IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA ANN NASH,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 76098

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(2) because it is a direct appeal from a Judgment of Conviction based on a jury verdict that involves a conviction for an offense that is a Category B felony.

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not abuse its discretion in admitting evidence.
2. Whether the district court did not abuse its discretion in issuing jury instructions.
3. Whether there was no violation of the Confrontation Clause.
4. Whether there was sufficient evidence to convict Appellant of Child Abuse, Neglect or Endangerment and Battery Constituting Domestic Violence.

STATEMENT OF THE CASE

On September 1, 2015, Appellant Lisa Nash was charged by way of Amended Information with Child Abuse, Neglect Or Endangerment (Category B Felony - NRS

200.508(1)), Battery Constituting Domestic Violence - Strangulation (Category C Felony – NRS 33.018; NRS 200.481; NRS 200.485;) and Coercion (Category B Felony – NRS 207.190). I Appellant's Appendix ("AA") 012–15. Appellant was arraigned and pled not guilty on August 18, 2015. I AA 012–15.

Appellant's jury trial commenced on September 11, 2017. I AA 016. Trial lasted five (5) days. I AA 016; II AA 236; III AA 437; IV AA 577; V AA 732. On September 15, 2017, the jury returned a verdict of guilty of three of the counts of Child Abuse, Neglect Or Endangerment (Category B Felony - NRS 200.508(1)) and the single count of Battery Constituting Domestic Violence (Misdemeanor - NRS 200.481; 200.485; 33.018) and a verdict of not guilty of Coercion and three of the counts of Child Abuse, Neglect Or Endangerment. I AA 008–09.

On April 23, 2018, Appellant was sentenced to suspended sentences and probation was imposed for a period not to exceed three (3) years. I AA 009. The Judgment of Conviction was filed May 7, 2018. I AA 008–09. Appellant filed her Notice of Appeal on June 6, 2018. I AA 001.

STATEMENT OF THE FACTS

Shaylyn, the victim in this case, came to live with Appellant, her aunt and prospective adoptive parent, in early 2014. II AA 301, 326. Shaylyn was 15 years old and had been in the foster care system for most of her life. II AA 300; II AA 494, 497–98. She had suffered physical, mental, and sexual abuse. II AA 331; II AA 495.

She also has several disabilities, including asthma and a potential autism spectrum disorder. II AA 302, 331.

Appellant knew Shaylyn's history and diagnoses. III AA 495; IV AA 612–13. And yet she abused Shaylyn herself, over the short seven months Shaylyn was placed with her. II AA 301, 349–55, 362. Appellant's daughter, Megan, captured two of these instances on video. II AA 349–55, 359. In the first, on June 20, 2014, Appellant and Shaylyn are in the kitchen. II AA 271. Shaylyn is on her knees. II AA 271. Appellant stands above her, barking orders for Shaylyn to meow like a cat and moo like a cow. II AA 271. In the second, on July 3rd of 2014, Appellant is yelling at Shaylyn, who is asthmatic and overweight, forcing her to run up and down the stairs because Shaylyn snuck pretzels. II AA 353, 361. Ultimately, she becomes physically violent with Shaylyn. II AA 271–72. Appellant yells at Shaylyn as the girl cries; she pulls Shaylyn by the hair, throws her to the ground, and smacks her repeatedly in the head. II AA 271–72; 350–51, 370. Shaylyn cries for help, and Appellant threatens to throw her down the stairs. II AA 271–72.

Appellant's abuse of Shaylyn was also confirmed through testimony as well as this video evidence. Megan told Child Protective Services ("CPS") Investigator Shanna Davis about Appellant's abuse of Shaylyn. III AA 491–94. Davis testified to this and to the fact that Shaylyn herself told Davis about at least one incident of physical abuse, including that Appellant strangled her. III AA 498–99, 506. Megan's

written, voluntary statement to police reveals that Appellant also pulled Shaylyn's hair, choked her, and poked her with a knife. II AA 368–71. Megan's then-boyfriend, Lonny Hennessy, also testified, confirming that Megan told him that Appellant cornered Shaylyn and slapped her, yelled at her, and poked her with a knife. III AA 475–77. Shaylyn, too, testified that Appellant forced her to run up and down the stairs as punishment and that Appellant sat on her and shook her such that she could not breathe. II AA 305, 309.

Scared, Megan was the one who eventually called the police. II AA 364–66. Megan spoke with responding Officers Michael Marano and Praise Witham and also provided a written, voluntary statement. II AA 283–84, 363, 367–68. She also showed them the videos of Appellant's abuse of Shaylyn. II AA 283–84. Police and CPS responded to Appellant's residence, where she was arrested. II AA 284, 321, 325. Both Officer Marano and the CPS employee noted that Shaylyn seems younger than her years, sweet but "slow." II AA 288, 328–29.

SUMMARY OF THE ARGUMENT

First, Appellant's claim that the district court abused its discretion in admitting "prior bad act" evidence is without merit because, as the district court found, the evidence was not of prior bad acts. Rather, the State offered a written, voluntary statement—which reflected the conduct actually charged—for impeachment purposes, as a prior inconsistent statement. Second, Appellant's claim

that the district court abused its discretion in issuing the jury instruction on negligent treatment or maltreatment is without merit because the instruction given quotes the statute directly, and the portion Appellant alleges was missing was, in fact, present. Third, Appellant's claim that the admission of mental health and medical reports through a third party violated his Sixth Amendment rights is without merit because the Appellant affirmatively waived the issue. Regardless, a victim's health records are not testimonial and thus do not violate the Confrontation Clause. Fourth and finally, Appellant's claim that there was insufficient evidence to convict her of the three counts of Child Abuse, Neglect or Endangerment and of misdemeanor Battery Constituting Domestic Violence is without merit because this Court must consider all evidence offered at trial, regardless of the propriety of its admission. And viewed in the light most favorable to the State, the copious, consistent evidence offered at Appellant's trial would have supported any rational jury in finding the essential elements of Appellant's crimes beyond a reasonable doubt.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE

First, Appellant complains the district court abused its discretion in admitting "prior bad act" evidence. Appellant's Opening Brief ("AOB") at 8–10. This argument is without merit. The State did not offer evidence of prior bad acts. Rather,

the State offered Megan's voluntary statement for impeachment purposes, as a prior inconsistent statement. The district court did not abuse its discretion in admitting it.

A trial judge retains wide latitude regarding the decision to admit or exclude evidence. See McLellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Such decisions are reviewed for abuse of discretion. Id. However, such discretion "should not be disturbed [on] appeal absent a showing that the district court was manifestly wrong when it allowed the admission of this evidence." Crawford v. State, 107 Nev. 345, 353, 811 P.2d 67, 72 (1991).

The prior inconsistent statement of a testifying witness is admissible for impeachment purposes—and is specifically excluded from the definition of hearsay. NRS 51.035(2)(a). NRS 50.135(2) precludes admission of "[e]xtrinsic evidence of a prior contradictory statement by a witness" unless "[t]he witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate him thereon." Further, the Nevada Supreme Court has held:

> that when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement pursuant to NRS 51.035(2)(a). The previous statement *is not hearsay and may be admitted both substantively and for impeachment*.

Crowley v. State, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004) (emphasis added); see also Richard v. State, 134 Nev. __, __, 424 P.3d 626, 630 (2018) (holding that a

witness's "memory lapse was akin to a denial of his prior statement, and the State could properly present his prior inconsistent statement").

In this case, Megan's testimony during the State's direct examination was a series of minimizations of Appellant's abuse of Shaylyn and, moreover, demonstrated clear "failures of recollection" and "memory lapses" that constituted denial of her prior, written statement to police. II AA 349–54, 361–71; Richard, 134 Nev. at __, 424 P.3d at 630; Crowley, 120 Nev. at 35, 83 P.3d at 286. For example:

> Q. Do you remember at any point your mom striking Shaylyn?
> A. Like?
> Q. Hitting her?
> A. Yeah.
> Q. About how many occasions?
> A. Maybe like on the video. *And I don't know if there were other times. I'm trying to think. It's been long. I'm sorry*.
> Q. I understand. Would your mom physically abuse Shaylyn?
> A. That one time. Other stuff was PT.
> Q. What's PT?
> A. What they do PT tests in the military. Exercise, boot camp.

II AA 349–50 (emphasis added). Megan also denied certain instances of abuse that were in fact shown in the video and which Megan had written about in her voluntary statement, such as Appellant choking Shaylyn and pulling her hair:

> Q. Would you say your mom would choke her?
> A. No.
> Q. Did your mom ever choke her?
> A. No. It was more or less grabbing her shoulder area. I wasn't close enough to determine whether or not, so that's what it might have looked like at the time but I don't –
> Q. So you are referring to the video?
> A. Yes.

> Q. Did your mom ever choke her on other occasions?
> A. No.
> Q. Did your mom pull her hair?
> A. *I don't think so. I don't know. I don't remember*.

II AA 351–52 (emphasis added).

Megan conceded that the videos the State introduced were ones she took; these showed certain instances of Appellant's abuse of Shaylyn. II AA 360–62. However, Megan attempted to minimize and qualify what was shown in black and white by stating of the video wherein Appellant forced Shaylyn to run up and down stairs: "That was the first time it's ever been like as bad as it was." II AA 362. Megan minimized other instances, stating, for example:

> Q. Outside of the videos, *do you recall* your mom slapping or pushing Shaylyn?
> A. *Maybe* like one time she like shoved her, but it was like -- it wasn't like -- I don't know. It wasn't intentionally trying to hurt her more like scare her.

II AA 353 (emphasis added).

In contrast, Megan's voluntary, written statement to the police directly contradicted Megan's vague and admittedly forgetful testimony. II AA 363–71. During its direct examination, the State refreshed Megan's recollection with the statement. II AA 362–64. Megan claimed the statement was "over-exaggerated." II AA 364. The State used the statement to clarify with Megan several specific instances of Appellant's abuse of Shaylyn, including choking Shaylyn, pulling her hair, denying her food as punishment, and "poking" her with a knife. IIA A 368–71.

Again, Megan claimed she did not remember these events and that her statement was "over-exaggerated." II AA 368, 370. For example:

> Q. With regard to the statement you read while you are up there, did you tell police your mom choked Shaylyn?
> A. *I don't remember*.
> Q. Would it help to refresh your recollection --
> A. You mean in the statement?
> Q. Correct.
> A. Yes, in the statement I did.
> Q. You said, yes?
> A. In the statement I did. Sorry, I'm trying to --
> Q. In the statement did you tell police your mom pulled her hair?
> A. Yes.
> Q. In the statement did you tell the police your mom would keep her from eating as a punishment?
> A. Like I said, that was way over-exaggerated.
> Q. All that stuff was outside the video in your statement, the statement you wrote?
> A. Yes. Well, some of it.
> Q. Because there's a point in here when you note in the video, here's what happened. Is that fair?
> A. Yes.
> Q. But all of that stuff you're telling them about, you mom choking shocking her, your mom pulling her hair that's all before that point in the statement?
> A. In the statement before that point, probably.

II AA 368 (emphasis added).

Given Megan's minimizations, self-contradictions, and instances of failure of recollection, on Day Two of trial, the State moved to introduce Megan's entire voluntary, written statement. III AA 440. As the State explained, the statement was needed to impeach Megan, to highlight her prior inconsistent statements. III AA 440. Indeed, the statement demonstrated how clear and specific Megan had been, closer

to the time of the abuse, about the details—belying her "back and forth" testimony about whether it happened at all and whether the written statement was "over-exaggerated," as Megan claimed on the stand. III AA 440. The district court found that because the matters at issue were not collateral, impeachment with extrinsic evidence was allowed. III AA 445–46. Further, it was appropriate because Megan's testimony had been "all over the place about what she remembered and what she didn't remember." III AA 446. Thus, the district court admitted the statement in its entirety. III AA 446.

Megan's written, voluntary statement simply does not qualify as evidence of "prior bad acts." As the district court found, the statement constituted not evidence of "prior" bad acts but of the very acts that the State sought to prove against Appellant at trial. III AA 441–42. Indeed, as the district court discussed, "there were specific instances that were not in the video that were charged based on [Megan's] statement." III AA 442. The two videos alone showed abuse that occurred in June and July; but as the district court noted, the Amended Information showed a time-frame of several months for the abuse. III AA 442. Megan could not possibly have video-taped every instance. As at trial, Appellant has not pointed to a single instance in Megan's statement that would qualify as a "prior bad act" rather than an act that was actually charged. Even Appellant's uncited assertion that "the statement includes an allegation form Megan this 'abuse' happens two to three times a month"

means that the statement contains a specific, prior inconsistent statement, which Megan denied by testifying that she did not remember more instances than that shown on the video. AOB at 9; II AA 351–53, 368. That denial made the prior inconsistent statement about regular abuse admissible both substantively and as impeachment. Richard, 134 Nev. at __, 424 P.3d at 630; Crowley, 120 Nev. at 35, 83 P.3d at 286.

As such, the district court found, Megan's statement was admissible as impeachment evidence, "extrinsic evidence of a witness's capacity or motive to testify": that is, to contextualize Megan's bias and her motive in offering incomplete, untrue testimony and to highlight her prior inconsistent statements. III AA 446. Thus, it was "not subject to those limitations set out in NRS 50.056" on impeachment on collateral matters. III AA 446. The district court also found that the "document has inconsistent statements." III AA 446. Thus, it was admissible as a prior inconsistent statement. NRS 51.035(2)(a). And, under Crowley, Megan's admitted memory lapses constituted a denial of the prior inconsistent statement that meant was admissible both as impeachment and as substantive evidence. 120 Nev. at 35, 83 P.3d at 286. Appellant cannot establish the district court abused its discretion in admitting the entire statement when there were so many bases for its admission.

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II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING JURY INSTRUCTIONS

Next, Appellant complains the district court abused its discretion in issuing the jury instruction regarding the theory of negligent treatment or maltreatment. AOB at 10–12. This argument is without merit. Appellant did not object to the relevant instruction, and Appellant cannot establish that it was an incorrect statement of the law. In fact, it quotes the statute directly, and the portion Appellant alleges was missing was, in fact, present.

As an initial matter, Appellant did not object to these jury instruction issues below. Thus, the issues are waived. Dermody v. City of Reno, 113 Nev. 207, 210–11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). If reviewable all, the issue may only be examined for plain error. Maestas v. State, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012). Plain error review asks:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan v. State, 131 Nev. __, 343 P.3d 590, 594 (2015).

In this case, there was no unmistakable error regarding jury instructions. District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). District courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000.

Here, there is no readily apparent error in the instruction. At the relevant time, NRS 432B.140 stated:

> Negligent treatment or maltreatment of a child occurs if a child[1] has been abandoned, is without proper care, control and supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so.

Jury Instruction 6, the instruction at issue, stated:

> "Negligent treatment or maltreatment" of a child occurs if a child has been abandoned, is without proper care, control and supervision, or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults of habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so.

[1] The phrase "has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic" was added in 2015. 2015 Nevada Laws Ch. 399 (A.B. 49).

V AA 931. As is clear from this direct comparison, barring the quotation marks, the language in the instruction actually given to the jury reflects the statutory language ***exactly***. Appellant's quoted language of Jury Instruction 6 is simply inaccurate. AOB at 10. Thus, Appellant's argument concerning the phrase "lacks the subsistence, education, shelter, medical care or other care necessary" is utterly irrelevant. This phrase was included in the jury instruction. Thus, Appellant has alleged no error, let alone a plain one.

III. THERE WAS NO VIOLATION OF THE CONFRONTATION CLAUSE

Next, Appellant complains the admission of mental health and medical reports through a third party constituted a violation of the Sixth Amendment's Confrontation Clause. AOB at 12–14. This argument is without merit. Appellant affirmatively waived the issue, not only through lack of objection but also through introducing the underlying information herself in her trial testimony. Further, the victim's health records are not testimonial and thus do not violate the Confrontation Clause.

Appellant did not object to these records on Confrontation Clause grounds. Thus, again, the issue is waived—or, if reviewable, only for plain error. Maestas, 128 Nev. at 146, 275 P.3d at 89; Dermody, 113 Nev. at 210–11, 931 P.2d at 1357. Further, confrontation issues may be waived by the failure to object, for example to the use of affidavits, declaration, or preliminary hearing transcripts. Sparkman v. State, 95 Nev. 76, 81, 590 P.2d 151, 155 (1979); Drummons v. State, 86 Nev. 4, 8

N.2, 462 P.2d 1012, 1014 n.2 (1970). "The test for the validity of a waiver of a fundamental constitutional right is whether the defendant made an 'intentional relinquishment or abandonment of a known right or privilege.'" Raquepaw v. State, 108 Nev. 1020, 1022, 843 P.2d 366 (1992); see also Ford v. State, 122 Nev. 796, 138 P.3d 500 (2006) (defendant waived his right to confrontation when he stipulated through counsel to the substitution of one doctor for another).

Appellant did not object to the records underlying the testimony about Shaylyn's diagnoses on Confrontation Clause grounds. Appellant did make an objection to the CPS report itself on hearsay grounds, but only as to what the allegations against Appellant were. II AA 322. Appellant also objected to evidence of Shayla's autism, including CPS records, on relevancy grounds. II AA 326, 338–40. The district court overruled these objections. II AA 322, 326, 339. However, Appellant raised no Confrontation Clause objection to the underlying health records. Thus, the State was deprived of an opportunity to cure any potential error, or to elicit testimony through non-hearsay means. This should preclude appellate review. See Sparkman, 95 Nev. at 81, 590 P.2d at 155.

Assuming arguendo this Court choses to examine the issue, it should be noted that the State never actually introduced the CPS report that Appellant now seems to complain about, let alone the underlying health records supporting the information about Shaylyn's diagnoses contained that report. Rather, during its direct

examination of Balinda Jackson-Gordon, the CPS employee and third-party witness whose testimony Appellant challenges on Confrontation Clause grounds for the first time on appeal, the following exchange took place:

> A. I was given a report, and I responded to the residence on allegations.
> Q. What were those allegations of?
> A. The allegations were that . . . physical abuse taking place within a household between an aunt and her niece.

II AA 322. Jackson-Gordon mentioned the report in two other places:

> Q. . . . During your contact with Shaylyn, did you get a feel for her mental progress?
> A. Based on the report I read *and based on talking with her*, she was very mild. Although she is very big -- at that time she was 15 -- very big and very tall. She looked like she was a lot older then what she was, but while I was engaging with her she presented herself as if she was younger in terms of her mental cognition.

II AA 328 (emphasis added). And:

> Q. Do you know whether or not she's on psychotropic meds?
> A. According to the report she was.

II AA 331. Thus, the information provided from the underlying health reports was very minimal. Further, Jackson-Gordon's comments on her "mental cognition" were based not just on the report but on her own observations. Id. Just as Jackson-Gordon did, the jury was able to make its own judgments on Shaylyn's demeanor and cognition because Shaylyn, herself, testified. II AA 300–19.

It is difficult to see how such minimal references to health reports could have harmed Appellant's case—given Jackson-Gordon's personal observations,

Shaylyn's presence in the courtroom, and the fact that Appellant, herself, went into much further detail than Jackson-Gordon in discussing Shaylyn's condition and diagnoses. During her own direct examination, Appellant stated, "I saw all of the issues that Shaylyn had," and further:

> Q. A lot of effort was made yesterday in finding out or discussing I believe with both social workers had testified whatnot. Were you ever given, yourself, a solid diagnosis from somebody with the appropriate letters after their name as to what Shaylyn has or suffers from?
> A. That is a yes and no. Technically, no, but there were many, many diagnoses. It ranged from bipolar to anxiety to emotional, sort of mood disorder. It was kind of all over the place. And so honestly, I couldn't tell what her real true issue was.
> Q. Did you ever know what the true issue was at any time? Did you ever find out?
> A. No. I was in the process of doing that. I was going to take her to UNLV and have her evaluated through their autism program when I got arrested.

IV AA 609–12.

The fact that Appellant intentionally relinquished or abandoned any potential Confrontation Clause issue is clear. Raquepaw, 108 Nev. at 1022, 843 P.2d at 366. Again, Appellant testified about Shaylyn's diagnoses—meaning that she, herself, put information about Shaylyn's potential autism and other diagnoses before the jury. IV AA 609–12. Even before that, Appellant asked Jackson-Gordon about the underlying health reports, themselves, in cross-examination. For example:

> Q. . . .When you say all of the things that Shaylyn had had going on with her life, you are reading that from a report right?
> A. Yes.
> Q. You did not make those determinations?

A. No.
Q. Can you tell me the name of the doctor that made those determinations?
A. I don't have that information.
Q. Is that a yes or a no?
A. No.
Q. Did you read a report from a doctor saying they made those determinations?
A. No.

II AA 332–33. In other words, Appellant was clearly aware that the underlying health records constituted potential grounds for a hearsay or Confrontation Clause objection. But rather than make that objection, Appellant chose to confront the issues in cross-examination and then through her own testimony during her direct examination.

Even if Appellant had not waived the issue, any objection would have been futile because a victim's medical and mental health records are not "testimonial" and thus their admission does not violate the Confrontation Clause. A defendant's Sixth Amendment right to confront witnesses against him is not violated by the admission of statements that are not testimonial in nature. Harkins v. State, 122 Nev. 974, 976, 143 P.3d 706, 709 (2006). This Court has enumerated several factors

> to consider in determining whether a statement is testimonial: (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question (e.g., whether the statement was the product of a police interrogation); (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or

> whether it was a recount of past events made in a more formal setting sometime after the exigency had ended. No one factor is necessarily dispositive, and no one factor carries more weight than another. These factors will assist courts in ascertaining the relevant facts surrounding the circumstances of a hearsay statement in order to determine its testimonial nature.

Id. at 987, 143 P.3d at 714.

Here, the only statements Appellant raises for the first time as Confrontation Clause violations cannot be characterized as "testimonial," particularly when examined under the plain error framework. Jackson-Gordon testified that she responded to Appellant's house based upon a report of physical abuse. II AA 320–37. She testified that, "according to the report," Shayla had multiple mental health diagnosis and the mental capacity of an eight-year-old child. II AA 322, 328, 231.

Under Hawkins, the health records underlying the "report" Jackson-Gordon testified about are not testimonial and thus are not a basis for a Confrontation Clause violation. 122 Nev. at 987, 143 P.3d at 714. The statements that make up medical and mental health records are made to a health provider, not to a government agent; and the doctors that generate such reports are not government agents. Such reports are regularly generated by health providers, not generated at the behest of a government agency. The purpose of a child's health records, as here, is to provide health care and education for the child, not to gather information for a later trial. Thus, the Hawkins factors weigh heavily against considering a child's medical and

mental health records as "testimonial" evidence that implicates the Confrontation Clause.

IV. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF THREE COUNTS OF CHILD ABUSE, NEGLECT OR ENDANGERMENT AND OF BATTERY CONSTITUTING DOMESTIC VIOLENCE

Appellant complains there was insufficient evidence to convict her of the three counts of Child Abuse, Neglect or Endangerment and of misdemeanor Battery Constituting Domestic Violence. AOB at 14–15. This argument is without merit. There was multiple sources of testimonial evidence of each instance of abuse and video evidence of two instances. Regardless whether any of it was admitted erroneously, when viewed in the light most favorable to the State, this evidence would have supported a rational jury in finding the essential elements of Appellant's crimes beyond a reasonable doubt.

When reviewing a sufficiency of the evidence claim, the relevant inquiry is not whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (quotation and citation omitted). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of

evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (emphasis removed).

Further, in assessing a sufficiency of the evidence challenge, "'a reviewing court must consider all of the evidence admitted by the trial court,' *regardless whether that evidence was admitted erroneously*." McDaniel v. Brown, 558 U.S. __, __, 130 S.Ct. 665, 672 (2010) (emphasis added) (quoting Lockhart v. Nelson, 488 U.S. 33, 39, 41, 109 S.Ct. 285, 291 (1988). This is because an appellate court "cannot know what evidence might have been offered if the evidence improperly admitted had been originally excluded by the trial judge." United States v. Sarmiento-Perez, 667 F.2d 1239, 1240 (5th Cir. 1982). This Court has affirmatively adopted this analysis. Stephans v. State, 127 Nev. 712, 721, 262 P.3d 727, 734 (2011).

Here, any rational jury would have found all elements of three instances of Child Abuse, Neglect or Endangerment and one instance of Battery Constituting Domestic Violence beyond a reasonable doubt.[2] First of all, Megan's videos were

[2] In fact, the evidence was overwhelming. Thus, any alleged error was harmless. Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the

undeniable evidence. As discussed, they unambiguously showed several instances of Appellant's abuse of Shaylyn, including yelling, mocking, belittling, threatening, hitting, hair-pulling, throwing to the ground, and strangling. II AA 271–72; 350–51, 353, 361, 370. The videos, alone, could have supported a rational jury in convicting Appellant of these crimes beyond a reasonable doubt.

And the State presented far more than Megan's videos—including Megan's testimony about Appellant's abuse of Shaylyn. Although Megan was less than forthcoming on the witness stand, Megan's own prior inconsistent statements confirmed several instances of abuse. Megan's written, voluntary statement to police reveals that Appellant also pulled Shaylyn's hair, poked her with a knife, and "choked" her. II AA 368–71. Regardless of whether that statement was erroneously admitted—a contention with which the State obviously does not agree, see Section I, *supra*—this Court must consider that statement in examining the sufficiency of the evidence. McDaniel, 558 U.S. at__, 130 S.Ct. at 672. Moreover, that statement was not the only source of Megan's prior discussions of Appellant's abuse of Shaylyn. Megan also told CPS investigator Davis about the abuse, and Davis

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defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001). Given the overwhelming evidence discussed herein, any potential error in admitting Megan's statement, see Section I, or in any Confrontation Clause issue, see Section III, was harmless.

testified as to that conversation at trial. III AA 491–94. Megan's also told her then-boyfriend, Lonny Hennessy, that Appellant cornered Shaylyn and slapped her, and that Appellant yelled at her, and poked her with a knife—all of which Hennessy testified to at trial. III AA 475–77.

Beyond Megan's videos, her testimony, and her statements to police and other individuals, State provided copious other evidence of each element of Appellant's four offenses. With regard to being made to run up and down the stairs, Shaylyn herself also testified to the incident. II AA 305, 309, 349–55, 359, 361. Shaylyn herself also testified that Appellant sat on her and shook her such that she could not breathe. II AA 305, 309. Davis testified that Shaylyn told her about the strangling/choking/sitting incident. III AA 498–99, 506. Davis also testified that Shaylyn told her Appellant hit her in the head three or four times. III AA 506–07.

Finally, though Appellant seems to imply otherwise, the statutes do not require evidence of a lasting physical or mental injury. AOB at 15; see NRS 200.481 (defining as "any willful and unlawful use of force or violence upon the person of another"); NRS 200.508 (defining "abuse, neglect or endangerment of child" as when a person "willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect *or to be placed in a situation where the child may suffer* physical pain or mental suffering as the result of abuse or neglect") (emphasis added). Indeed, this Court has held that

the State need not present evidence of "actual physical pain or mental suffering . . . under the second theory in NRS 200.508(1)." Clay v. Eight Jud. Dist. Ct., 129 Nev. 445, 453, 305 P.3d 898, 904 (2013). Thus, Appellant does not provide any authority for the assertions that the lack of evidence of physical or mental injury—or the victim's subjective "happiness"—mean that Appellant did not commit these crimes. AOB at 15.

Regardless of Appellant's argument that any particular piece of evidence should have been excluded, this Court must consider each and every piece of evidence discussed herein in this sufficiency of evidence issue, as it was all offered at trial. McDaniel, 558 U.S. at __, 130 S.Ct. at 672. There were many sources of evidence—video, written, and testimonial—to corroborate each instance of Appellant's violence against Shaylyn. With all of this evidence considered in the light most favorable to the prosecution, any rational jury would have convicted Appellant of these four counts beyond a reasonable doubt. Milton, 111 Nev. at 1491, 908 P.2d at 686–87.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

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/ / /

Dated this 11th day of March, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 5,979 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 11, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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