IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD ALEXANDER JENKINS,

Appellant.

v.

STATE OF NEVADA,

Respondent.

Case No. 83465

_____/

APPELLANT'S REPLY BRIEF

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCING

NINTH JUDICIAL DISTRICT
STATE OF NEVADA

The Honorable Thomas W. Gregory, presiding

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I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JUDGMENT OF GUILT OF LEWDNESS WITH A 14-TO-16-YEAR-OLD MINOR CHILD AS A MATTER OF STATE AND FEDERAL LAW.

The State contends that the evidence "amply" supports the verdict, and trumpets State v. Catanio, 120 Nev. 1030, 102 P.3d 588 (2004) in support of its position.

Catanio does not help the State at all.

Catanio is an appeal from a pretrial dismissal of lewdness with a minor child charges. It is not an "insufficient evidence" case, but rather, addresses the issue of whether probable cause of a violation of NRS 201.230 can be based on a lack of physical contact between the defendant and the victims.

Unsurprisingly, the answer to that question is yes. See: 120 Nev. at 1033-34, 102 P.3d at 590. But consider the facts of Catanio:

There, the defendant offered the 13-year-old victims money to masturbate in his presence. The defendant engaged in progressively lewd conduct with them, from giving them candy to giving them pornographic materials, alcohol, handcuffs and condoms. Further, the defendant admitted to the police being sexually aroused by the sight of the boys masturbating.

Catanio does not hold and does not mean that the State may properly prosecute a defendant who touches a child's clothed buttocks without saying or doing anything sexual in that regard.

Closer to the mark, albeit not 100% on it, is Shue v. State, 133 Nev. 798, 908, 407 P.3d 332, 340 (2007) [reversed in part]. There, this Court held that an NRS 201.230 prosecution cannot be based on the defendant's act of kissing a 15-year-old minor without her consent, absent evidence of the nature of the kiss. The facts that the victim felt uncomfortable and scared, and that the defendant admitted he found the young girl attractive, were not enough to establish lewd conduct, even if the kiss may have been inappropriate.

Ultimately, what we are talking about is whether the activities of Mr. Jenkins clearly were intended to be sexually offensive to G.W. See: Ranson v. State, 99 Nev. 766, 767-68, 670 P.2d 574, 575 (1983). On this record, the Court is constrained to answer that question in the negative.

First off, the fact that Appellant touched G.W. on her clothed buttocks, by itself, does not establish lewd intent, any more than the "kiss" in Shue.

Consider these scenarios: 1) A high school football coach pats his player on the buttocks, telling him "to get in there and do well." 2) A high school girls' basketball coach, demonstrating a "chest pass," throws a ball that hits one of the teenaged players in her breasts. 3) A high school drama teacher, teaching a student how to "stage" an act of kicking a perpetrator in the gonads, during a scene in a dramatic play, manages to have the young actor actually miss and connect with the other teenaged actor's gonads.

Nobody – not even the Douglas County District Attorney's Office – would prosecute those three cases under NRS 201.230. The lewd and lascivious intent in those three scenarios is obviously missing.

Turning to this case, hopefully the Court has read the State's brief at RAB 2-10 with a critical eye, asking "Where's the evidence of sexual intent?" It simply is not there!

There simply is no evidence of a sexual statement by Mr. Jenkins during any of the prosecuted activities. And there is no evidence that Appellant was aroused. And there is no evidence, unlike Catanio, of escalating conduct.

Instead, what we have is a sad teenager, looking for a "father figure" after the untimely death of her stepfather, and an adult male who was all too willing to be that "father figure." Whether G.W.'s "clinginess" simply imitated the behavior of Appellant's daughter, Alyssa, G.W.'s then-best friend, or not, the evidence is simply devoid of any sexual intent in the Appellant's otherwise arguably inappropriate behavior. The fact that G.W. now says she felt uncomfortable and scared does not carry the day – whether in Shue or in the situation regarding the innocent Gage.

For these reasons, as well as the reasons stated at AOB 15-19, the evidence is insufficient to sustain the convictions of NRS 201.230 as a matter of law.

II. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT

RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW WHEN IT ALLOWED THE STATE'S "COLD" "CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME" EXPERT TO TESTIFY.

Interestingly, the State asserts at RAB 2 that this case does not present issues of first impression. But then, the State relies upon NRS 50.350 as authority to permit Dr. Carmichael's testimony. See: RAB 2, 25. That statute has not been construed to date. Construction of the statute absolutely makes this an issue of first impression!

NRS 50.350 provides:

> "1) In any criminal…action, expert testimony offered by the prosecution…which concerns the behavior of a defendant in preparing a child under the age of 18 years…for sexual abuse by the defendant is admissible for any relevant purpose. Such expert testimony may concern, without limitation:
>
> a) the effect on the victim from the defendant creating a physical or emotional relationship with the victim before the sexual abuse; and
>
> b) any behavior of the defendant that was intended to reduce the resistance of the victim to the sexual abuse or reduce the likelihood that the victim would report the sexual abuse."

The 2015 passage of this statute post-dates Perez v. State, 129 Nev. 850, 313 P.3d 863 (2013), but it appears to codify the majority's holding. It does away with a challenge to a "Child Sexual Abuse Accommodation Syndrome" expert (herein after "CSASS") on the theory that the psychological studies behind "the syndrome" are "too squishy" to be admitted in a court of law. Frankly, it is unclear at best why the legislature even saw the need to create NRS 50.350 in light of Perez.

But because the statute uses the terms "expert testimony" and "for any relevant purpose," the statute appears to coopt NRS 50.275 and the "assistance requirement" of Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008).

Indeed, it is basic law that when two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation, the court attempts to reconcile the statutes and read them in harmony, provided that its interpretation does not violate legislative intent. Szydel v. Markman, 121 Nev. 453, 457, 117 P.3d 200, 202-03 (2005), and cases cited therein.

The "harmonization" here is relatively easy. If a CSAAS expert's testimony is inadmissible per NRS 50.275, NRS 50.350 does not make it admissible. The opinion evidence still has to be relevant and material, meaning it has to pertain to a specific issue in the case; and the opinion evidence cannot invade the province of the trier of fact, meaning whether the defendant perpetrated sexual abuse and whether either the victim or the defendant is telling the truth or lying.

So construed, the State's position fails.

The State contends that Appellant's position is based upon the dissenting opinion in Perez. A careful review of AOB 23 reveals otherwise. In addition to that dissent and the cases cited therein[1], the well-developed law throughout the country

[1] State v. Starks, 492 P.3d 326, 332 (Ariz. App. 2021); State v. Etzel, 488 P.3d 783, 791 (Or. App. 2021); People v. Bowker (1988) 203 Cal.App.3d 385, 391, 249 Cal.Rptr. 886, 890; People v. Wells (2004) 118 Cal.App.4th 179, 188, 12

is that CSAAS experts may testify to facts explaining why child victims might delay reporting sexual abuse or might make inconsistent statements or recanting statements regarding sexual abuse. However, CSAAS experts may not testify to opinions indicating that sexual abuse occurred. The CSAAS syndrome was never meant to diagnose abuse or to establish a defendant as a perpetrator. Where the CSAAS testimony crosses that line, it becomes inadmissible, and the question then becomes whether the error is harmless or prejudicial. See: State v. J.Q., 599 A.2d 172, 184-87 (N.J. Super 1991)[reversed]; People v. Beckley, 456 N.W.2d 391, 407-08 (Mich. 1990)[reversed in part]; People v. Taylor, 552 N.Y. Supp. 2d 883, 890-91 (N.Y.A.D. 1990)[reversed]; State v. Foret, 628 So.2d 1116, 1130 (La. 1993)[reversed].

We submit that all of this authority is perfectly consistent with Townsend v. State, 103 Nev. 113, 118-19, 734 P.2d 705, 708 (1987): While psychiatric testimony is admissible to establish PTSD patterns in sexually abused children, it is not admissible to establish either the defendant as a perpetrator or the victim as a truthful witness. Those opinions would invade the province of the jury.

Here, and unlike Townsend, the psychologist was a "cold expert," meaning Dr. Carmichael could not and did not opine on whether G.W. was even a victim of sexual abuse. So, his testimony was irrelevant and therefore of no assistance to the

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jury. Etzel, *supra*; Hallmark, *supra*, 124 Nev. at 502.

Otherwise, his CSAAS testimony crossed the line. As pointed out at AOB 10-11, Dr. Carmichael testified that the victim and the perpetrator eating together or going on trips together "can be" part of grooming; it is "possible" for the child to enjoy such activities, even love "the perpetrator" for what he does; the touching on the back or a kiss on the forehead "masks" the inappropriate part of touching; watching movies together "can be" a form of grooming; there is no profile that fits child sexual perpetrators; and their activities "are not always about sex."

In other words, all of these facially innocent behaviors, together with G.W.'s testimony, make this Appellant (but not Gage) a sexual abuser. This testimony went well beyond explaining inconsistencies in G.W.'s stories.

Moreover, a CSAAS expert was unnecessary to explain G.W.'s credibility. Her "delay" was not all that substantial; the alleged events occurred in the early and late summer of 2018, whereas the reporting occurred in the early autumn of 2018.

Moreover, a "CSAAS" expert was unnecessary to establish why G.W. gave a different statement to Detective Chrzanowski that was either inconsistent to or an embellishment on her initial statement. The reason for that was because of G.W.'s subsequent interactions with coach Marie Foster. This Appellant had absolutely nothing whatsoever to do with G.W.'s decision to make a second or third statement

to the Investigator. Accordingly, Dr. Carmichael's testimony was irrelevant and therefore did not assist the jury even to that extent.

This error, whether singularly or in cumulation with the NRS 48.045(2) errors, denied Appellant his right to a fair trial. Even if the evidence is sufficient, the issue of innocence or guilt is close; the crime charged is grave in nature; and the quantity and character of the error is profound. See: Gonzalez v. State, 131 Nev. 991, 1003, 366 P.3d 680 (2015).

III. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN ALLOWING EVIDENCE OF UNCHARGED NON-SEXUALIZED TOUCHINGS BETWEEN APPELLANT AND G.W. IN SO DOING, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

The State conveniently ignores discussion of Randolph v. State, 136 Nev. Ad. Op. 78, 477 P.3d 342 (2020), Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993) and Cipriano v. State, 111 Nev. 534, 541-43, 894 P.2d 347, 351-52 (1995). In order for the testimonies of Tamera Woodbridge, Ashley Gosney, Nicholas Lonnegren, Joe Girdner, Caylyn Keith, Kurt Ahart, Erica Janicki and Bella Guerrazzi (hereinafter "the eight witnesses") to be admitted, their testimonies would have to be a description of a crime. Here, none of the eight described a crime. They described unusual – indeed, inappropriate – behavior on the part of the Appellant and G.W.; but they described nothing that was prosecutable. Just as the evidence could not come in under NRS 48.045(3), it was equally inadmissible

under NRS 48.045(2) for the reasons stated at AOB 27-29.

So, the State takes a different approach. It points out that Judge Gregory mentioned somewhere along the line that the evidence could come in as "*res gestae.*"

Respectfully, if that is the State's best position, it should be stipulating to error.

To be admissible as *res gestae* under NRS 48.035(3), evidence of another act or crime must be so closely related to the act in controversy or the crime charged that an ordinary witness cannot describe it without referencing the act or crime.

As noted by this Court in Weber v. State, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005)[2], NRS 48.035(3) does not contemplate a hypothetical witness or an abstract viewpoint from which two or more acts might be considered intertwined. Further, the other act/crime in question must reference a witness's ability to describe, not merely explain, the charged crime.

Based on this restrictive interpretation of NRS 48.035(3), then, in Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005), a first-degree murder case, the defendant's threatening statements to the arresting police after his arrest were not

[2] Weber was overruled on other grounds, Farmer v. State, 133 Nev. 693, 698, 405 P.3d 114, 120 (2017).

admissible *res gestae* relative to the reason for his flight.

In Flores v. State, 116 Nev. 659, 662, 5 P.3d 1066, 1068 (2000) [reversed], evidence that a co-defendant was convicted of an earlier murder in which the same gun was used was not admissible against the defendant in a murder prosecution under the "*res gestae*" doctrine of NRS 48.035(3).

And in Bletcher v. State, 111 Nev. 1477, 1479-80, 907 P.2d 978, 979 (1995), the defendant's use of drugs shortly before the murder was not admissible under the "complete story of the crime" doctrine, even though the murder was drug related. Accordingly, the second-degree murder conviction was reversed.

Clearly, G.W. was able to describe – not merely explain, but describe – what happened to her in "the squishy room", the "storage closet," and "under the stairs" at the Douglas County Recreation Center, as well as in the living room of the Appellant's home in the presence of his own daughter, without referencing anything that the eight witnesses described. The issues of what happened in other parts of "the rec center," at Douglas High School, at Pau Wa Lu Middle School, or at a restaurant had absolutely nothing whatsoever to do with the charged events. G.W., who was 16-years-old at time of trial, could easily explain what happened in the living room and those three areas of the "rec center" without referencing anything else.

As argued at AOB 29-31, the sheer number of eight of these witnesses,

coupled with their dramatic reactions to the Appellant's non-criminal behavior, and the rec center's insistence in turning over only the "most inculpatory" clips to the Douglas County Sheriff's Office, clearly made this evidence more prejudicial than probative. And the prosecutor's closing argument regarding the uncharged non-crimes only cemented the proposition that the error cannot possibly be harmless.

IV. CONCLUSION

Nothing in the State's brief should deter this Court from reversing the Judgment of Conviction, preferably with directions.

DATED this 30th day of March, 2022.

Respectfully submitted,

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By: */s/RichardCornell*_____
Richard Cornell

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28(e), and NRAP 32(a)(8):

I have read the Appellant's Opening Brief before signing it; to the best of my knowledge, information and belief, the Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e), in that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)-(6). Specifically, the brief is 2.0-spaced; it uses a mono-spaced type face which is Times New Roman14-point; it is in a plain style; and the margins on all four sides are at least one (1)inch.

The Brief also meets the applicable page limitation of Rule 32(a)(7), because it contains less than 7,000 words, to wit: 2,519 words.

DATED this 30th day of March, 2022.

/s/RichardCornell
Richard Cornell, Esq., #1553

CERTIFICATE OF MAILING

The undersigned certifies that they are an employee of Richard F. Cornell, P.C., and that on the 30th day of March, 2022 they served a true and correct copy of the foregoing document upon opposing counsel, as set forth below, by way of the court's E-flex filing system:

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Kathryn O'Bryan, Employee