Theresa A. Ristenpart, Esq. (NSBN 9665)
RISTENPART LAW, LLC
464 South Sierra Street
Reno, NV 89501
(775) 200-1699

Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF NEVADA

LISA ANN NASH, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 76098

APPELLANT LISA ANN NASH'S REPLY BRIEF

Theresa A. Ristenpart, Esq. (NSBN 9665)
RISTENPART LAW, LLC
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NRAP 26.1 Disclosure

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Court may evaluate possible disqualification or recusal. Appellant Lisa Ann Nash is an individual who was represented in Clark County District Court by Steve Evenson, Esq.

DATED this 24th day of April, 2019.

RISTENPART LAW, LLC

By: /s/ Theresa Ristenpart

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page Number**

Nevada Supreme Court Cases

III. REPLY

1. MEGAN NASH'S WRITTEN STATEMENT CONTAINING VAGUE AND UNSUBSTANTIATED ALLEGATIONS OF PRIOR BAD ACTS.

The State argues that Megan Nash's prior written statement was admissible as impeachment as Megan Nash testified that she "not remember" in response to State questioning about the acts charged against Ms. Nash. Opposition at 5-11.

The State glossed over the fact that the written statement contained allegations of prior, unsubstantiated acts of physical child abuse against Shaylyn. The statement, admitted as Exhibit 2, stated "This has happened on more than one occasion, it happens about 2-3 times a month."

Under Nevada's rules of criminal evidence, evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question. NRS 48.045(1). *Qualls v. State*, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998). The trial court's failure to adhere to the procedural requirement of a proper, on-the-record hearing prior to admission of such evidence may be cause for reversal but does not mandate reversal in all cases. *Id. quoting See Felder v. State*, 107 Nev. 237, 241, 810 P.2d 755, 757 (1991); *see also Wesley v. State,* 112 Nev. 503, 512, 916 P.2d 793, 799-800 (1996), *cert. denied,* 520 U.S. 1126, 137 L. Ed. 2d 346, 117 S. Ct. 1268 (1997). The trial court's failure to conduct a proper hearing on the record is cause for reversal on appeal unless: (1) the record is sufficient for this court to

determine that the evidence is admissible under the test for admissibility of bad acts evidence set for in *Tinch*; or (2) where the result would have been the same if the trial court had not admitted the evidence, *see Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). *Id*.

Here, the reference to unsubstantiated and vague allegations of abuse "2-3 times a month" would mislead a juror to believe that Appellant Nash engaged in repeated and multiple abusive acts over a long period. This is highly prejudicial to Appellant Nash as she was forced to defend against unsubstantiated allegations which did not have definite basis. The purpose of having a pre-trial hearing under *Petrocelli* is exactly for this reason; to prohibit a defendant from being unfairly prejudiced.

The court did not attempt to redact or sanitize the written statement to protect Appellant Nash's from being unfairly prejudiced and fighting against a vague and unsubstantiated claim. The district court abused its discretion by admitting vague prior bad act evidence without first having a hearing to establish if relevant and proven by clear and convincing evidence.

2. THE APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY THE IMPROPER ADMISSION OF MENTAL HEALTH AND MEDICAL REPORTS THROUGH A THIRD PARTY.

The State argues that the testimony and evidence, regarding Shaylyn's mental health and medical reports was "very minimal." The State further argues that any harm caused by the improper admission of Shaylyn's cognitive issues was ameliorated

by the fact that Appellant Nash testified about Shaylyn's mental health. Opposition at 15-18.

This evidence regarding Shaylyn's cognitive was clearly more than "minimal." The jury placed a lot of weight on this testimony about Shaylyn's mental competency as demonstrated by the jury question "Was Shaylyn aware of what had happened?" in reference to the alleged incidents. APP 0335. The State capitalizes on this and labels Shaylyn as "special needs" with a lesser IQ. APP 0824. The State repeatedly argues in closing argument that Appellant's behavior was even more heinous and child abuse because Shaylyn was a special needs child who had multiple mental diagnoses. APP 0824, 0872, 0874, 0876. The State used this argument to convict Appellant Nash.

Appellant Nash did not relinquish or abandon any potential Confrontation Clause. Appellant Nash testified about her understanding of Shaylyn's diagnoses in response and only after the district court already let in damaging and severely prejudicial inadmissible hearsay against Ms. Nash through the third-party caseworker. There was no evidence from the caseworkers that Shaylyn was in a special needs placement with Appellant Nash.

Lastly, the State argues that Shaylyn's medical and mental health records are not "testimonial" and their admission does not violate the Confrontation Clause. Opposition at 18. The State argues that the statements were made to a health provider

and not generated at the behest of a government agency. Opposition at 19. The State makes these assumptions without any record supporting these arguments.

CPS Jackson-Gordon testified that:

> 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. APP 0328.

The State asked CPS Jackson-Gordon more questions about information she had through her records at CPS.

> Q. Now, with regard to Shaylyn, did you have any information with regard to her physical ailments? In other words, was she on any medication? Did she have any diagnoses?
> A. Yes.
> Q. What information, if any, did you have?
> A. That she operated on a level of a child that was about 8 years old. She has suffered from post-traumatic stress disorder. She's been diagnosed with ADD and ADHD. She's got asthma. She's been classified as being emotionally and developmentally disturbed. And she has been sexually abused in her past. She's been separated from her family. Her siblings have all been adopted out and Ms. Nash was her last recourse.
> Q. Do you know whether or not she's on psychotropic meds?
> A. According to the report she was.
>
> APP 0331.

CPS Jackson-Gordon was employed Clark County Department of Family Services and Child Protective Services, a government agency. APP 0320. It is not clear in the transcript as foundation was never established regarding what records CPS Jackson-Gordon was referring. It is not evident from the record

whether these medical reports and mental health reports were made at the behest of a government agency. Under cross-examination, CPS Jackson-Gordon commented that the "reports" she was referring to were CPS reports. APP 0336-0337. CPS records are made for the purpose of gather evidence for use at a later trial as the purpose as it is a government agency investigating allegations of child abuse and neglect. APP 0324. Since these were CPS records, then the medical and mental health reports were obviously generated at the behest of a government agency and are testimonial. *Harksins v. State*, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006).

The admission of prejudicial and unsubstantiated medical and mental health testimony through the CPS worker violated Ms. Nash's constitutional right to confrontation and, as such, this error warrants a reversal of the convictions.

3. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

There was no evidence of physical injury. There was no evidence of mental injury. There were two pieces of physical evidences admitted; video clips and Megan Nash's written statement. The State relies on Megan Nash's written statement to bolster their claim that there was enough evidence. Opposition at 22. As earlier argued, this written statement contained vague and unsubstantiated prior bad act allegations which were not to a hearing, nor determined to be proven by clear and convincing evidence.

With the improper admission of Megan's unspecified allegations of prior persistent abuse happening two to three times a month and the State's argument that Shaylyn was particularly vulnerable given her special needs and low IQ, no reasonable jury would have found that Lisa Nash's actions amounted to felonious child abuse or neglect.

Here, if all the improper and highly prejudicial evidence had not been admitted, a jury, acting reasonably, would not have convicted Ms. Nash. If this Court does not find that any of the above errors, standing alone, are sufficient for a reversal, then their cumulative effect was to deny Mr. Nash's Constitutional rights. Such cumulative error is prejudicial, and the remedy required is a reversal. This Court has repeatedly recognized the cumulative error doctrine. *Big Pond v. State*, 101 Nev. 1, 2 (1985); *Earl v. State*, 111 Nev. 1304, 1311 (1995); and *Homick v. State*, 112 Nev. 304, 316 (1996): If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction. Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. *Id*. Accordingly, because of the cumulative effect of these errors, this matter must be reversed and remanded for a new trial.

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IV. CONCLUSION

Lisa Nash relies on the foregoing to respectfully request that this Court vacate the Judgment filed against her in the Eighth Judicial District, Clark County.

Respectfully Submitted this 24th day of April, 2019.

By: */s/Theresa Ristenpart, Esq.*
Theresa Ristenpart, Esq.
Appellant Counsel for Lisa Ann Nash

CERTIFICATE OF COMPLIANCE WITH NRAP 32(a)

Certificate of Compliance with Formatting Requirements, Volume Limitation, Typeface Requirements, and Type Style Requirements in Case Number 76124.

1. This brief complies with the type-volume limitations of Nevada. R. App. P. 32(a)(7)(B) because:

This brief contains 2223 words, excluding the parts of the brief exempted by Nevada R. App. P. 32(a)(7)(C).

2. This brief complies with the typeface requirements of Nevada. R. App. P. 32(a)(5) and the type style requirements of Nevada. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font and Times New Roman type style.

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.

By: */s/Theresa Ristenpart, Esq.*
Theresa Ristenpart, Esq.
Appellant Counsel for Lisa Ann Nash
Dated this 24th day of April, 2019.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of RISTENPART LAW, LLC and that on the 24th day of April, 2019, a true and correct copy of the **Lisa Ann Nash's Reply Brief** was e-filed and e-served on all registered parties to the Nevada Supreme Court's electronic filing system as listed below:

Steven S. Wolfson
Clark County District Attorney

Adam Laxalt
Attorney General State of Nevada

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document to the following non-CM/ECF participants:

Lisa Ann Nash
1220 Roberson Lane
Fallon, NV 89406