

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONOVINE MATHEWS,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent,)
_____)

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Elizabeth A. Brown
Clerk of Supreme Court
Case No. 72701

**APPELLANT'S MOTION FOR
TRANSMISSION OF ORIGINAL STATE'S EXHIBITS 2-25**

Comes Now Appellant DONOVINE MATHEWS, by and through Deputy Public Defender DEBORAH L. WESTBROOK, and moves for an order directing the District Court Clerk to transmit original **State's Exhibits 2-25** to this Honorable Court pursuant to **NRAP 30(d)** and **10(b)(2)**. This Motion is based upon the following Memorandum and all papers and pleadings on file herein.

DATED this 20th day of October, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK, #9285
Deputy Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 30(d) of the Nevada Rules of Appellate Procedure allows an appellant to include copies of relevant and necessary exhibits in the appendix. However, if an exhibit is not able to be reproduced,

the parties may file a motion requesting the court to direct the district court clerk to transmit the original exhibits. The court will not permit the transmittal of original exhibits except upon a showing that the exhibits are relevant to the issues raised on appeal, and that the court's review of the original exhibits is necessary to the determination of the issues.

NRAP 30 (d).

Donovine asks that this Court direct the District Court Clerk's office to transmit original **State's Exhibits 2 – 25** to the Supreme Court for its review because those exhibits cannot be reproduced in the record and because they are necessary to this Court's determination of issues in the case.

Background Information Relevant to Donovan's Appeal

The State charged Donovan with one count of child abuse, neglect or endangerment with substantial bodily harm. The State claimed that Donovan abused his girlfriend's 2-year old son, CJ, by intentionally burning the backs of his hands with hot water. However, Donovan has always maintained that CJ's burns were accidental in nature.

At the hospital, Donovine told Detective Philip DePalma that he had boiled some water in a pot on the stove and poured it into a black cup on the kitchen counter, intending to make some coffee. Donovine placed the mug in front of some cookies and candy that were sitting on the counter. Donovine then went into the bedroom to change JJ's diaper. While Donovine was checking JJ's diaper, he heard CJ screaming from the kitchen. When Donovine returned to the kitchen, he found CJ standing beside the spilled black cup, saying "It hot. My hand, my hand." Although Donovine did not see how the cup fell, CJ was tall enough to reach across the countertop on his tippy toes. After providing this information to Detective DePalma, Donovine agreed to accompany DePalma back to his girlfriend's apartment to conduct a videotaped reenactment of the events leading up to and following CJ's accident in the kitchen. In the video Donovine shows DePalma exactly where he placed the mug on the countertop before leaving the kitchen.

Transmission of State's Exhibit 2

State's Exhibit2 is a DVD-R that contains Donovine's videotaped reenactment of the events leading up to and following CJ's accident in the kitchen. This DVD-R was played for the jury in its entirety. Because Donovine did not testify at trial, Donovine relies on the contents of **State's**

Exhibit 2 as a basis for a portion of his Statement of Facts in his Opening Brief. In addition, Donovine's description of where he placed the mug in **State's Exhibit 2** was relied on by his expert witness, Dr. Lindsey "Dutch" Johnson. The district court excluded Dr. Johnson as a witness at trial because his opinions allegedly "lacked foundation". On appeal, Donovine argues that the court erred by excluding Dr. Johnson from trial. Because Dr. Johnson relied on information contained in **State's Exhibit 2** in forming his expert opinions, **State's Exhibit 2** is both relevant and necessary to Donovine's argument that Dr. Johnson should have been permitted to testify at trial. While **State's Exhibit 2** is both relevant and necessary to Donovine's appeal, Donovine is unable to copy this video for inclusion in Appellant's Appendix. See NRAP 10(b)(2).

Transmission of State's Exhibits 3-25

State's Exhibits 3 – 25 are color photographs taken of 2-year old CJ at Sunrise Hospital on January 6, 2016. On appeal, Donovine argues that **State's Exhibits 14-25** were unduly prejudicial and not a fair and accurate representation of how CJ's hands actually looked at the time, as compared with **State's Exhibits 3-13**. Although all 23 pictures were taken on the same day, and all 23 pictures depict the same subject matter (*e.g.*, CJ and his burned hands), CJ's injuries appear to be unnaturally red and discolored in

State's Exhibits 14-25. In order to evaluate Donovine's argument that these prejudicial photographs should have been excluded at trial, it is necessary for the Court to see the original exhibits. However, Donovine is unable to reproduce those color photographs in Appellant's Appendix. See NRAP 10(b)(2).

Because Appellant relies on and refers to **State's Exhibits 2-25** at numerous points in his Opening Brief, it is necessary for this Court to review all of these original exhibits on appeal. Appellant therefore requests that this Honorable Court direct the Eighth Judicial District Court Clerk to transmit original **State's Exhibits 2-25** for this Court's review.

DATED this 20th day of October, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of October, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

DEBORAH L. WESTBROOK
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

DONOVINE MATHEWS
NDOC No. 1161064
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office