IN THE SUPREME COURT OF THE STATE OF NEVADA

JANET SOLANDER, Appellant, vs. THE STATE OF NEVADA, Respondent.	)))))))))	CASE NO. 76228 Electronically Filed Sep 24 2019 07:35 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction (Jury Trial))

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	)	
Appellant,	)	
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vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	

APPELLANT'S REPLY BRIEF

SUPPLEMENTAL ARGUMENT

Appellant incorporates by reference the points and authorities and arguments preserved in her Opening Brief, and offers the following corrections to the State's Answering Brief as follows:

I. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF SEXUAL ASSAULT OF A MINOR UNDER FOURTEEN.

The State relied on Doctrine of the Law of the Case and reiterated much of its emotional appeal to the fact-finder in its Answering Brief with respect to the State's first-of-its-kind application of the Sexual Assault statute to the use of catheters in a parent-child relationship. The State ignored Appellant's arguments that this prosecution applied the statute to behavior that the Legislature in no way intended for this statute to be applied, to wit: the parental application (or, more accurately, threat of application) of a catheter to an incontinent child or a child

deliberately withholding her urine to the detriment of the child's health. To assign a per se "sexual penetration" burden of proof of these circumstances was not contemplated by the plain language in NRS 200.364(5).

More persuasively, however, the testimony of each of the minors made it so that there was a physical impossibility that the catheters were ever inserted in any of the children. The Eldest Daughter provided no specificity or description consistent with the insertion of a catheter: "Oh my God. So basically I don't know the answer to that because I don't know." (AA XIV, 3323) and "Janet had a catheter…she put it in me…pee came out." (AA XIV, 3318.) The Middle Daughter similarly testified in generalities and testified that the catheters were threatened as a means to compel compliance to avoid being beaten. She also testified that Appellant held a catheter in one (1) hand and a razor blade in the other hand, implying that it is physically possible to single-handedly insert a catheter. (See AA XVI, 3775)(cf. testimony of the State's expert, Dr. Sandra Cetl AA XIX, 4704.) By contrast, the Youngest Daughter testified that she fought, kicked, and wriggled to the point where Appellant was forced to pin the child with one (1) hand and insert the catheter with the other. (AA XVI 3884-3885.)

Notably, none of the adopted children alleged that they had been abused with catheters when the Florida CPS workers interviewed them in an untapped and undocumented interview while they lived at the Marvelous Grace Girls Academy;

it was only after the girls returned to Las Vegas, after they had traveled back together and unsupervised by any state agent, that they concocted and disclosed for the first time the allegations of Appellant inserting a catheter into them. (AA II, 338.) The Youngest Daughter, the most theatrical of the group, elaborated on the story and mixed up the catheter insertion allegation with the paint stick, which is where the Sexual Assault of a Minor Under Fourteen by way of paint stick came from.

The motivation behind the minors' testimony cannot be ignored: they did not want to be adopted by the Solanders, they did not like the home school structure in the home, and they did not want to be disciplined for their bad behaviors. (AA XIII, 3250; AA XV, 3711.) Their behavioral problems were well-documented by the children's therapists while they in the custody of the Department of Family Services, and their last foster parent before the Solanders proved herself to be a poor historian about the girls' problems. (See AA XII, 2821-2844.) To retaliate for discipline and a life the adopted children did not want, they concocted the extreme story of what they had been threatened with to make it appear that they had actually been abused when catheters. Their testimony bore out, however, that they only knew enough factual information to describe the catheter process in only basic, generic terms. There was no corroborating evidence of these stories.

Appellant's biggest problem with her trial, however, was that at least two (2) full weeks of testimony had occurred painting her as a horrible, abusive foster parent for dissimilar conduct by the time that the jury ever heard about the alleged catheter insertions on the adopted children. The State capitalized on improper and inflammatory bad act evidence, which is the type of evidence that convictions cannot rest on. See Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281-82 (2005).

Therefore, the convictions for Sexual Assault With a Minor Under Fourteen must be vacated because the State did not meet its burden beyond a reasonable doubt.

II. NRS 200.508(1) IS AMBIGUOUS AND OVERBROAD, AND AFFORDS NO DEFENDANT PROPER NOTICE AS TO WHAT CONSTITUTES CHILD ABUSE, NEGLECT OR ENDANGERMENT FOR AN "EXTENDED PERIOD OF TIME" TO A CRIMINAL DEGREE.

The State's Answering Brief erroneously suggests that this Court has no duty to review arguments that were not preserved at the trial court or for which Appellant provided no record cite. In Appellant's lengthy Opening Brief, there are record cites to the lengthy Appendices, ad nauseum, with one single exception, which references the exact day and page of the trial transcript (Day 20, page 210), when there was significant argument by the Defense as to the lack of notice. This was not something pulled from no record cite, and Day 20, as well as all days of all

of the trial, are clearly included in the Appendix. Appellant has in no way waived the lack of notice argument because that was argued at trial and is included in her Appendix at Vol. XX, 4811.

The State incorrectly argued that Appellant did not preserve the objection in the trial court below, which is contradicted by the Court's own recognition of the argument as an objection to the overbreadth of the language, "extended period of time," rendering NRS 200.508(1) ambiguous and overbroad. The plain meaning of the words "extended period of time" never placed a reasonable parent on notice as to what forms of deprivation are criminally liable, and deprivation is a common and acceptable form of parental punishment. (Anthony Lee R. v. State, 113 Nev. 1406, 952 P.2d 1 (1997)("[S]tatutory language should not be read to produce absurd or unreasonable results.")

Ambiguity inures to the benefit of the accused. Application of Laiola, 83 Nev. 186, 426 P.2d 726 (1967). The ruling by the trial court, contrary to Laiola, As pled, the Second Amended Information was inadequate notice. The construction of a statute is a question of law subject to de novo review. State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). By operation of law, Appellant's convictions for Child Abuse, Neglect or Endangerment for deprivations of an "extended period of time" are void and as pled, allowed the jury to come to an absurd result.

Therefore, the ambiguity in NRS 200.508(1) that allowed the State to introduce language calling for an extreme result should resolve in the reversal of her convictions for all counts in which "extended period of time" is used, to wit: Counts 3, 4, 5, 6, 10, 15, 16, 17, 18, 21, 26, 27, 28, 29, 41, 44, 45.

III. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT WAS GUILTY OF CHILD ABUSE, NEGLECT OR ENDANGERMENT RESULTING IN SUBSTANTIAL BODILY HARM.

The State's Answering Brief relies heavily on arguing that Appellant's disciplinary practices were "extreme." While NRS 200.508 criminalizes conduct constituting child abuse, neglect, or endangerment that results in substantial bodily harm, the statute provides definition for what must be proven for "substantial bodily harm." "Substantial bodily harm" is bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ, or prolonged physical pain. NRS 0.060.

The State initiated a prosecution based on a fundamental disagreement with Appellant's parental disciplinary practices. Obviously, arguing Appellant's discipline to be "extreme" is not the same as establishing criminal culpability beyond a reasonable doubt.

At trial, the State failed to prove the timing or source of the linear scars that were identified on the buttocks and backs of the adopted children. (AA XIX,

4646.) The testimony that Child Protective Services and/or Department of Family Services failed to photograph and preserve the injuries and scarring of the foster children in their care prior to placing them with the Solanders and that the children had been spanked with belts by their biological relatives meant that Appellant could not have been isolated as the source of the old, faded linear scars to the trier of fact beyond a reasonable doubt. (See AA XIX, 4705-4706.)

Given the numerous eyes on those children – multiple doctors who testified they conducted body checks, including on the child who underwent two (2) colonoscopies, in addition to all of the Child Welfare workers in and out of the Solander home, there was never even an inkling or reason to report the Solanders for their disciplinary practices. (See, e.g., AA XIV, 3313; 3423; AA VII, 1743; 1965.) It was only after the children were being forced to return from Florida and after they had been afforded a practice opportunity in Florida to come up with the tall tales they ultimately told the CPS investigators.

It cannot be overstated how much the irrelevant bad act evidence impacted the jury's deliberations. The State used bad acts evidence to bolster its forensically weak evidence that the Solanders individually yielded any permanent disfigurement to the bodies of any of the children when they used allowable corporal punishment to deter their children from lying, manipulating, or otherwise engaging in bad behavior. There was no protracted loss or impairment of any

bodily member or organ that was observable to any of the medical professionals or Child Welfare workers who interacted with the adopted children until after the Solander children had returned to Florida and collaborated together to come up with their story.

Therefore, the State failed to prove beyond a reasonable doubt that Appellant was guilty of Child Abuse, Neglect or Endangerment resulting in Substantial Bodily Harm as to any of the adopted girls.

IV. ADMISSION OF PRIOR OR CO-OCCURRING BAD ACTS INVOLVING APPELLANT'S CARE OF THE FOSTER CHILDREN IN HER HOME VIOLATED HER RIGHTS TO DUE PROCESS.

NRS 48.045 bar against evidence of other crimes, wrongs, or acts of proof of a person's character is well-established law for a good reason. Bad acts evidence conflates the legal issue for the jury, and did so in Ms. Solander's case. For the first two (2) weeks of trial, the jury sat through witness after witness who testified about their observations of Ms. Solander as being odd, unlikeable, or as fostering her foster children in a way they would not personally have done. None of that conduct was ever charged as criminal. The State curiously argued that the bad acts evidence was important to show Ms. Solander's commonality of focusing so much on food and toileting, which should have rendered the bad acts admissible, but then spent the last weeks of the trial arguing that Ms. Solander treated the foster children differently than her adopted children. The State cannot have it both ways.

An accused should be tried for the crimes charged, not because other people see her non-criminal, non-similar conduct as "bad."

This Court has correctly ruled that the practice of admitting bad acts evidence is disfavored. Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281-82 (2005). The Nevada Supreme Court has reversed more than twenty (20) cases on the grounds that the admission of bad acts evidence rendered the verdict of a trial to be reversible error. (See Footnote 1 in Appellant's Opening Brief for more specificity).

NRS 48.045(2) provides: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before admitting any such evidence under one of the enumerated exceptions, there are three (3) predicates the State must establish: (1) the offered acts are relevant to the crime charged; (2) the offered acts are proven by clear and convincing evidence; and (3) the evidence supporting the offered acts of the evidence is more probative than prejudicial. Salgado v. State, 114 Nev. 1039, 1042 (1998), citing Meek v. State, 112 Nev. 1288, 1292-93, 930 P.2d 1104, 1107 (1996).

In this case, the State argued that Ms. Solander's "bad acts" evidence of her care and practices with the foster children were relevant because of a similar fixation on toileting and food preparation. Then, at trial, the State argued the opposite, which prejudiced Ms. Solander because she was portrayed as a bad person who differentiated between her adopted children and her foster children. The State's presentation of cumulative witness after witness about Ms. Solander's treatment of the foster children was presented as a contrast to denigrate Ms. Solander, not to point out any similarities or relevant patterns of criminal conduct. (See AA IX, 2187; 2488; AA XV, 3555.)

The State argued that Ms. Solander's practice of pre-sorting the toilet paper demonstrated Ms. Solander's hyper-fascination or obsession with toileting. (AA XXI, 5014.) The State was permitting to argue that Ms. Solander had a hyper fascination with toileting ignores the actual facts that at various points in the home, Ms. Solander was potty training between (2) and four (4) foster children, all young, all of whom had their own potty training barriers in the homes they had been removed from, in addition to the three (3) adopted daughters with their own histories of wetting and soiling problems. (See, e.g., AA II, 366 related to the Diaz-Burnett sibling group's original home.) The decisions Appellant made to provide structure to bathroom time for as many as seven (7) children at a time was out of lawful duty to the foster children and for organization for her own children.

The State was permitted to argue this was evidence of a common scheme or plan that Ms. Solander sought to make more money from the foster children. That is patently untrue and belied by the record. While it is true foster parents earn more money for especially needy children, the purpose of bad acts evidence is to present a common scheme or plan related to the criminally charged conduct. Ms. Solander did not earn more money for her adopted daughters simply because they had bed wetting and self-soiling issues past the age that normal children are generally potty-trained. The arguments at trial were that Ms. Solander's treatment of the foster and adopted children were similar, not different. Notably, the State's original Motion did not allege at all that the Solanders' common scheme or plan was for the purpose of making more money. The State's Answering Brief misstated the common scheme or plan argued by the prosecutors to the trial court. (AA I 97-124.) The issue of how much foster parents were compensated for needy children did not arise until trial.

The State was allowed to argue by virtue of the bad acts evidence that Ms. Solander was "obsessive" about what the foster children ate, in order to make her seem like a controlling, bad person who purposely starved the foster children in her care; indeed, witnesses testified the foster children were skinny. (AA II, 377.) Notably, the children came into foster care skinny, already had issues of their own, and no testimony was presented by any medical professional of any of the foster or

adopted children that they were skinny to a degree that was criminal abuse or neglect.

Therefore, Appellant is entitled to a new trial where the bad act evidence is excluded in its entirety, because the purpose that the evidence was originally offered for was not the actual purpose argued by the State at closing.

CONCLUSION

WHEREFORE, for the reasons set forth in her Opening Brief and considering the responsive arguments contained in this Reply Brief, the Appellant, JANET SOLANDER, respectfully requests that this Court:

1) Vacate all of her convictions, and
2) Reverse and remand for a new trial that comports with due process of law based on any one (1) individual error or all of the errors cumulatively that denied her a fair trial per Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); Dechant v. State, 10 P.3d 1108 (2000).

DATED this 24th day of September, 2019.

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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 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 3C(h)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,494 words.

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 24th day of September, 2019.

/s/: Caitlyn McAmis
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 24th day of September, 2019, the foregoing **APPELLANT'S REPLY BRIEF** was served upon the appropriate parties hereto via the Supreme Court's notification system in accordance to the Master Service List as follows:

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