreme Court has made clear every element of a charged offense must
be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25L.Ed.2d

1 368 (1970). Therefore, the State has the burden to prove beyond a reasonable doubt all of the
2 elements of the alleged offense, including the validity of any prior offenses being used for
3 enhancement purposes. To allow less would permit the State to avoid its constitutionally
4 imposed burden of proof to convict Mr. Kephart of a felony offense. This would clearly
5 contravene Mr. Kephart's rights under the Nevada and United States Constitutions to due
6 process of law and proper notice. U.S. Const. Fifth, Sixth and Fourteenth Amendments;
7 Nevada Const., Art 1, Sec 8.

8 Once the State has provided proof of two prior domestic battery convictions, the burden
9 then is on the defendant to rebut the validity of a prior conviction. Dressler v. State, 107 Nev.
10 686, 693, 819 P.2d 1288 (1991). Mr. Kephart has demonstrated that there is sufficient evidence
11 to rebut the validity of the prior conviction as an enhancement simply by reviewing the written
12 court record.

13 A prior conviction is admissible as long as the court records reflect that the spirit of
14 constitutional principals were respected. Davenport v. State, 112 Nev. 475, 477, 915 P.2d 878
15 (1996). However, the conviction is not admissible as an enhancement under certain
16 circumstances, such as if the conviction was the result of negotiations or if it would offend the
17 spirit of constitutional principals. Smith v. State, 105 Nev. 293, 774 P.2d 1037 (1989). The
18 court record sufficiently provides enough evidence to suggest that the nolo contendere plea and
19 conviction were a result of negotiations or that the parties were fully aware of the prior
20 conviction and allowed Mr. Kephart to plead to a first offense anyway. In light of all of the
21 facts in this matter, allowing the State to use the previous conviction to enhance the current
22 offense would offend the spirit of Constitutional principals and judicial integrity.

23 In State v. Grover, 109 Nev. 1019, 862 P.2d 421 (1993), the State was allowed to use
24 the second "first offense" conviction as an enhancement because the record failed to show that
25 the prosecuting authority had any knowledge of the prior conviction. The case at bar is
26 distinguished from Grover because the prosecuting attorney had knowledge of the prior

1 conviction, as evidenced by the court record. However, the Grover analysis can be applied to
2 the case at bar to support a finding opposite that of Grover using the distinguishing fact of
3 requisite prior knowledge.

4 **CONCLUSION**

5 Mr. Kephart has constitutional rights to due process and fair trial. The record clearly
6 supports Mr. Kephart's contention that he was convicted of a first offense with the parties' full
7 knowledge of the prior conviction. Since the oral record has not been preserved by the courts,
8 Mr. Kephart is now subject to a felony prosecution. The State should not be allowed to benefit
9 from the lack of an oral record.

10 Based upon the foregoing, it is respectfully requested that the Court deny the admission
11 of the prior domestic battery convictions as a felony enhancement.

12 **AFFIRMATION PURSUANT TO NRS 239B.030**

13 The undersigned does hereby affirm that the preceding document does not contain the
14 social security number of any person.

15 DATED this 8th day of February, 2017.

16 JEREMY T. BOSLER
17 Washoe County Public Defender

18 By /s/CHRISTINE BRADY
19 CHRISTINE BRADY
20 Deputy Public Defender
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Washoe County Public
Defender and that on this date I served via electronic service, a copy of the foregoing
document, to:

MICHAEL BOLENBAKER
Deputy District Attorney

DATED this 8th day of February, 2017.

/s/ LINDA GRAY
LINDA GRAY

1 Code No. 4185

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4
5 IN THE SECOND JUDICIAL DISTRICT COURT
6 OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8 THE HONORABLE WILLIAM A. MADDOX

9 -o0o-

10 STATE OF NEVADA,)
11 Plaintiff,) Case No. CR16-0298
12 vs.) Dept. No. 15
13 JOHN THOMAS KEPHART,)
14 Defendant.)
15 _____)

16 TRANSCRIPT OF PROCEEDINGS

17 Motion

18 Monday, February 13, 2017

19 RENO, NEVADA

20
21
22
23
24 Reported By:

RANDI LEE WALKER, CCR #137

1 APPEARANCES:

2
3 For the State:

4 WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE
5 By: MICHAEL BOLENBAKER, DDA.
6 ONE SOUTH SIERRA STREET
7 RENO, NV. 89520

8 For the Defendant:

9 WASHOE COUNTY PUBLIC DEFENDER'S OFFICE
10 By: CHRISTINE BRADY, DPD.
11 350 S. CENTER STREET
12 RENO, NV. 89520
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INDEX OF EXAMINATIONS

WITNESSES
JOHN KEPHART

DR
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CR
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REDR
31/33

RECR
32

1 RENO, NEVADA, MONDAY, FEBRUARY 13, 2017, 8:25 A.M.

2 -oOo-

3
4 THE COURT: This is Case Number CR16-0298, State
5 of Nevada versus John Thomas Kephart.

6 This is time and place set for a hearing in
7 regards to prior convictions. I suppose it could make a
8 difference how it's characterized: as a ruling on
9 evidence, or as a suppression motion. I say that,
10 because I think the State has a right to appeal from a
11 suppression motion immediately. I don't know that you
12 have a right to appeal from a ruling on evidence until
13 after sentencing. So maybe you need to address that when
14 you get up.

15 It's your motion. Why don't the parties identify
16 themselves.

17 MS. BRADY: Christine Brady, on behalf of Mr.
18 John Kephart, who is present and out of custody.

19 MR. BOLENBAKER: Mike Bolenbaker, for the State.

20 MS. BRADY: Thank you, Your Honor. Initially
21 when I filed it, I'm thinking of this as a jurisdictional
22 issue.

23 Just to give you some procedures, a little bit of
24 background about how this case sort of made its way to

1 trial. I was not initially on this case. It was maybe
2 back in 2015, initially, in Justice Court. It was
3 initially in Justice Court, late-2015. Mr. Kephart had a
4 private attorney. I don't have the details of what
5 happened in that case, so Mr. Bolenbaker can illuminate
6 the Court on that. But that case -- I believe it was set
7 for a preliminary hearing and was ultimately dismissed in
8 Justice Court. And then an Indictment was filed, I
9 believe, in January of 2016.

10 THE COURT: February 24th, 2016.

11 MS. BRADY: January 24th, 2016.

12 THE COURT: February.

13 MS. BRADY: February, 2016. And the Indictment
14 that was issued was Count I, domestic battery by
15 strangulation; and Count II, domestic battery, third.

16 Mr. Kephart, I don't know if he had private
17 counsel or -- there was some confusion about whether his
18 private counsel was still going to represent him.

19 But on June 5th, 2017, Judge Flanagan ordered for
20 the Public Defender's Office to represent Mr. Kephart.
21 Mr. Kephart appeared without counsel, it looks like, on a
22 hearing on May 11th, 2016.

23 And then I made my first appearance in the case
24 on June 22nd, 2016, at which time I was really working

1 with Mr. Kephart to defend against the domestic battery by
2 strangulation. That was one of the main charges we
3 were -- that was Count I -- litigating.

4 On January 11th, a week or so before trial, the
5 State filed an Information Superseding Indictment alleging
6 just the third domestic battery.

7 So the issue, from my analysis, is whether or
8 not, really, there's even -- A, whether there's
9 jurisdiction. And I think you addressed the
10 jurisdictional issue right before trial, but that's why I
11 was -- one of the reasons why I wanted to address this
12 before trial is, that I don't know what was presented to
13 the Grand Jury in terms of the priors. I don't know --
14 you know, the burden of proof is lower there. But there's
15 a jurisdictional issue as to whether or not this is really
16 a third domestic battery.

17 I'm looking at when I received the Information
18 Superseding Indictment. Of course now that I'm not faced
19 with a domestic battery by strangulation, I'm looking
20 through the priors and speaking with my client, I did
21 notice that in the prior he was represented by counsel in
22 his first -- now I'm going to talk a little bit about sort
23 of the procedure of him entering his plea.

24 His first plea that he entered, he had counsel,

1 he was represented by counsel, and reviewed everything
2 together. Then another complaint was filed against him in
3 union, and it was for an incident that actually preceded
4 the one he had just pled to. And he did not have an
5 attorney for the second one.

6 And in speaking with Mr. Kephart, he indicated to
7 me that he was pretty much negotiating directly with the
8 D.A., and the D.A. was allowing him, in their
9 negotiations, for him to enter: A, a no-contest plea and;
10 B, that this would count as another first.

11 And in support of that, it does show on the
12 judgment of conviction for both of them, and for the
13 subsequent one where he negotiated a first, it shows
14 domestic battery, first offense.

15 And in his mind, he believed that the next one
16 would be a second. And so on that basis, Your Honor, I'm
17 asking for -- it is my argument that the second domestic
18 battery to which he pled, that actually occurred prior to
19 the first one to which he pled, does not constitute a
20 valid second domestic battery for enhancement purposes,
21 pursuant to the negotiations, and my client's
22 understanding at the time.

23 And I will reserve any rebuttal, Your Honor.

24 THE COURT: Mr. Bolenbaker.

1
2 MR. BOLENBAKER: Thank you, Your Honor. I'm not
3 sure how to approach the evidentiary-versus-suppression
4 issue, so I guess I'll leave that to Your Honor.

5 What I will say, though, is that I don't
6 understand how the defendant could not be on notice, when
7 he signed a waiver that specifically says that this
8 conviction and any other conviction can be used against
9 you to enhance. And it gives him a clear description of
10 what would happen if he was to get another conviction for
11 domestic battery.

12 In the misdemeanor level, the only difference
13 between a domestic battery first, and domestic battery
14 second, is the maximum penalties. The domestic battery
15 second carries, obviously, a one-year counseling, higher
16 jail time, higher fines, things of that nature.

17 And I think what's very clear from the minutes
18 from the second offense back, I think, in 2010, is that,
19 for whatever reason, the State at that time did not have
20 the prior offense. It's clear from the Court minutes, it
21 says he amends the charge to domestic battery first, as he
22 couldn't prove the prior domestic.

23 The Court, in its wisdom, wanted to make sure
24 that everybody knew that they had given a copy to the

1 District Attorney's Office. It says there right in the
2 minutes. That clearly shows that there was no proof
3 issue, necessarily, on the charge; it was simply a matter
4 of an inability to actually prove up the prior offense, to
5 make it a second. So that's why it's reduced down to a
6 first. Not for enhancement purposes, but merely for
7 penalty purposes.

8 And I can tell you, I have a good feeling on
9 where the Nevada Supreme Court lies on this, because
10 there's two unpublished decisions, that I didn't put in my
11 motion, or response, because I don't think it's
12 appropriate to put unpublished opinions. But if you look
13 at these two decisions, they clearly make a distinction
14 between those that are specifically reduced for not only
15 penalty, but enhancement. And that's the Smith line of
16 cases, versus those that are simply reduced and are not
17 specifically reduced for penalty and enhancement.

18 I have copies up here. It's Kapetan versus
19 State, 126 Nev. 729, from 2010; and Tosh versus State, 385
20 P.3d 607, from 2016. I have copies, if you would like to
21 review them. And I have highlighted the relevant
22 portions. If I can approach.

23 MS. BRADY: I would like to see them. Can we get
24 another copy?

1 THE COURT: We will mark them as exhibits. If
2 you could make three copies.

3 MR. BOLENBAKER: I think the way the Nevada
4 Supreme Court is handling these is changing. I think at
5 first they were not supposed to be used as precedent.

6 I believe that the Supreme Court rules have
7 changed now, and the decisions that are coming out now,
8 that are unpublished, are actually allowed to be cited.

9 But I think it's a good direction on where they
10 believe -- the Nevada Supreme Court believes the
11 distinction lies, and that is that for a reduced charge
12 from a second to a first to be considered for a first for
13 an enhancement, it has to be specifically mentioned. And
14 that's clearly not in the minutes.

15 What is clear from the minutes is that they
16 simply just could not prove the prior, which all that
17 really does is just reduce the penalties.

18 That, combined with the idea that he signed a
19 waiver -- the whole purpose of the waiver is to put him on
20 notice. That's the whole idea of why we have in DUIs and
21 domestics: "Look at this waiver that shows you your rights
22 and what's going to happen to you in the future." That's
23 the whole point of waivers.

24 We don't have waivers on other misdemeanors. The

1 only reason we have the waiver is for this exact reason:
2 so that an individual can't come in now and say, "Wait a
3 minute. I wasn't sure. I didn't know." And we can come
4 back and say, "Wrong. You had a waiver. You had a waiver
5 that clearly explained to you what the rights were, and
6 what the future was going to hold for you."

7 So I wish that we had the transcript. I tried,
8 and tried to get it. There was no transcript. I tried to
9 contact to find out who the D.A. was at the time. He's no
10 longer there. So, I mean, I did make efforts to try and
11 dig deeper into exactly what happened.

12 But I think it's clear from the minutes that this
13 was not expressly reduced for enhancement purposes, which
14 is, I think, what is required under the Speer line of
15 cases, and what I have here in the Tosh and the Kapetan
16 decisions.

17 THE COURT: The problem I have on that argument
18 is that they consistently go through, if you look at --
19 and I'm looking at Exhibit 2. And at first, after I read
20 the cases that you cited, I thought: "Well." But if you
21 look at the criminal complaint, they specifically go
22 through and scratch out -- it was originally charged
23 domestic battery, with one prior conviction within the
24 last seven years, and they scratch it out and put "first

1 offense." And it's initialed by Smith -- I think was his
2 name -- the Deputy DA. And that's on page 1 of the
3 complaint.

4 And then if you look on the second page of that,
5 he goes through and scratches out -- I guess the second
6 page -- scratches out the section that says, "Further, the
7 said defendant has committed a like offense," blah, blah,
8 blah, blah. And they put a square box around it and
9 scratch that out, and then write out. And then the Deputy
10 DA initials that. And they have got the prior conviction,
11 they set it forth there, but he scratches it out.

12 And then you get down to the -- when he gets
13 sentenced -- no, the plea, and they scratch out "second"
14 and put "first" again, next to his initials.

15 And then if you go back up to page -- if you look
16 at the judgment of conviction, the Judge says he's guilty
17 of the first offense. Domestic battery, first offense, on
18 the very first page, and sentences him to a first-offense
19 punishment.

20 So it's pretty clear that everybody in that
21 courtroom considered this to be a first offense, and --

22 MR. BOLENBAKER: The way I respond to that is:
23 What else would they call it? If you don't have the prior
24 conviction, that's the normal nomenclature then for it to

1 be considered a first offense.

2 I think what sometimes happens is, is the State
3 has the burden in a lot of things in criminal law; right?
4 Burden of proof, to prove beyond a reasonable doubt.

5 THE COURT: They did not have the burden.

6 MR. BOLENBAKER: But this is actually one thing
7 where it says it has to specifically state that it was
8 limited for enhancement.

9 And, actually, I'll change my opinion on this.
10 But this Tosh, this actually does refer to it as a
11 suppression issue, if you read this.

12 But that's the one thing that it says, is that it
13 has to specifically say it's limited; which is the
14 opposite of what we would normally think in these kind of
15 situations.

16 Normally we would think: Well, if there was
17 ambiguity, we side with the defendant. Which is actually
18 not what they say here. They actually say it has to
19 specifically be limited for enhancement purposes.

20 And they actually make the distinction here:
21 "Entering a plea in this Tosh case, specifically
22 permitting the defendant to enter a plea of guilty --
23 however a plea agreement is reached, does not include an
24 understanding the underlying conviction cannot thereafter

1 be used for enhancement purposes, the conviction may be
2 used for such purpose without violating the plea
3 agreement, regardless of the official designation of the
4 prior offense."

5 And that's exactly what you're concerned about.
6 The exact thing that you're talking about is -- you're
7 concerned because it says "first offense."

8 This case tells you what the Nevada Supreme
9 Court -- the Appellate Court says that the actual
10 designation of "first offense" is not what they're looking
11 at.

12 What they're looking at is: Was that agreement
13 specifically limiting the State's ability to enhance it?
14 And that's not in the record.

15 I think we can all agree that there's nothing in
16 there that says -- from the minutes -- that this
17 conviction is hereafter specifically limiting the State
18 from using another conviction for a third offense. I
19 don't think anybody could argue that. That's not in the
20 minutes.

21 What this case says is that actual designation
22 and what you're concerned about is not what they are
23 looking at.

24 What they're looking at is: Is there any

1 language that says that the State was specifically
2 limited, as part of the plea bargain, from going back in
3 and charging the next one as a third? And that's not in
4 there. And that's what these line of cases say, because
5 it falls under that Speer line, not the Smith line.

6 So I think we can see where the higher courts are
7 looking at it. And I think it's the appropriate way to
8 look at it, because this is -- what we have to do is find
9 out: Was it specifically limited? And we don't have that
10 information here. And, thereafter, that, combined with
11 the idea that he signed a waiver, that clearly puts him on
12 notice. And that's what we're really concerned about is:
13 Was he on notice? -- and he was -- then this is a third
14 offense.

15 THE COURT: Let me read your cases here.

16 MS. BRADY: And may I respond?

17 THE COURT: Yes. Let me read these cases.

18 MS. BRADY: I will read them, too.

19 THE COURT: Have you read it?

20 MS. BRADY: I'm almost done. Thank you, Your
21 Honor.

22 May I have a couple more minutes?

23 THE COURT: Yes.

24 MS. BRADY: Yes, I have, Your Honor.

1 THE COURT: Go ahead.

2 MS. BRADY: Thank you.

3 THE COURT: They remanded this one case back, to
4 allow the defendant to create a record.

5 MS. BRADY: Correct.

6 THE COURT: I don't know if you planned on
7 calling the defendant as a witness this morning or not.

8 MS. BRADY: Yes, Your Honor. But if I could
9 respond also to the State. So the State, Mr. Bolenbaker,
10 says he personally could not see how Mr. Kephart failed to
11 be on notice, because of the written waiver that he
12 signed.

13 However, as you will notice on the written
14 waiver, it indicates the penalties also for a second DUI.
15 It indicates the penalties for a first DUI, a second DUI,
16 and a third DUI.

17 So the waiver itself does not put him on notice
18 specifically that this instance is that the next one will
19 be a third DUI. It does not put him on notice.

20 If it was a waiver only saying that the next one
21 is a felony, then the State could say, "I see no way that
22 he's not on notice."

23 But in this case, he's on notice for first,
24 second, and third. And it was his understanding that the

1 next one would be a second.

2 Secondly, in terms of this case that Mr.
3 Bolenbaker provided, the unpublished decision, Sheldon
4 Tosh versus the State of Nevada, it states that -- and I'm
5 reading on page 1, and I'm trying to look where the
6 specific cite is -- in the second column, about a third of
7 the way down, or an eighth of the way down, on the first
8 paragraph -- this Court has concluded that a second DUI
9 conviction obtained pursuant to a guilty plea entered
10 under an agreement specifically permitting the defendant
11 to enter a plea of guilty to a first DUI offense, cannot
12 be used to enhance a third DUI offense to a felony,
13 because doing so would violate the agreement under which
14 the guilty plea was entered, and would frustrate the
15 reasonable expectation of the parties.

16 And here, Mr. Kephart's reasonable expectation
17 and his negotiation was that he was entering another to a
18 first, and that the next one would be a second.

19 On page 2 of this unpublished opinion, at the
20 section at Star 2, going down again about two sentences:
21 In Tosh, there was no written plea agreement on the record
22 regarding Faulkner's conviction. However, in this case,
23 the amended complaint, with crossing out the second and
24 putting "first" on the actual judgment of conviction that

1 Mr. Kephart and the Judge signed, those two things
2 together, combined, constitute written proof that this was
3 negotiated to a first, and that the next one would be a
4 second.

5 The other statement is that Mr. Bolenbaker
6 indicated that the minutes don't reflect that this was
7 specifically negotiated to another first for enhancement
8 purposes; however, I want to note that I also made efforts
9 to try to get any transcripts or any recordings -- my
10 office also made those efforts -- and we had the same
11 experience that Mr. Bolenbaker came across.

12 I will note that the minutes are not transcripts.
13 So to the extent that we cannot definitively say, without
14 actually hearing the transcripts, what was said. The
15 minutes are a summary, and maybe they would incorporate
16 everything, but minutes don't always incorporate every
17 detail of conversations. Transcripts do that.

18 And we don't have access to the transcripts, so
19 it's going too far to say that, Your Honor. To rely on
20 the minutes alone is saying that this was not negotiated
21 to a first for enhancement purposes is not
22 constitutionally valid, because we don't have official
23 transcripts that are in the Court record and that are
24 official and reliable, for enhancement purposes.

1 And then again on page 2, it does say it was
2 remanded back for Tosh to have the right to testify.

3 So I would like to call Mr. Kephart to the stand.

4 THE COURT: If you could come up and be sworn.
5

6 JOHN KEPHART,

7 called as a witness by the Defense,
8 who, having been first duly sworn, was examined
9 and testified as follows:
10

11 DIRECT EXAMINATION

12 BY MS. BRADY:

13 Q Could you please state your name and spell it for
14 the record.

15 A John Kephart: J-o-h-n K-e-p-h-a-r-t.

16 Q Who did you negotiate with for the domestic
17 battery from 2010?

18 A It was the D.A.

19 Q And what was your understanding of the
20 negotiations?

21 A My understanding of the negotiations is they
22 didn't want to take it to trial, so they offered me a
23 first domestic battery instead of taking it to trial.

24 So like I -- they just offered me a fine, and

1 pretty much just a first domestic battery. That's it.

2 Q And what was your understanding -- if you were to
3 get another one, another domestic battery, what was your
4 understanding as to what level domestic battery that would
5 be?

6 A I was under the understanding that it would be a
7 second.

8 MS. BRADY: No further questions.

9 THE COURT: Mr. Bolenbaker.

10 MR. BOLENBAKER: If I may approach.

11 THE COURT: Yes.

12
13 CROSS EXAMINATION

14 BY MR. BOLENBAKER:

15 Q Do you recognize this document right here?

16 A I recognize my signature, my initials on the
17 document. I don't -- I mean, this has been almost
18 10 years ago, so I don't recognize this document.

19 Q So it's been a while, so your memory might be a
20 little hazy?

21 A Well, I mean, do you remember 10 years ago like
22 every sort of papers you signed?

23 Q Well --

24 THE COURT: He gets to ask the questions, Mr.

1 Kephart.

2 BY MR. BOLENBAKER:

3 Q First of all, it's not 10 years ago; right? It's
4 from 2010?

5 A Seven years ago.

6 Q But you just said yourself your memory is a
7 little about what happened --

8 MS. BRADY: Objection. That's overstating. He
9 did not say his memory was hazy about what happened; he
10 said he didn't recognize all the specifics of that
11 particular document.

12 THE COURT: The objection is overruled.

13 BY MR. BOLENBAKER:

14 Q So you agree with me that your memory was a
15 little hazy?

16 MS. BRADY: Objection. Again,
17 Mischaracterization.

18 THE COURT: Ask him what his memory is, then.
19 "What is your memory?"

20 BY MR. BOLENBAKER:

21 Q What is your memory?

22 A I remember going to Court that day, and they
23 didn't want to take it to trial because like me and my
24 girlfriend got in an argument that day, and like that was

1 it. So they're just like if you just plea out to a first,
2 we'll just let this go a fine. And I'm like, "All right.
3 That's fine."

4 Q You wanted the lesser penalty; correct?

5 A For sure. I mean, like, at the same time I
6 didn't want to go to trial over this, you know.

7 Q Sure. So they offered you what would have been a
8 lesser penalty; correct?

9 A Well, yeah, but --

10 Q The answer is yes or no.

11 A Somewhat, I guess. Like I would have went to
12 trial over it, but --

13 Q Let me ask a question -- yes or no. You wanted a
14 lesser penalty; correct? Yes or no?

15 A I don't feel like I can answer it with a
16 yes-or-no answer.

17 Q You have a hard time answering the questions that
18 I ask; right?

19 A Sometimes.

20 Q In fact, during the actual jury trial in this
21 case, you refused to answer some of my questions, didn't
22 you?

23 A Yes.

24 Q Now, let me show you this document again. Do you

1 recognize this document? Yes or no?

2 MS. BRADY: Objection, Your Honor. Asked and
3 answered. He's now harassing the witness.

4 THE COURT: Overruled. He's not even close to
5 harassing.

6 THE WITNESS: I don't remember that document.
7 BY MR. BOLENBAKER:

8 Q So you don't remember. But you do recognize your
9 initials on it; correct?

10 A Yes, sir.

11 Q And you recognize, then, that you would have read
12 the document if you put your initials on it; correct?

13 A Maybe. I don't know.

14 Q You don't remember, either, do you?

15 A I mean, sometimes I sign stuff because -- oh,
16 just sign this, and I'll sign it to get it out of the way,
17 you know. It's like I pled to a first domestic, so I
18 just --

19 Q Do you remember signing this document? Yes or
20 no, Mr. Kephart?

21 A I don't remember signing the document, but --

22 Q It's your testimony that the one thing you do
23 remember is, after all this has happened, that you were
24 specifically limited in the ability of the State to

1 enhance the next conviction to a felony. That, you have a
2 great memory of; is that correct?

3 A Yes. Yes, I represented myself on that case.

4 Q But your memory about everything else regarding
5 the negotiations you don't have a memory of; correct?

6 A Well, like --

7 Q Yes or no?

8 MS. BRADY: Objection. Wait. Objection. What
9 was the question?

10 THE WITNESS: I don't understand that.

11 THE COURT: Mr. Kephart, wait a second now.

12 MS. BRADY: What was the question?

13 THE COURT: When he asks you a question, if you
14 can, answer it yes or no. If you can't, then say you
15 can't answer it yes or no.

16 THE WITNESS: I can't answer it yes or no.

17 MS. BRADY: Objection. It's a confusing
18 question. I don't even understand what the question was.
19 BY MR. BOLENBAKER:

20 Q Let me show you this. Can you read this part out
21 here, right here? Number 1, can you read that?

22 THE COURT: Out loud, or to himself?

23 MR. BOLENBAKER: Out loud, please.

24 MS. BRADY: May I see what he's reading, Your

1 Honor? The D.A. didn't -- may I approach?

2 MR. BOLENBAKER: It's from the waiver.

3 MS. BRADY: May I approach?

4 THE COURT: It's the first line.

5 BY MR. BOLENBAKER:

6 Q If you could read Number 1.

7 A It says: "I understand the State will use this
8 conviction as any other prior conviction from this or any
9 other state which prohibits the same or similar conduct to
10 enhance the penalty for any subsequent offense."

11 Q Do you understand that?

12 A No. I mean, kind of.

13 Q Do you understand that you had another domestic
14 battery conviction at the time, from 2010?

15 A Yes.

16 Q And this actual paragraph here is actually
17 bolded; right? 2, 3 and 4 are not bolded, but the 1 is
18 bolded. Would you agree with me on that?

19 MS. BRADY: Objection. Let me see. I don't see
20 anything bolded here. What's bolded? Are you talking
21 about -- that's not bolded. What are you talking about?

22 MR. BOLENBAKER: The waiver; it's bolded.

23 MS. BRADY: It's not bolded. Objection.

24 MR. BOLENBAKER: Take a look.

1 MS. BRADY: I don't see where that's bolded.

2 THE COURT: What number?

3 MR. BOLENBAKER: Number 1, where it specifically
4 says that this conviction or any other conviction could be
5 used for enhancement purposes.

6 THE COURT: I can't tell from that one whether
7 it's bolded or not.

8 BY MR. BOLENBAKER:

9 Q But you see it, you read it, and these are your
10 initials on the bottom; correct?

11 A Those are my initials.

12 Q All right. You'd also agree with me -- did you
13 have a chance to look at the Court minutes from 2010?

14 A No.

15 Q You did not review them?

16 A No.

17 MS. BRADY: I did not give him the Court minutes,
18 Your Honor. There would be no reason why a defendant
19 would have copies of the Court minutes.

20 THE COURT: Well, show them to him now.

21 MR. BOLENBAKER: I have them somewhere.

22 BY MR. BOLENBAKER:

23 Q I'd like to show you the Court minutes.

24 MS. BRADY: And I would object to trying to

1 impeach him according to the Court minutes. Again,
2 because they are not official transcripts, and they do not
3 indicate what people's statements and conversations were.
4 They are summaries.

5 MR. BOLENBAKER: I think the Clerk of the Court
6 might take offense to that, but --

7 THE COURT: I understand that, but you can ask
8 him questions, and you can object to some of the
9 questions, but he can answer.

10 MS. BRADY: I think the Clerk of the Court would
11 know exactly what I'm talking about.

12 BY MR. BOLENBAKER:

13 Q On the bottom of that page, tell me where it says
14 that this conviction specifically limits the State's
15 ability to use that conviction as an enhancement.

16 MS. BRADY: Objection. These aren't transcripts.

17 THE COURT: Let him read it. He's asking him if
18 there's anything in the minutes that say that; that's all
19 he's asking.

20 MS. BRADY: What is the relevance of asking the
21 client what's in the minutes, when he's not responsible
22 for the minutes, never saw the minutes? What does Mr.
23 Kephart have to do with the minutes?

24 MR. BOLENBAKER: Your Honor, I believe he's

1 perjuring himself by making up a conversation that
2 happened, and I'm just simply --

3 MS. BRADY: Objection.

4 THE COURT: Let's move forward. I can sort this
5 out. We don't have a jury here. I'm pretty sure the
6 Court Reporter doesn't care what you guys are saying,
7 unless you say it fast. So let's move forward. Answer
8 the question. Do you see anything in there?

9 THE WITNESS: I really don't understand this
10 document at all.

11 MR. BOLENBAKER: Okay. No further questions.

12 THE COURT: Mr. Kephart, were you arrested on
13 this charge?

14 THE WITNESS: Yeah.

15 THE COURT: So you were arrested, you're in jail,
16 and you get bailed out, I assume?

17 THE WITNESS: Yes.

18 THE COURT: And then what happened after that?
19 What happened after you were arrested and bailed out? You
20 went back to Court?

21 THE WITNESS: Yeah, we each went back to Court,
22 and --

23 THE COURT: Did you have an attorney?

24 THE WITNESS: No.

1 THE COURT: Now, you had one the first time. Why
2 didn't you get one the second time?

3 THE WITNESS: I didn't have enough funds.

4 THE COURT: Did anybody advise you you had a
5 right to an appointed counsel?

6 THE WITNESS: No. I mean, like they advised me
7 that I had counsel; but, at the same time, they're like,
8 "Well, we just want to give you a first on this." So I
9 was like, "Okay." You know what I mean? Me and my
10 girlfriend just got in argument for me going fishing, and
11 that was it, you know.

12 THE COURT: The same girlfriend we had here?

13 THE WITNESS: Yes -- no, no, a different
14 girlfriend. It was my daughter's mother.

15 THE COURT: So you only appeared in Court twice?
16 Well, how many times did you appear in Court?

17 THE WITNESS: Once.

18 THE COURT: And you had discussions with the
19 Deputy DA in this case prior to entering a plea?

20 THE WITNESS: Yes.

21 THE COURT: What did he say?

22 THE WITNESS: He just told me that they wanted to
23 drop it down to a first, because they didn't want to take
24 it to trial, because they felt there wasn't enough

1 evidence to convict me in a trial. So they're like,
2 "Well, we'll give you a first on this." And I'm like,
3 "All right. I'll will take a first." You know?

4 THE COURT: And where did this discussion take
5 place?

6 THE WITNESS: It was in a room just right down
7 the hallway from the courtroom.

8 THE COURT: And then you said, "Okay." What
9 happened after that? I want step-by-step.

10 THE WITNESS: We just went into the courtroom and
11 the D.A. told the Judge that they wanted to give me a
12 first, because of the lack of evidence of anything going
13 on.

14 So I was like -- they told the Judge, and the
15 Judge usually agrees with the D.A. you know? So it's like
16 whatever sentencing the D.A. suggests, usually the Judge
17 agrees with. So they're like, "Well give you a first."
18 So it was pretty much a fine, and I signed a bunch of
19 paperwork.

20 THE COURT: Did you have to get counseling?

21 THE WITNESS: Yes.

22 THE COURT: So you have done it once before?

23 THE WITNESS: I have only done counseling once
24 for this.

1 THE COURT: Well, you had one prior to this,
2 though.

3 THE WITNESS: Yeah. That's the only thing I did
4 counseling for. I didn't have extended counseling because
5 of this.

6 THE COURT: Does anybody have any more questions?

7 MS. BRADY: I do.

8
9 REDIRECT EXAMINATION

10 BY MS. BRADY:

11 Q So the two happened within a similar period of
12 time; correct --

13 A Yes.

14 Q -- with the same person?

15 A Yes.

16 Q And almost an ongoing situation with you and her
17 having arguments?

18 A Yeah, for sure.

19 Q Is it fair to say that because they happened so
20 closely, they just combined the counseling and all of that
21 into one?

22 A I mean, I don't think so, because like in the
23 second one, nobody could find me doing anything wrong.
24 But, I mean, I was arrested anyway on it, you know what I

1 mean? So I don't feel that they combined anything on it,
2 you know? They just gave me a plea bargain instead of
3 going to trial over it for a first.

4 MS. BRADY: No further questions.

5 THE COURT: Anything more, Mr. Bolenbaker?

6 MR. BOLENBAKER: Briefly.

7
8 RE-CROSS EXAMINATION

9 BY MR. BOLENBAKER:

10 Q When were you arrested on this case?

11 A Over a year-and-a-half ago, probably. It seems
12 like a year-and-a-half ago.

13 Q And you would agree with me that at no point
14 between you being arrested, until approximately a week
15 before this trial, did any issue ever come up about you
16 being charged with domestic battery, third offense?

17 A When I was first arrested, that's what they told
18 me: That I was charged with a third.

19 Q And it's not until a week before trial. So you
20 had been charged with domestic battery, third offense, for
21 a year-and-a-half; correct?

22 A Yeah.

23 MR. BOLENBAKER: No further questions.

24 MS. BRADY: Just to respond.

FURTHER REDIRECT

BY MS. BRADY:

Q Your Count 1 was domestic battery by strangulation; correct?

A Yes.

Q Most of the conversations, and the defense, was geared around the domestic battery by strangulation; correct?

A Yes.

Q And it wasn't until the week before trial that you were arraigned on the Information Superseding Indictment charging only the third domestic battery; correct?

A Yes.

THE COURT: You can step down.

(The witness was excused.)

THE COURT: Mr. Bolenbaker, did you have anything else?

MR. BOLENBAKER: No, Your Honor.

THE COURT: Anything more?

MR. BOLENBAKER: Just to clarify, he was charged with domestic battery, third offense, the entire time, as well, and strangulation. We just made a strategic decision to just go with domestic battery, third.

1 THE COURT: I've read the plea in this case.
2 Anything more?

3 MS. BRADY: No, Your Honor. I'd submit the
4 matter to you.

5 THE COURT: You know, this is really difficult.
6 I came here today with the intent of suppressing. When I
7 say "suppressing," that's why I asked that question,
8 because I think there's different rules in terms of the
9 State's right to appeal, depending whether it's an
10 exclusion or suppression.

11 I will treat it as a suppression hearing. The
12 reason I'm doing that is because I'm going to grant the
13 suppression. And I'll tell you why. I have read these
14 cases.

15 I think you're right, Mr. Bolenbaker, that once
16 you present evidence rebutting the initial Motion to
17 Suppress, the burden shifts back to the defendant to prove
18 that it was some kind of agreement that it would only be
19 treated as a first, and so then the State is going to have
20 to comply with its agreement.

21 But in this case, I sit here -- if everybody has
22 tried to get a copy of the actual record -- and I can't
23 ignore my own experience, both as a prosecutor and as a
24 defense attorney in small counties, which is primarily

1 where I have practiced most of my career.

2 Keep in mind that I was a prosecutor for
3 16 years, and I suppose half my time was spent defending
4 criminal defendants for 10 years. I have been a Judge for
5 about 11 now. But I know how these go.

6 And I can tell you how they went in Virginia
7 City, when I was District Attorney up there, just not too
8 long ago.

9 You get in there, you're not sure -- and I'm
10 talking from the state of mind of the prosecutor -- if you
11 have that much, or enough evidence to go forward on the
12 domestic battery, and you've got it charged as a second;
13 and so you threaten to proceed on the second, in hopes of
14 getting a plea to the first.

15 And no one really thinks about whether or not the
16 first can be enhanced, or not enhanced, or anything else.
17 But you're basically saying, "Look, we'll give you a
18 second first."

19 And once there's an agreement, then the Court
20 slaps down a bunch of forms that it has, to be signed, and
21 the defendant signs them. And you have a non-lawyer judge
22 telling a non-lawyer, who's not represented by counsel,
23 what rights he's giving up.

24 First of all, the fact that we don't have a

1 record of this is not the defendant's fault, it's the
2 State's fault. If they didn't preserve one, then if what
3 he's saying is true and there is some evidence of that
4 somewhere in the record, it's not his fault that he can't
5 get it. It's the State's fault that he can't get it. And
6 whether you want to or not, you represent the State, Mr.
7 Bolenbaker.

8 The second problem I have with this, and the
9 decisions I'm reading by the Nevada Supreme Court, is, I
10 have always understood and was very comfortable with it
11 while I was a prosecutor, and availed myself of it a
12 number of times when I was a defense attorney, with the
13 idea that the State bears the burden, and that seldom, if
14 ever, should it be shifted. And in this case, I don't
15 know what the intent of the parties were.

16 In situations like this, a written plea agreement
17 is not going to be prepared. And, as a matter of fact, up
18 until not too many years ago, most jurisdictions didn't do
19 plea agreements, and I think there's still some that don't
20 do them in Justice Court and Municipal Court.

21 So I just can't agree with the idea that when
22 there's a lack of evidence, that that somehow or another
23 inures against the defendant.

24 And so I'm going to exclude -- or suppress the

1 prior convictions, treat this as a misdemeanor.

2 You have, I believe, Mr. Bolenbaker, two days,
3 when I suppress something, to file a notice of intent to
4 appeal.

5 This would be, in my opinion, an excellent case
6 for the State to appeal. And I don't know if they make
7 you write your own opinions or not.

8 MR. BOLENBAKER: We'll see.

9 THE COURT: But it would be an excellent case to
10 appeal. And maybe we'll get a published opinion where the
11 Supreme Court gives us some guidance on this issue,
12 because I don't feel guided, and I'm applying the
13 principle that the State bears the burden. And in this
14 case, in more than one instance, it hasn't met that
15 burden. One, there's no record in this case.

16 And had he been represented by an attorney, and
17 the attorney had failed to prepare a plea agreement, I
18 would be more comfortable in dealing with your arguments,
19 Mr. Bolenbaker.

20 Would you let me know if you don't argue an
21 appeal, and we need to set the sentencing on this?

22 MS. BRADY: Your Honor, I believe we have a
23 sentencing date set already.

24 THE COURT: Do we? Well, it will be vacated if

1 he appeals.

2 Another thing I would like the parties to find
3 out is: I'm sure down in Justice Court they put them on
4 probation, which if I sentence him to a misdemeanor, he's
5 going to get some jail time, but he's also -- I'm going to
6 have a probation tail. And given that, I need to know who
7 I would order to supervise him. Do you have a probation
8 department here in Reno?

9 MR. BOLENBAKER: Well, a few things. I'm not a
10 hundred percent sure I'm going to appeal. I'll probably
11 go to my superiors and see what they want to do. That's
12 the first thing I've got to figure out.

13 Secondly, I think, as it stands right now, that
14 it is a misdemeanor, the appropriate thing would be to
15 remand it back to Justice Court for sentencing.

16 But if you can do it here, you obviously have
17 jurisdiction. They do have a Department of Alternative
18 Sentencing down in Justice Court, and that would be the
19 one that would supervise him.

20 THE COURT: Are they the ones that supervise a
21 Justice Court sentencing?

22 MR. BOLENBAKER: Correct. So that's who you
23 would give that power to, to supervise him, not the
24 Division of Parole and Probation, but the Department of

1 Alternative Sentencing.

2 What I want to make clear, though, it is your
3 ruling that the prior conviction specifically limited the
4 State's ability for enhancement purposes. I think that's
5 the language they're looking for.

6 THE COURT: Yes.

7 MR. BOLENBAKER: So that's what I think that we
8 would need.

9 And then I don't remember what day we had for
10 sentencing.

11 THE COURT: I think you have to -- if I'm
12 treating this as a suppression, that might not be a bad
13 issue for the Supreme Court, if this is an exclusion or
14 suppression. Because I think if I'm excluding it, you
15 would not be able to appeal until I sentence. If I
16 suppress it, I think you have two days to file a notice of
17 appeal and --

18 MS. BRADY: Or a jurisdictional issue, even.

19 THE COURT: Could be, yes.

20 MS. BRADY: Can I clarify? I interpreted your
21 ruling a little bit differently than what Mr. Bolenbaker
22 just characterized: As you not making a finding in terms
23 of specific language, but in terms of the language --
24 really, the specific language being absent, and there

1 being enough evidence to support that there is a
2 negotiation.

3 THE COURT: The parties treated the July 29th,
4 2010 conviction as a first. And if I understand what the
5 Supreme Court is starting to say now is that unless
6 there's some evidence that specifically shows that they
7 intended for that not to be used for the purposes of
8 enhancement, then it can be enhanced.

9 However, in this case, we have a lack of evidence
10 as to anything, because we don't have a transcript, which
11 is not the defendant's fault.

12 Because of the circumstances, and the way this
13 plea was entered, he wasn't represented by counsel, and so
14 there was no written plea agreement prepared. Had there
15 been, it would have been an easy call. But in this case,
16 there wasn't.

17 And it looks like, from reading these two cases,
18 the Supreme Court is saying: Well, once you show -- at
19 some point the burden shifts to the defendant to show that
20 it wasn't going to be used for the purposes of
21 enhancement.

22 It looks like the two cases that were cited, that
23 are reported, in one instance they say, "We're going to
24 make the State comply with an agreement that it's made,

1 not to use it for enhancement."

2 But then the next case says that we want specific
3 proof, which the defendant has to bring forward, if you
4 don't have a plea agreement, that that was the case.

5 We don't have that here, but I'm finding that
6 it's not the defendant's fault that we don't have a better
7 record than what we do, because we can't get a transcript
8 of the entry of plea in this case.

9 Plus, he wasn't represented by counsel. So I
10 don't know very many defendants that prepare plea
11 agreements.

12 And I know exactly how this happened. He shows
13 up, the State goes to him and says, "Look, we'll let you
14 plead to a first. You'll get the first punishment, not
15 the second punishment. And in return, if you do that --"
16 that's the quid pro quo.

17 I don't know whether there was any discussion of
18 it being used to enhance. The forms that we have -- I
19 know how those forms get -- the Clerk puts something in
20 front of the defendant it wants signed, and the defendant
21 signs it, and it advises him of it. But he's not
22 represented by counsel, so nobody's really telling him
23 what any of it means. So that's where I have a hard time
24 with this.

1 But what I'm finding is that there wasn't a
2 record to indicate one way or the other. And it's not the
3 defendant's fault that record doesn't exist.

4 You prepare an order. You prepare a written
5 order --

6 MS. BRADY: Okay.

7 THE COURT: -- and give it to Mr. Bolenbaker.
8 And I suppose that will give you more time to decide
9 whether you plan on appealing this or not.

10 MR. BOLENBAKER: Okay. Once the order comes in,
11 I have two days from then?

12 THE COURT: Yes. I'm pretty sure, if you look at
13 that, I think there's a section -- you know, there used to
14 be a section. Well, probably three or four years ago
15 there was a section there that allows the State to appeal
16 from a suppression to the Supreme Court.

17 I'm not sure what the consequences are if I go
18 ahead and sentence him and then you appeal from that. I
19 don't know if that fixes the amount of punishment he'd get
20 or not.

21 MR. BOLENBAKER: It seems cleaner and makes more
22 sense to do it before he gets sentenced, because that's
23 really what the issue is, is a sentencing issue. So to
24 me, it makes sense to do it beforehand. And he's out of

1 custody, so it's not like he's really being prejudiced or
2 anything in any way.

3 THE COURT: No. So prepare an order, lodge it
4 with the Court, and e-mail me a copy and e-mail Mr.
5 Bolenbaker.

6 If I don't get any objections from you within
7 five days of that time -- so basically, once you've gotten
8 it, you've got five days to make any objections you have
9 to what she's saying the order should be.

10 MR. BOLENBAKER: Okay.

11 THE COURT: Anything more?

12 MR. BOLENBAKER: No. Thank you, Your Honor.

13 MS. BRADY: No. Thank you, Your Honor.

14 THE COURT: That will be the order of the Court.

15 The two cases that you lodged with the Court,
16 those will be marked as an exhibit.

17 (The proceedings were concluded.)

18 ///

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20 ///

21 ///

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23 ///

24 ///

1 STATE OF NEVADA)

2) ss.

3 COUNTY OF WASHOE)

4
5 I, RANDI LEE WALKER, Official Reporter of the
6 Second Judicial District Court of the State of Nevada, in
7 and for the County of Washoe, do hereby certify:

8 That as such Reporter, I was present in
9 Department No. 15 of the above court on said date, time
10 and hour, and I then and there took verbatim stenotype
11 notes of the proceedings had and testimony given therein;

12 That the foregoing transcript is a true and
13 correct transcription of my stenotype notes of said
14 hearing to the best of my ability.

15 DATED: At Reno, Nevada, this 24th day of March,
16 2017.

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21 /s/ Randi Lee Walker

22 RANDI LEE WALKER, CSR #137
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5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF
7 THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR16-0298

11 v.

Dept. No. 7

12 JOHN THOMAS KEPHART,

13 Defendant.
14

15 [PROPOSED] ORDER GRANTING MOTION TO SUPPRESS

16 This matter came before the Court on February 13, 2017. The Court has
17 considered the record, the Defendant's *Objection to Admission of Prior Convictions*
18 *as a Felony Enhancement and Motion to Dismiss*, filed January 12, 2017, the
19 State's written response thereto, and all subsequent replies, responses, and oral
20 arguments from both parties at the hearing.
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23 ///

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1 **Background**

2 Mr. Kephart was convicted of a misdemeanor First Domestic Battery on
3 May 19, 2010 for an offense that occurred on or about November 28, 2009 in
4 Humboldt County, Nevada, pursuant to negotiations. Mr. Kephart was
5 represented by counsel and signed an *Admonishment of Rights*.
6

7 Mr. Kephart was convicted of another misdemeanor First Domestic Battery
8 on July 29, 2010 also in Humboldt County, Nevada, pursuant to negotiations for
9 an offense that occurred on or about June 3, 2010. During the proceedings in this
10 case, Mr. Kephart represented himself in proper person, negotiated directly with
11 the State and entered his plea and was sentenced as a proper person without
12 counsel. The available record relating to the July 29, 2017 conviction includes the
13 Complaint, a Judgment of Conviction and minutes which are not a verbatim
14 account of what was said, but instead briefly summarize the various proceedings
15 and actions held throughout the case.
16

17 The instant case was first brought against Mr. Kephart in Sparks Justice
18 Court by way of a Complaint filed on September 30, 2015 alleging one count of
19 Domestic Battery by Strangulation. Mr. Kephart was represented by private
20 counsel. An Amended Criminal Complaint was filed in Sparks Justice Court on
21 December 2, 2015, adding a second count of Domestic Battery, a felony, for having
22 been previously convicted of two other Domestic Battery offenses within seven (7)
23 years. A Preliminary Hearing was set for February 3, 2016 and was dismissed by
24 the State without prejudice on February 3, 2016 due to the absence of witnesses.
25
26

1 The State then sought prosecution via a Grand Jury Indictment. The
2 Grand Jury indicted Mr. Kephart on Count I: Domestic Battery by Strangulation
3 and Count II: Third Domestic Battery. On May 11, 2016, the Court appointed the
4 Washoe County Public Defender's Office to represent Mr. Kephart, after he
5 previously appeared in court without counsel. Negotiations in the case were
6 unsuccessful and a jury trial was set for January 17, 2017.
7

8 On January 11, 2017, the State filed an Information Superseding
9 Indictment, charging Mr. Kephart with the one count of Domestic Battery, a
10 violation of NRS 33.018, NRS 200.485, and NRS 200.481, dropping the element of
11 strangulation and now prosecuting as a felony solely due to the two prior
12 Humboldt County Domestic Battery convictions mentioned above.
13

14 On January 12, 2017, Mr. Kephart, by and through counsel, filed an
15 *Objection to Admission of Prior Convictions as a Felony Enhancement and Motion*
16 *to Dismiss*. Mr. Kephart requested the Court deny the admission of the prior
17 domestic battery convictions from Union Justice Court, Humboldt County,
18 Nevada, for felony enhancement purposes.
19

20 On January 17, 2017, before the jury was seated, the Court orally addressed
21 the Defendant's objection to the prior Humboldt County convictions. The Court
22 found it had jurisdiction to preside over the case regardless of whether a guilty
23 verdict would ultimately result in a misdemeanor or a felony conviction. This
24 Court did not dismiss the case and further held the issue of enhancement based on
25 prior convictions is a sentencing issue and may be moot if Mr. Kephart is
26

1 acquitted. As such, this Court gave the State leave to respond to the Defendant's
2 motion in the event of a guilty verdict.

3 The trial concluded on or about January 19, 2017, wherein a jury found Mr.
4 Kephart guilty of Domestic Battery.

5 On January 25, 2017, the State filed its *Response to Objection to Admission*
6 *of Prior Convictions as a Felony Enhancement and Motion to Dismiss*. The Mr.
7 Kephart filed his *Reply* and the matter was submitted for consideration on
8 February 8, 2017. A hearing on the matter was held on February 13, 2017.

9
10 **Discussion**

11 It is the finding of this Court that to admit Mr. Kephart's prior 2010
12 Domestic Battery convictions from Humboldt County, Nevada to enhance his
13 instant conviction to felony would offend the spirit of constitutional principles of
14 Due Process and Notice in accordance with Nevada Supreme Court precedence in
15 the line of cases relating to *State v. Smith*, 105 Nev. 293, 298, 774 P.2d 1037, 1040
16 (1989) and *Speer v. State*, 116 Nev. 677, 5 P.3d 1063 (2000).

17 The records demonstrate Mr. Kephart was convicted for two prior Domestic
18 Battery offenses in 2010. Both Judgments clearly show that each of those
19 convictions is within three months of each other and both are entered as "First
20 Domestic Battery" convictions. The record also establishes both 2010 Domestic
21 Battery convictions were for offenses that occurred within seven years of the
22 instant offense. The question in dispute is whether the second Domestic Battery
23 conviction in 2010 was specifically negotiated by the parties as a misdemeanor
24
25
26

1 "First Domestic Battery" for enhancement purposes; meaning there was an
2 agreement that a subsequent Domestic Battery within seven years would only be
3 enhanced to a misdemeanor Second Domestic Battery rather than a felony.
4

5 In his motion, Mr. Kephart argued that, under *Smith v. State*, a conviction
6 is not admissible as an enhancement if the conviction was the result of
7 negotiations. Mr. Kephart asserted that his prior Domestic Batter convictions may
8 not be used to enhance a the current conviction "to a felony where the second conviction was
9 obtained pursuant to a guilty plea agreement specifically permitting the defendant to enter a
10 plea of guilty to first offense... and limiting the use of the conviction for enhancement
11 purposes." *Speer v. State*, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000).
12

13 Moreover, at the hearing on February 13, 2017, Mr. Kephart testified under
14 oath that he was not on notice that the next Domestic Battery conviction would
15 result in a felony, with mandatory prison time. In this way, he further asserts,
16 that a felony enhancement contradicts his understanding of the prior plea
17 negotiations.
18

19 The State responded in opposition that the above rule does not apply where
20 there is no plea agreement explicitly limiting the use of the prior conviction for
21 enhancement purposes. *Id.* at 679-80. State argues Mr. Kephart signed an
22 *Admonishment of Rights* as part of his July 29, 2010 plea, which put him on notice
23 that his July 29, 2010 conviction would be used for enhancement purposes. For
24 the reasons stated below and because Mr. Kephart was representing himself in
25 proper person when he signed the *Admonishment of Rights* for his July 29, 2010
26

1 plea, this Court rejects the State's argument that Mr. Kephart was sufficiently put
2 on notice that his July 29, 2010 conviction would be used for felony enhancement
3 purposes.
4

5 This Court recognizes the rule created by the *Smith* and *Speer* line of cases is not
6 applicable in the absence of a plea agreement limiting the use of the prior as an
7 enhancement. The Nevada Supreme Court opined, "Our decisions in *Crist*, *Perry*
8 and *Smith* were based solely on the necessity of upholding the integrity of plea bargains and
9 the reasonable expectations of the parties relating thereto." *Speer v. State*, 116 Nev. 677, 680,
10 5 P.3d 1063, 1065 (2000). Also, this Court's understanding of the Nevada Supreme
11 Court's decisions are that, once the State demonstrates evidence regarding the
12 parties' specific negotiations for future enhancements, the burden shifts to the
13 defendant to show it wasn't going to be used for the purposes of a felony
14 enhancement. The purpose behind this is to ensure the State complies with
15 negotiated agreements not to use a specific prior for a felony enhancement.

16 In Kephart's case, there is not a record to indicate one way or the other.
17 We don't have a transcript, which is not the defendant's fault. Both the Deputy
18 District Attorney for Washoe County and the Deputy Public Defender for
19 Washoe County in the instant case contacted the court in Humboldt County,
20 Nevada in an attempt to obtain a transcript and/or a recording of the hearing
21 related to the July 29, 2010 Domestic Battery conviction. Humboldt County
22 informed both parties that there were neither transcripts nor recordings.
23

24 What we have are two prior 2010 misdemeanor judgments within a few
25 months of each other that clearly indicate "First Domestic Battery." We also have
26 the June 4, 2010 *Criminal Complaint*, which serves as the basis for the July 29,

1 2010 conviction. In that *Criminal Complaint*, the prior conviction is notably
2 crossed out in both the title and body of the document. The court record
3 sufficiently provides enough evidence suggesting the parties were fully aware of
4 the prior May 19, 2010 conviction prior to allowing Mr. Kephart to plead to a First
5 Domestic Battery on July 29, 2010.
6

7 As previously noted, Mr. Kephart was not represented by counsel on July
8 29, 2010, and there was no written plea agreement prepared. Had there been a
9 written plea agreement, this decision would have been an easy call, but there
10 wasn't one. This Court observes that proper person Defendants do not typically
11 prepare plea agreements. What tends to happen is that the Defendant shows up,
12 the State negotiates with him and says something to the effect of, "Look, we'll let
13 you plead to a first. You'll get the first punishment, not the second punishment."
14 Then, the Clerk puts something in front of the Defendant to sign, he signs it.
15 However, the Defendant is not represented by counsel, so nobody's really telling
16 him what any of it means. This is where this Court has a hard time with using the
17 July 29, 2010 conviction for felony enhancement purposes.
18
19

20 Based upon the foregoing reasons, the Court hereby GRANTS Defendant's motion to
21 exclude the prior First Domestic Battery convictions for felony enhancement purposes.

22 IT IS SO ORDERED

23
24 Dated this 27th day of February, 2017.

25
26 
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of April 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy,
Washoe County District Attorney's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof to:

John Reese Petty
Washoe County Public Defender's Office