IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs.

Ct. App. 28,700
CR-2005-05712
(Bernalillo County)

ALICIA VICTORIA GONZALES,

Defendant.

COURT OF APPEALS OF NEW MEXICO
FILED
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BRIEF IN CHIEF

Criminal Appeal from the Second Judicial District Court County of Bernalillo
The Honorable Neil C. Candelaria, District Judge

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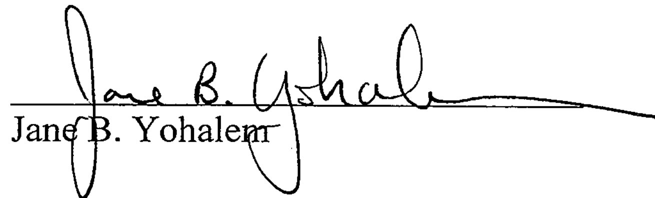
STATEMENT OF COMPLIANCE WITH RULE 12-312(g) NMRA

The body of the *Brief in Chief* exceeds the 35-page limit established by this Court for briefs in chief on this Court's general calendar.

As required by Rule 12-312(G) NMRA, I certify that this *Brief* is proportionally spaced and the body of the *Brief* contains 10,998 words, which is less than the 11,000 word maximum permitted by the rule. This *Brief* was prepared using WordPerfect, Version X3, and the word count was obtained from that program.



Jane B. Yohalem

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SUMMARY OF PROCEEDINGS

Nature of the Case

This is an appeal from the conviction of Defendant Alicia Gonzales of one count of child abuse resulting in death, negligently caused; and one count of child abuse not resulting in death or great bodily injury, negligently caused, pursuant to NMSA 1978, §30-6-1(D) (2004). These convictions arose out of an April 29, 2005, automobile accident on Interstate 25 in Albuquerque. At about 9:00 p.m. on that date, Ms. Gonzales, who was driving while intoxicated, crashed into the rear of another car. Although the driver and adult passenger sitting in the front seat of the car she struck were uninjured, Manuel Delgado, a 7-year old child sitting in the backseat, died from his injuries, and a second child, D'Andre Fortune, five years old, who was also sitting in the backseat, received minor injuries from which he fully recovered.

Although these children were not passengers in Defendant's vehicle, and although Defendant was not aware of their presence in the other vehicle, the State charged the Defendant with child abuse. Defendant was not charged with vehicular homicide. The primary issue raised in this appeal is whether the Legislature intended to punish as child abuse, pursuant to NMSA 1978, §30-6-1(D) (2004), driving while intoxicated which results in injury to a child in another vehicle.

Defendant contends that the Legislature never intended that injury to a child where the child is not in the defendant's vehicle, but is a passenger in the other vehicle, and where the defendant is entirely unaware of the child's presence, would be punishable as child abuse. Defendant also contends that, even if the Legislature did intend to define such conduct as child abuse, § 30-6-1(D) is not definite enough to put either an ordinary member of the public or law enforcement authorities on notice that Defendant's conduct is punishable as child abuse. Therefore, the statute is void-for-vagueness as applied to the facts of this case. In the alternative, Defendant seeks remand for a new trial based on the trial court's introduction of Defendant's irrelevant and highly prejudicial comment, made hours after the accident, that, if a child had been injured, he "was probably a little shit."

Summary of Relevant Facts and Proceedings

The facts in the record concerning the accident were largely undisputed. A small two-door Pontiac Sunfire was traveling southbound on I-25 at night, after dark. TR. Vol. 5, pp. 62, 64, 77. An adult driver and an adult passenger were in the front seat and there were two children in the back seat. *Id.* at 62, 64, 80. The car was struck from behind by Defendant's Toyota 4Runner. Witnesses agreed that the 4Runner was moving at a high rate of speed prior to the collision (far faster than the other traffic) and that it had been weaving in and out of traffic. *Id.* at 77, 78, 96.

Just before hitting the Sunfire, the 4Runner scraped the side of a Ford pickup truck, knocking off its mirror. *Id.* at 100-01. A witness described the 4Runner as braking for a few seconds after knocking off the mirror, and then keeping going into the rear of the Sunfire, and continuing to push that car forward. *Id.* at 102, 105.

The Sunfire was badly crushed from the back. *Id.* at 181. Seven-year-old Manuel Delfino died upon impact. Five-year-old D'Andre Fortune, who was sitting next to Manuel, sustained minor injuries in the crash, from which he fully recovered. TR. Vol. 7, pp. 32, 38; Vol. 5, pp. 54, 48, 54, 61. The adults in the front seat were not injured. Photographs taken by police after the accident showed the back seat and a child's car seat, pushed up against the Sunfire's front seat. Ex. 8 (Ex. H shows an infant seat which was not occupied at the time of the crash). Photographs of the Sunfire and trial testimony showed that the Sunfire had tinted windows. TR. Vol. 5, p. 212; Ex. I.

Defendant was semi-conscious at the scene of the accident. *Id.* She was taken to the hospital's trauma unit. TR. Vol. 6, p. 169. She was bleeding from the mouth and had other minor injuries. *Id.* at 166. Her blood alcohol level was measured at the hospital at .21. Ex. 16.

Hours after the accident, as she was lying in a hospital room, the Defendant asked Officer Enyart, who was sitting near her, what had happened and where she

was. The officer told the Defendant that she had been in a car accident. Defendant responded that it was not such big deal because nobody got hurt. The officer then told her that, actually, a little boy had been hurt. The officer reported that Defendant responded, "Well, he was probably a little shit, anyway." TR. Vol. 6, p. 37.

Defendant was charged with one count of child abuse resulting in death, pursuant to NMSA 1978, § 30-6-1(D), and one count of child abuse not resulting in death or serious bodily injury. On each of these counts, the State charged intentionally caused and, in the alternative, negligently caused, child abuse. Defendant was also charged with aggravated driving while intoxicated. Finally, she was charged with leaving the scene of an accident after scraping the side of the pick-up truck. RP 1-2.

Prior to trial, Defendant filed a motion to dismiss the child abuse counts. She argued that child abuse requires knowledge of the presence of a particular child, and conduct that endangers that particular child, rather than conduct which endangers the general public. Defendant argued that the proper charges were vehicular homicide and aggravated driving while intoxicated. RP 82-98. At the hearing on the motion to dismiss, in addition to rebutting Defendant's arguments on the law, the State also argued, in the alternative, that it would present evidence that another driver had been able to see a child in the Sunfire that night, and that, from this

evidence, a jury could infer that the children were visible to the Defendant. TR. Vol. 3, p. 42. The court denied the motion to dismiss both as a matter of law and because there were facts in dispute. *Id.* at 60.

The evidence subsequently presented at trial by the State concerning the visibility of the children was the testimony of a driver who had pulled up right alongside the passenger side of the Sunfire. The driver testified that it was because he remained right next to the Sunfire for several seconds, looking directly into the car, with his window down, that he was able to see the child sitting closest to him. TR. Vol. 6, pp. 127, 140. No evidence was presented that the children were visible to a vehicle approaching a car with tinted windows, in the dark, from the rear, as Defendant did here. The State, apparently recognizing the failure of proof, did not argue to the jury that Defendant was aware of the presence of the children. TR. Vol. 7, 99-109, 126-31.

When questioned by the judge during the hearing on the motion to dismiss, the prosecutor admitted that this was a test case, stating "the State hasn't tried to prosecute for child abuse under these circumstances before." TR. Vol. 3, 48. When asked by the court why the State had chosen to prosecute this case solely as child abuse, without charging vehicular homicide in the alternative, the prosecutor reported that she had asked that same question of her supervisor. The supervisor

could not explain; she couldn't recall the decisionmaking process. *Id.* at 40. The State never sought to amend the indictment to add a charge of vehicular homicide nor did the State seek to have the jury instructed on the lesser-included-offense of vehicular homicide. RP 205-20.

Defendant's objections to the child abuse charges were renewed at the conclusion of the State's case in a motion for a directed verdict, again at the conclusion of all of the evidence, and again by the submission of requested jury instructions which would have required the jury to find that Defendant was aware of the presence of the children in the other vehicle and that the Defendant knew or should have known that her conduct created a substantial and foreseeable risk of harm to those children, in particular, rather than to the general public. TR. Vol. 7, p. 47-48; 81, RP 234, 243.

Defendant sought by motion in limine at the beginning of the trial to exclude Defendant's comment, when told hours after the collision that a child had been injured, that "he was probably a little shit anyway." TR. Vol 5, p. 17. Defendant contended that the comment was irrelevant and highly prejudicial, pursuant to Rule 11-403. *Id.* The trial court admitted the evidence as probative of Defendant's mental state at the time of the collision, and especially, her disregard for the children. *Id.* at 20. The last thing the State said to the jury before the jury retired

to deliberate was: "When she said, he was probably a little shit, anyway. Ladies and gentlemen, this is child abuse, and we ask that you convict her of that." TR. Vol. 7, p. 131.

Thereafter, the jury returned a verdict of guilty as to one count of child abuse (negligently caused), one count of child abuse resulting in the death of the child (negligently caused), one count of aggravated driving while under the influence, and one count of leaving the scene of an accident. TR. Vol. 8. The jury was unable to reach a unanimous decision as to either count of intentional child abuse, and a mistrial was declared as to those charges. TR. Vol. 8, p. 7.

Ms. Gonzales was sentenced to 12 years imprisonment for negligent child abuse resulting in death, 3 years for negligent child abuse not causing serious bodily harm, 90 days for aggravated driving while intoxicated, and 364 days for leaving the scene of an accident. The sentences were to run consecutively, with the exception of the 90-day sentence for aggravated driving while intoxicated. The court suspended 4 years minus 1 day. Ms. Gonzales's actual sentence of imprisonment was therefore 12 years. RP 314-18. In mitigating the sentence for child abuse, the court found "that the defendant has no criminal history, that the defendant showed great remorse for her actions and the defendant has great potential for rehabilitation." RP 315.

This appeal was timely filed. Defendant does not appeal the convictions for aggravated driving while intoxicated and leaving the scene of an accident.

ARGUMENT

POINT I

THE LEGISLATURE NEVER INTENDED TO PUNISH AS CHILD ABUSE DRIVING WHILE INTOXICATED WHICH RESULTS IN INJURY TO OR THE DEATH OF A CHILD WHO IS A PASSENGER IN ANOTHER VEHICLE

Defendant contends that the Legislature did not intend to punish for child abuse a person who drives while intoxicated and causes a collision which results in injury to or the death of a child in another vehicle. Although driving while intoxicated admittedly endangers the general public, adults and children alike, it is not "child abuse" under § 30-1-6(D) simply because a child, rather than an adult, is injured. Our Legislature intended to punish as child abuse only the kind of highly reprehensible conduct, either direct assault or battery of a child or the kind of serious neglect of a child's care, which are commonly recognized as child abuse. Conduct in the operation of a motor vehicle which endangers the general public is punished under the Motor Vehicle Code, even when a child happens to be injured.

A. The Standard of Review

The interpretation of a statute is an issue of law that is subject to *de novo* review by this Court. *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022. The primary goal in statutory construction "is to ascertain and give effect to the intent of the Legislature." *Id.*; *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994).

This Court begins the search for legislative intent "by looking first to the words the Legislature chose and the plain meaning of the language." *State v. Moya,* 2007-NMSC-027, ¶ 6, 141 N.M. 817, 161 P.3d 862. Caution, however, must be exercised in applying the plain meaning rule: "Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning...." *Helman*, 117 N.M. at 353, 871 P.2d at 1359.

The plain meaning rule "must yield on occasion to an intention otherwise discerned in terms of equity, legislative history, or other sources." *Moya*, 2007-NMSC-027, ¶ 9. Our Supreme Court seeks a construction which is consistent with the statute's "obvious spirit or reason." *Id.* at ¶ 6.

B. Section 30-1-6: The Relevant Statutory Language

NMSA 1978, § 30-1-6(D) (2004), the criminal statute under which Defendant was charged and convicted, defines child abuse as follows:

> 30-6-1. ABANDONMENT OR ABUSE OF A CHILD.
>
> D. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:
>
> (1) placed in a situation that may endanger the child's life or health;
>
> (2) tortured, cruelly confined or cruelly punished; or
>
> (3) exposed to the inclemency of the weather.

The prosecution here relied exclusively on the language of § 30-6-1(D)(1). Defendant was convicted of two counts of "negligently ... and without justifiable cause, causing ... a child to be placed in a situation that may endanger the child's life or health." RP 253, 255.

The language of § 30-6-1(D)(1) is admittedly broad. Read without regard to the context and purpose of the statute, it could easily be interpreted to include all negligent conduct which might cause injury to a child. *See People v. Beaugez*, 43 Cal. Rptr. 28, 32-33 (Dist. Ct. App. 1965) (interpreting language similar to New Mexico's, the court commented that "[i]n number and kind the situations where a

child's life or health may be imperiled are infinite"). Recognizing that a reading including all conduct which imperils a child's life or health is inconsistent with the statute's focus on child abuse, our courts looked to the purpose sought to be accomplished by the Legislature to clarify the scope of the prohibited conduct. This Court, shortly after the statute's enactment, identified its purpose as to punish "*abuse*," and not "mere normal parental action or inaction." *State v. Coe,* 92 N.M. 320, 321, 587 P.2d 973, 974 (Ct. App. 1978). Addressing a facial challenge to the statute on vagueness grounds in a case of child abuse resulting in death where the defendant either directly physically abused the child or stood by without taking action to protect the child, this Court commented: "The statute gives fair warning to any reasonable person that child abuse is prohibited and punishable behavior." *Id. See also, State v. Lucero*, 87 N.M. 242, 531 P.2d 1215 (Ct. App. 1975) ("[t]he obvious public interest to be served by [this section] is the prevention of cruelty to children").

In an effort to determine whether the Legislature intended to include Defendant's conduct at issue here within the definition of child abuse, the next few subsections will examine the history leading up to the passage of this statute; the law in other states which adopted this definition prior to New Mexico and thus served as models for our Legislature; and the case law in this state and other states.

C. The Historical Context in Which the Child Abuse Act Was Adopted by our Legislature

It is an established cannon of statutory construction that a statute must be interpreted as the Legislature understood it at the time it was passed. *Moya*, 2007-NMSC-027, ¶ 9. The language found in current § 30-6-1(D) (2004) has remained unchanged since New Mexico first adopted a statute criminalizing child abuse in 1973. *Compare* 1973 N.M. Laws, Chapter 360, Section 10 and NMSA 1978, § 30-6-1 (2004). In determining legislative intent, then, it is appropriate to look to the events leading up to the passage of the statute in 1973, and to look to other state's statutes that served as models for our Legislature. *Doe v. State ex rel. Governor's Organized Crime Prevention Com'n,* 114 N.M. 78, 80, 835 P.2d 76, 78 (1992).

1. The events leading to the passage of the statute

Prior to the 1973, New Mexico did not have a criminal statute addressing child abuse. Only abandonment of a child was a criminal offense. 1925 N.M. Laws, ch. 108, § 1 (codified as NMSA 1953, § 40-3-1, -2, -3). If the abandonment caused death, an increased penalty was imposed. *Id.* at § 2. The statute as amended in 1963 and again in 1969, continued to punish specifically abandonment, and not child abuse more generally. 1963 N.M. Laws, ch. 303, §§ 6-1, -2; (codified as NMSA

1953, § 40A-6-1, -2; 1); 1969 N.M. Laws, ch. 182, § 4 (codified as NMSA 1953, .§ 40A-6-1, -2; 1).

During the 1960's and early 1970's, just prior to the enactment by our Legislature in 1973 of the current § 30-6-1 (D) criminalizing child abuse, there was a nationwide focus on child abuse and neglect. An article in the COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS, published in 1971, less than two years before the passage of the New Mexico statute, notes the "rapid growth of interest and concern in this area by doctors, lawyers, social workers, and psychologists." *An Appraisal of New York's Statutory Response to the Problem of Child Abuse,* 7 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS 51 (1971). The JOURNAL attributes that "growth of interest in preventing and dealing with cases of child abuse" largely to "the realization that a surprising number of children were being physically abused," generally by their parents, guardians, or other caretakers. *Id.* Rather than a rare event limited to a relative handful of cases, as previously believed, new studies estimated that as many as 200,000 to 250,000 children nationwide were in need of state protection. *Id.* at 51, fn. 3. It was during this time period that the American Academy of Pediatrics introduced the term "battered child syndrome" as a diagnosis for children who are repeatedly subject to serious physical abuse and are injured or die as a result. *Id.,* at 51, fn. 2.

This work by doctors, psychologists and sociologists spurred legal scholars, lawyers, and legislatures to take a new interest in addressing child abuse and protecting children. A seminal article in the 1966 COLUMBIA LAW REVIEW by Professor Monrad G. Paulsen, relied on to this day, reviewed state statutes addressing child protection. Paulsen, Monrad, *The Legal Framework for Child Protection*, 66 COLUMBIA L. REV. 679 (1966). At that time, 40 states had laws criminalizing cruelty to children. According to Professor Paulsen, these statutes generally included "abandonment, torture, torment, cruelty, deprivation of the necessities of life ..., and endangerment of life or limb or health, infliction of unjustifiable physical pain or mental suffering, impairment or moral, exposure to the elements, or injury in any other manner." *Id.* at 682. The prosecutions under these so-called "cruelty statutes" generally involved assault and battery of a child, or other patent mistreatment (Paulsen's examples of mistreatment include a parent who left a child in a car for several hours in the cold and another who chained an infant to a bathtub). *Id.* at 683-84. In the majority of states, these statutes were directed at parents and caretakers only, but some states provided that "any person" could be charged with the crime of cruelty to a child. *Id.* at 682-83. Penalties varied widely, from 30 days to 15 years, with the majority imposing a maximum of one year. *Id.*

at 682. The higher penalties were imposed by states which had recently enacted a new statute or amended an old statute. *Id.*

2. *Other state statutes which served as models for New Mexico*

The language adopted by the New Mexico Legislature in 1973 to define child abuse: "placing or permitting a child to be placed in a situation endangering that child's life or health," had previously had been adopted as a definition of child abuse by several other states.

In a 1965 decision mentioned in Paulsen's seminal article, a California appellate court reviewed this statutory language. The court acknowledged the difficulty in defining the type of conduct intended to be penalized by this statutory language and its almost limitless scope when read literally. *Beaugez*, 43 Cal. Rptr. at 32-33. The court commented that, "[i]n number and kind the situations where a child's life or health may be imperiled are infinite." *Id.* at 32. The California court then narrowed what it acknowledged would otherwise be unconstitutionally vague language by interpreting the statute in light of the social purpose behind its enactment:

> The type of conduct which this portion of the statute seeks to reach defies precise definition. In number and kind the situations where a child's life or health may be imperiled are infinite. Yet the aim of the statute is not obscure and its objective is a salutary social one. It seeks to protect children from wilful mistreatment

> whether directly or indirectly applied. The portion of the statute which we construe relates to indirect mistreatment. Frequently it is the only sort of abuse that can be proved. Unhappily it is a matter of common knowledge that badly mistreated children are received as county hospital patients daily. Because, in most cases, abuse occurs in the privacy of the home, proof of the actor directly responsible is, more often than not, impossible. If children are to be protected against such mistreatment, responsibility must be fixed upon those indirectly responsible – those who wilfully permit a situation to exist which imperils children.

Beaugez, 43 Cal. Rptr. at 32-33.

The circumstances which led to the defendants' conviction in *Beaugez* provide an example of the kind of conduct the California court found to fit within the intended scope of the statutory language at issue here. The defendants were the parents of an infant who had twice been hospitalized with severe, unexplained, physical injuries. Although the evidence was insufficient to specifically identify either the method of harm or which parent was the perpetrator beyond a reasonable doubt, the injuries were plainly not accidental. Both parents were found guilty of "placing a child or permitting him to be placed" in a situation where danger to the child was "reasonably foreseeable," and where a reasonably prudent person would have taken steps to protect the child. *Id.* at 30. The broad language of the statute allowed the State to convict without having to prove either the method used or which parent directly inflicted the harm.

Two other states addressed challenges to this definition of child abuse: New York and Illinois. These states concluded that statutory language defining child abuse as "causing or permitting a child to be placed in a situation where its life or health may be endangered" was not void-for-vagueness so long as the statute was applied only to circumstances commonly understood by the community to constitute child abuse. The Illinois case, *Illinois v. Vandiver*, 283 N.E.2d 681 (Ill. 1971), reviewed a conviction for "spanking" a three-year old so severely that her body was extensively bruised. The New York case, *People v. Bergerson*, 17 N.Y.S.2d 398 (Ct. App. 1966), reviewed the death of a child who was left on the streets by the defendant unsupervised after becoming extremely intoxicated at a beer party for minors hosted by the defendant.

It was in this historical context and with guidance from these decisions in other states that the New Mexico Legislature, in 1973, amended its longstanding criminal statute punishing abandonment of a child. Faced with the medical, social, legal literature, and media coverage exposing a much larger problem than previously believed of child abuse by caretakers and others involved in children's lives, New Mexico amended its criminal law to bring it into line with the majority of other states. Like virtually all of the 40 states which had previously adopted statutes criminalizing child abuse, the New Mexico statute focused on acts of cruelty,

mistreatment, and neglect directed at a child, which are commonly understood as child abuse. Like other state statutes, New Mexico's statute included both specific prohibitions on torture, cruel confinement, cruel punishment, exposure, and abandonment, and broad language aimed at allowing the state to prosecute for child abuse, even when it could not prove which defendant struck the actual blows or exactly how the injuries were caused. 1973 N.M. Laws, ch. 360, § 10 (currently codified at § 30-6-1(D)).

D. The History of Child Abuse Prosecutions in New Mexico Strongly Supports Legislative Intent to Limit Child Abuse to Crimes Directed Against a Child

The New Mexico prosecutions beginning immediately after the passage of the child abuse statute and continuing to the present are uniformly consistent with society's traditional understanding of child abuse. In *Lucero,* 87 N.M. 242, 531 P.2d 1215, the earliest published appellate decision in New Mexico, the defendant was convicted of what this Court describes as battering a child, resulting in death. A year later, in *State v. Adams,* 89 N.M. 737, 557 P.2d 586 (Ct. App. 1976), this Court upheld the conviction of a parent who failed to intervene to protect a child who died after multiple trauma, inflicted over a period of time.

Later cases follow this same pattern. Defendants were most often prosecuted under what is now subsection D of the child abuse statute based on violent physical

abuse either directly inflicted by the defendant on a child,[1] or where the defendant has stood passively by, knowing such abuse was being inflicted by someone else, without intervening or getting help.[2] In a number of these cases, several adults who

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[1]*State v. Utter*, 92 N.M. 83, 582 P.2d 1296 (Ct. App. 1978) (baby was beaten and thrown across a room, causing death); *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978) (child severely beaten); *State v. Robinson*, 93 N.M. 340, 600 P.2d 286 (Ct. App.1979) (child had numerous bruises, two skull fractures, failure to thrive); *State v. Sheldon*, 110 N.M. 28, 791 P.2d 479 (Ct. App. 1990) (skull fractures on both sides of child's head which "were the result of child abuse"); *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990) (child beaten to death, injuries over 90% of child's body); *State v. Stills,* 1998-NMSC-9, 125 N.M. 66, 957 P.2d 51 (child beaten, strangled and sexually abused); *State v. Wilson*, 2001-NMCA- 32, 130 N.M. 319, 24 P.3d 351 (child repeatedly bruised and died of a skull fracture); *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221 and *State v. Herrera*, 2001-NMCA-073, 131 N.M. 22, 33 P.3d 22 (shaken baby syndrome); *State v. Abril*, 2003-NMCA-111, 134 N.M. 326, 76 P.3d 644 (child dehydrated and with multiple rib fractures from "roughhousing"); *State v. Stewart*, 2005-NMCA-126, 138 N.M. 500, 122 P.3d 1269 (defendant kicked child in the face and threw him into a chair); *State v. Walters*, 2007-NMSC-50, 142 N.M. 644, 168 P.3d 1068 (baby was violently shaken, had bruises and fractures, and had been sexually assaulted).

[2]*State v. Fuentes*, 91 N.M. 554, 577 P.2d 452 (Ct. App. 1978) (failed to prevent or stop repeated beatings resulting in bone fractures); *State v. Lucero,* 98 N.M. 204, 647 P.2d 406 (1982) (mother failed to obtain help when she knew that father was hitting child); *State v. Williams*, 100 N.M. 322, 670 P.2d 122 (Ct. App. 1983) (defendant failed to stop repeated beatings of child by her husband or to seek help); *State v. Crislip*, 110 N.M. 412, 796 P.2d 1108 (Ct. App. 1990) (defendant passively "permitted" wife to inflict multiple blunt trauma injuries to the child's head, resulting in death); *State v. Ruiz*, 119 N.M. 515, 892 P.2d 962 (Ct. App. 1995) (child died from blunt force trauma and shaking); *State v. Jojola,* 2005-NMCA-119, 138 N.M. 459, 122 P.3d 43 (child suffered severe injury in defendant's presence which could not have been caused by a fall); *State v. Lopez,* 2007-NMSC-037, 142 N.M. 138, 164 P.3d 19 (defendant aware of physical abuse

had the opportunity to injure the child were all convicted of child abuse under§ 30-6-1(D). It is difficult to read the descriptions of the defendant's conduct. Repeated beatings, strangling, sexual abuse, and multiple fractures are common. Footnotes one and two attempt to comprehensively list the New Mexico appellate decisions in cases which involve convictions for violent, direct physical abuse of a child, both where the defendant either directly committed the abuse or stood by without intervening. Direct physical abuse of a child, generally but not always committed by the child's caretaker or custodian, constitutes the overwhelming majority of cases which have been prosecuted since the passage of what is now subsection D(1) of § 30-6-1. Indeed, for several decades after the passage of the Act, these were the only cases prosecuted.

In addition to these cases involving direct, violent, physical abuse inflicted on a child, there are a small number of New Mexico child abuse cases which prosecute an individual who did not directly strike a child, but who instead committed a dangerous act knowing the child was so close to that act that harm to that child was highly likely. These cases also describe conduct that is easily recognizable as child abuse. Two representative cases involve an attack with a

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of the baby, was responsible for the baby's welfare, and did nothing to stop the abuse).

weapon where the child, although arguably not the target, was directly in the line of attack. In *State v. Ungarten*, 115 N.M. 607, 609-10, 856 P.2d 569, 571-72 (Ct. App. 1992), this Court upheld a conviction where the defendant brandished and then thrust a knife in the direction of a ten-year-old child and his father. The child was so close he testified that he could not tell if the thrust was directed at him or his father. In *State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150, the defendant threatened the child's mother with a gun while the child was standing directly behind the mother.

Several recent cases involve the creation of dangerous or abusive conditions in the child's home. These cases are analogous to child neglect in the civil arena, but prosecute only those instances of neglect involving a high degree of danger to the child. In *State v. Jensen*, 2006-NMSC-45, 140 N.M. 416, 143 P.3d 178, defendant's conviction for placing a child in a situation which may endanger his life or health was upheld where the defendant supplied alcohol to a child daily for two weeks, allowing him to consume it in excess quantities, and, during this same two-week period, prepared meals for the child in an area littered with rodent droppings. In *State v. Graham*, 2005-NMSC-4, ¶ 14, 137 N.M. 197, 109 P.3d 285, defendant allowed his two children, an infant and a three-year-old, to be in the immediate vicinity of a controlled substance, where the substance was accessible to the

children, and could easily have been ingested by them. In *State v. Reed,* 2005-NMSC-031, ¶ 4, 138 N.M. 365, 120 P.3d 447, the defendant loaded and shot a gun in a child's living room, knowing child had left the room only briefly and would return at any moment. In *State v Guilez*, 2000-NMSC-20, ¶ 13, 129 N.M. 240, 4 P.3d 1231, and *State v. Castenada,* 2001-NMCA-052, 130 N.M. 679, 30 P.3d 368, the defendants were convicted of child abuse for placing their children in a their vehicle, without a seatbelt, and then driving while intoxicated. *State v. Santillanes,* 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456, involved similar conduct: the defendant placed his children in his vehicle and drove with them while intoxicated. In *Santillanes* defendant's conduct resulted in the death of the children when defendant collided with another vehicle. In *State v. Watchman,* 2005-NMCA-125, 138 N.M. 488, 122 P.3d 855, the defendant placed a child in the cab of her truck and left the truck, and the child, in the parking lot of a bar late at night.

All of these cases fit within the community understanding of what constitutes child abuse. They either involve physical assault on a child – the most obvious and shocking sort of child abuse – or they involve extreme neglect by someone at least temporarily responsible for the child's care, or they involve some action by a person who is aware of the child's immediate presence, and who, nonetheless, engages in

an attack on someone standing near the child, or takes a random shot, knowing that the child is nearby, that puts that particular child at great risk.

Common to all of the conduct found to constitute child abuse is that the defendant's conduct is directed toward a particular child, and not toward the general public. In every instance, at a bare minimum, the defendant acts abusively with knowledge of the immediate presence of a particular child.

In one case, this Court has specifically addressed the question of whether awareness of the child's presence is required in order to support a conviction of child abuse. In *State v. Lujan*, 103 N.M. 667, 712 P.2d 13 (Ct. App. 1985), defendants injured an infant by throwing cans and bottles from their truck into a moving car in which the infant was riding. Defendants also endangered the infant by repeatedly bumping their truck into the car in which the infant was a passenger in an attempt to force the car to stop. Defendants claimed on appeal that the evidence was insufficient to support a conviction for child abuse because they were not aware of the child's presence. This Court agreed that awareness of the child's presence was a necessary element of child abuse. The conviction was upheld on the basis that substantial evidence established that the defendants had watched the mother carry the infant into the car and, therefore, were well aware of the child's presence.

Significantly, although the Legislature has amended other sub-parts of § 30-6-1 several times since this Court's decision in *Lujan*, it has not modified § 30-6-1(D) to remove the requirement that the State establish that the defendant is aware of the presence of the child. *State v. Chavez*, 2008-NMSC-001, 143 N.M. 205, 174 P.3d 988 (in light of the Court's presumption that the Legislature is well-informed about the existing case law and acts with knowledge of it, the Legislature's continuing silence on an issue is evidence that it was both aware of and approved of the existing case law).

E. The High Penalties Imposed for Child Abuse Confirm the Legislature's Intent to Include Only Especially Reprehensible Behavior Directed at a Child

From the passage of the child abuse statute in 1973 to the present, there has always been a disparity in the punishment imposed by the Legislature for child abuse and that imposed for conduct which puts the general public, adults and children alike, at risk of harm. The sentence for involuntary manslaughter, for example, is 18 months; for negligent child abuse resulting in death, the sentence is 18 years. *Compare* §§ 30-2-3(B) and 31-18-15(A)(6) with §§ 30-6-1(E) and 31-18-15(A)(1).

A similar disparity exists between an intentional crime directed at an adult and the same conduct directed at a child. The sentence for aggravated battery of an adult

not resulting in great bodily harm or death is less than one year; for intentional child abuse not resulting in great bodily harm, it is three years for a first, 9 years for a second, and 18 years for a third offense. *Compare* §§ 30-3-5(B) and 31-19-1 with §§ 30-6-1(E) and 31-18-15(A)(1),(3),(5).

Over the years, the Legislature has widened this disparity, increasing the penalty for a first offense of child abuse not resulting in death or serious bodily injury from a fourth degree felony, when the statute was passed in 1973, to a third degree felony and severely punishing repeated offenses. The penalty for child abuse resulting in serious bodily injury or death, whether negligently or intentionally caused, was increased from a second degree felony in 1973, to a first degree felony. Although not applicable to Defendant's conduct in April, 2005, the Legislature increased the punishment for intentional abuse of a child under 12 years, resulting in death, to life imprisonment in 2005. NMSA 1978, § 31-18-15(A) (2005).

The severe penalties imposed by the Legislature for child abuse are an indication of the high degree of moral repugnance with which both our Legislature and our society view a child abuser. *See State v. Adonis*, 2008-NMSC-059, ¶ 15, 145 N.M. 102, 194 P.3d 717. In *Lucero*, 87 N.M. at 245, 531 P.2d at 1218, a case decided shortly after the child abuse statute was first enacted, this Court upheld the Legislature's choice to impose significantly higher penalties for child abuse,

compared to similar crimes directed against adults or the general public. In doing so, this Court described the severe penalties against child abuse as "a mark of our civilization." *Id.* An individual who is a child abuser is a pariah, someone who has stepped outside the norms of a civilized society: "[u]nfortunately, the venire of civilization is pitifully thin and even non-existent in some individuals [those who abuse children]." *Id.*

The moral repugnance and higher penalties attached to the crime of child abuse reflect the nature of the crime: child abuse is conduct which is "particularly abusive to children, that is directed specifically against a child, and that results in injury to that child." *People v. Taggart*, 621 P.2d 1375 (Colo. 1981) (interpreting a Colorado child abuse statute, subsequently amended, which was identical to New Mexico's definition of child abuse). As our Supreme Court noted in its decision in *Guilez*, 2000-NMSC-020, ¶ 17, the child abuse statute "recognizes that adults owe a greater responsibility to minors, who are more vulnerable than adults" and who "are under the care and responsibility of adults." *See also*, *Santillanes*, 2001-NMSC-018, ¶ 24.

Conduct like that at issue here which endangers the general public, both adults and children, is not viewed with the same level of moral opprobrium, even if a child is injured. As our Supreme Court noted in its recent decision in *Adonis*,

2008-NMSC-059, ¶ 15, when an especially severe punishment is imposed, it is a strong indication that the Legislature intends to reserve the crime at issue for the "most heinous and reprehensible conduct." It would expand the crime of child abuse well beyond the intent of the Legislature to sweep within its scope the conduct at issue here: conduct which endangers the general public and is properly punished as vehicular homicide,[3] a crime carrying a six-year, rather than an 18-year sentence.

F. No Other State Which Uses New Mexico's Definition of Child Abuse Has Prosecuted a Defendant for Child Abuse When a Child Passenger in Another Car is Injured

After diligent search, counsel has not been able to find a single state which uses New Mexico's definition of child abuse which has upheld a child abuse conviction for driving while intoxicated, resulting in injury or death to a child who was a passenger in another vehicle.

Counsel's nationwide search of child abuse cases yielded only two cases where a defendant had been convicted of child abuse based on driving while intoxicated when the injured child was a passenger in another vehicle. *Whitmire v. State,* 913 S.W.2d 738 (Tex. App. 1996); *People v. Deskins*, 927 P.2d 368 (Colo.

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[3]Vehicular homicide imposes a higher sentence on someone who drives while intoxicated than is otherwise imposed for involuntary manslaughter (18 months versus 6 years), reflecting the special reprehensibility of drunk driving. *Compare* §§ 30-2-3(B) and 31-18-15(A)(6) with §§ 66-8-101 and 31-18-15(A)(4).

1996). Both are in states with a definition of child abuse quite different from New Mexico's. Both the Texas and Colorado child abuse statutes define child abuse as "causing an injury to a child's life or health." Tex. Penal Code, § 22.04; C.R.S. 18-6-401(1)(a) (1983).

Despite the similarity of the Texas and Colorado statutes and their shared focus on injury to a child, the two states reached different results: Texas overturned the conviction; Colorado upheld the conviction. The Texas court held that both the particular child who was injured and the specific type of injury to that child must be foreseeable to the defendant. The court concluded that the type of unanticipated injury to a child in another car which occurs when someone drives drunk, therefore, is not child abuse.

The Colorado court, in contrast, held that driving while intoxicated, like any criminally negligent conduct which causes serious bodily injury to a child, is properly prosecuted as child abuse under the Colorado statute. Even under Colorado's definition of child abuse as "injury to a child", several justices vigorously dissented. The dissenters expressed the view that child abuse requires the conduct of the accused to be "in some fashion child-oriented, as opposed to being directed toward the public at large." *Deskins*, 927 P.2d at 379. The three

dissenters urged the majority to hold that, at a minimum, the defendant must be aware of the presence of the child in order for the conduct to constitute child abuse.

The paucity of prosecutions for driving while intoxicated and causing injury to a child passenger in another car, regardless of the definition of child abuse in state statute, confirms the strong shared sense of American society as to the nature of the conduct that should be punished as child abuse. In the nearly thirteen years since *Deskins* was decided by the Colorado court, no court in any other state has joined Colorado in punishing injury to a child who is a passenger in another car.

POINT 2

THE EVIDENCE IN THE RECORD WAS PATENTLY INSUFFICIENT TO SUPPORT CONVICTION FOR CHILD ABUSE

A. There Was No Evidence That Defendant Was Aware of the Presence of the Children

If this Court agrees that the Defendant's awareness of the children's presence in the other vehicle was a required element of the offence, then the evidence was not sufficient to support conviction of child abuse. In analyzing a sufficiency of the evidence issue, this Court inquires whether substantial evidence exists to support a verdict of guilty beyond a reasonable doubt with respect to each element of a crime charged. *State v. Trujillo*, 2002-NMCA-100, ¶ 8, 132 N.M. 649, 53 P.3d 909.

Although the State never argued to the jury that Defendant was aware of child's presence, the State did respond to Defendant's motion for a directed verdict by arguing that photographs in evidence showed that the Defendant could have seen a car seat as she approached the Sunfire, which had tinted windows, from behind, in the dark. TR. Vol 7, p. 54; Vol. 6, p. 21 (it was so dark the police used flashlights at the scene). The photographs which show a car seat (Exs. 8 and H) are both photographs showing a brightly-lit, crushed up car after the collision. Both are taken through the passenger-side window of the car. The car seats are in the back seat, which had been crumpled and pushed forward in the collision. Neither the car's back seat nor the car seat was oriented as it had been before the crash, and it is not possible to determine whether the car seat extended above the car's rear seat. The State pointed to no evidence, other than these photographs which had been introduced for other purposes, to support is claim that the car seats could have been seen by the Defendant that night. *Id.*

In responding to the motion to dismiss filed prior to trial by the defense, the State had argued that the testimony of another driver that he could see the children from his vehicle raised an issue of fact, requiring trial. TR. Vol. 3, p. 42. The State did not renew this argument in its response to Defendant's motion for a directed verdict at trial. That is because the evidence actually introduced at trial revealed

that the other driver was so differently situated from the Defendant that it was not possible to draw any inference about Defendant's ability to see the children from that testimony. The driver testified that he had pulled up in the right lane directly next to the Sunfire. He was able to see one of the children only because, for several seconds, the passenger side of the vehicle in which children were riding was "right beside him." He had his window down and was looking directly into the other car from a distance of a couple of feet. TR. Vol. 5, 127, 140. It was readily apparent that this testimony did not establish even an inference, let alone by proof beyond a reasonable doubt, that Defendant was able to see the children as she approached their car, which had tinted windows, from the rear, after dark.

Therefore, there can be no dispute here that, if an awareness of the child's presence in the other vehicle is required to establish child abuse, the evidence was insufficient to establish this element.

Should this Court conclude that the evidence in the record was sufficient to allow a jury to find beyond a reasonable doubt that Defendant was, in fact, aware of children's presence, reversal and remand is still required. The jury was never asked to decide whether the Defendant was aware of the children in the car. The jury instruction omitted this element entirely. Defendant preserved this issue by tendering jury instructions which would have required the jury to find that the

Defendant had knowledge of each child's presence at the time of the accident, and that she knew or should have known that her conduct created a substantial and foreseeable risk of harm to each child, in particular, rather than to the general public. RP 234, 243. The court refused these instructions. TR. Vol. 7, p. 78.

B. The Evidence Was Insufficient to Establish the Required Reasonable Probability That the Child Would Be Endangered

Our Supreme Court has construed the child abuse statute to require more than "a reasonable probability or possibility that the child will be endangered." *McGruder*, 1997-NMSC-23, ¶ 37.

Although there was danger to the general public, adults and children alike, the State here presented no evidence to show that it was probable that the children at issue here would be injured by Defendant's conduct.

Even assuming that the question is whether there is a probability of injury to any child, there was no evidence presented as to the likelihood of injury to a child, rather than an adult. Indeed, the evidence in the record – that it was 9:00 p.m. on a weeknight during the school year – strongly suggests that the likelihood of injuring a child was remote.

POINT 3

THE CHILD ABUSE STATUTE IS VOID-FOR-VAGUENESS AS APPLIED TO A DEFENDANT WHO DRIVES WHILE INTOXICATED, AND CAUSES A COLLISION WHICH RESULTS IN INJURY TO A CHILD PASSENGER IN ANOTHER CAR

If this Court concludes that the Legislature intended to punish Defendant's conduct as child abuse, the Legislature, nonetheless, failed to state its intent with sufficient clarity to meet either the due process requirements of the United States Constitution or of the New Mexico Constitution. Reversal on this basis is, therefore, required. This Court reviews the constitutionality of a statute *de novo*, and will review a claim that a statute is void-for-vagueness even if it was not preserved below. *State v. Laguna,* 1999-NMCA-152, ¶¶ 23, 24, 128 N.M. 345, 992 P.2d 896.

The void-for-vagueness doctrine requires that a penal statute define the criminal offense which it intends to punish with sufficient definiteness so that a person of ordinary intelligence can tell what conduct is prohibited. Our Supreme Court has held that "[p]enal statutes are strictly construed and should be of sufficient certainty so that a person will know his act is criminal when he does it." *State v. Collins*, 80 N.M. 499, 502, 548 P.2d 225, 228 (1969). *See also*, *State v. Leiding*, 112 N.M. 143, 145, 812 P.2d 797, 699 (Ct. App. 1991) ("penal statutes

must be strictly construed, and any doubts about their construction must be resolved in favor of lenity"); *State v. Martinez*, 2006-NMCA-068, 139 N.M. 741, 137 P.3d 1195 (applying these principles to the child abuse statute).

In addition to providing notice to the public of what conduct is prohibited, criminal statutes must be sufficiently definite to guide police officers, prosecutors, courts judges, and juries so that arbitrary and discriminatory enforcement is avoided. When the elements of a criminal statute are not clearly defined, subjective or *ad hoc* application of a statute by the authorities is encouraged. *Kollander v. Lawson*, 461 U.S. 352, 358 (1983). Such a statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.*

A claim of vagueness is analyzed according to the particular facts of each case. *Laguna,* 1999-NMCA-152, ¶ 24. Applying these standards to the facts here, it is apparent that this statute is simply not definite enough either to put the Defendant on notice that reckless driving while intoxicated would subject her to prosecution for child abuse or to provide standards to guide prosecutors, judges and juries.

As the history of this statute amply demonstrates, the interpretation of New Mexico's criminal child abuse statute has always been informed by the Legislature's

and the community's understanding of child abuse. *See Coe*, 92 N.M. 321, 587 P.2d 973 (holding that the statute is not unconstitutionally vague when it is applied to a defendant who has beaten and battered a child to death because such conduct is commonly understood to be child abuse).

No person of ordinary intelligence, sharing this society's common understanding of child abuse, would expect someone who drives while intoxicated and injures a child who is a passenger in another vehicle to be punished for child abuse. This action is nothing like the battering of a child or the severe neglect commonly understood to be child abuse.

Even apart from the common understanding of child abuse, the plain language used by the statute to describe the prohibited behavior does not clearly include this conduct. Rather than defining child abuse as simply any act which endangers a child, or any act which causes injury to a child, the statutory language requires an affirmative act directed at a child – "causing or permitting a child to be placed in a situation which endangers the child's life or health." This language is consistent with the punishment of conduct directed at or in close relationship to a particular child. It does not plainly include conduct like Defendant's, which endangers the general public, without being directed in any way at a child.

Certainly reasonable minds could disagree about the application of this language to the Defendant's conduct here.

Some courts turn to case precedent to clarify a statute and avoid a successful void-for-vagueness challenge. *See State v. Schriver*, 542 A.2d 686, 692 (Conn. 1988) (acknowledging that prior decisions could lend an authoritative gloss to an otherwise vague statute). Even if precedent is appropriately relied on, the decisions of this Court and our Supreme Court give no hint that the Defendant's conduct in this case would be punishable as child abuse. As reviewed above, New Mexico child abuse prosecutions fall within two general categories: (1) those where the defendant directly physically abused a child or knew about the abuse and failed to protect the child; or (2) those where the defendant, who is almost always someone in the role of a caretaker for child, neglected the child or affirmatively "placed" the child in a dangerous situation. Not a single case involves abuse which was not directed at a particular child; a child whose presence was known to the defendant at the time the defendant engaged in the abusive conduct. Not a single case involves conduct equally dangerous to the general public, adults and children alike, which just happens to result in injury to a child.

Indeed, there have been some highly-publicized prosecutions for driving while intoxicated, resulting in injury to or the death of children who were

passengers in the car hit by the defendant, which were prosecuted solely as vehicular homicide, not as child abuse. *Id.* at 13. Most prominent was the prosecution of Gordon House, whose drunk driving caused the death of several children who were passengers in another vehicle. *State v. House*, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967. He was not charged with child abuse. The publicity around the *House* case informed the public's understanding of the law punishing drunk driving.

Finally, this case provides a graphic example of the way in which the lack of definite description of the elements of child abuse and the confusion and uncertainty about its application to this defendant's conduct allows for discriminatory and inconsistent law enforcement, based more on personal predilection than on a definite and clearly understood legal principles. In argument on the defense's motion to dismiss, the prosecutor frankly admitted that this was the first prosecution of its kind in New Mexico. TR. Vol. 3, p. 48. When asked by the court why the State had chosen to prosecute this case solely as child abuse, without charging vehicular homicide in the alternative, the prosecutor reported that she had asked that same question of her supervisor. The supervisor could not recall why this decision had been made. *Id.* at 40.

In conclusion, NMSA 1978, § 30-6-1(D) simply does not convey a sufficiently definite warning of the conduct it proscribes when measured by common understanding and practice. Persons of common intelligence must necessarily guess at its meaning as applied to Defendant's conduct. Conviction under these circumstances violates due process. It also runs afoul of the state law principle, founded on due process considerations, known as the rule of lenity. The rule of lenity requires that if reasonable people could differ as to a statute's meaning, any doubts must be resolved in favor of lenity. *Leiding*, 112 N.M. at 145, 812 P.2d at 699 ("penal statutes must be strictly construed, and any doubts about their construction must be resolved in favor of lenity").

Under these principles, applying the child abuse statute to Defendant's conduct violates the due process clauses of both the New Mexico Constitution and United States Constitution, as well as the rule of lenity.

POINT 4

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ADMITTED INTO EVIDENCE AN IRRELEVANT AND HIGHLY PREJUDICIAL STATEMENT MADE BY DEFENDANT HOURS AFTER THE ACCIDENT WHICH INFLAMED THE PASSIONS OF THE JURY AGAINST THE DEFENDANT

Defendant contends that the trial court allowed the prosecution to admit into evidence an irrelevant and highly prejudicial comment made by Defendant in her

hospital room hours after the accident at issue here. Upon being told by a police officer that a little boy had been injured, the Defendant said, "he was probably a little shit, anyway." TR. Vol. 6, p. 37. The prosecutor concluded his closing argument by reminding the jury of this comment by the Defendant and relying on it to argue that her conduct amounted to child abuse:

> And then in the hospital– when she said, he was probably a little shit, anyway. Ladies and gentlemen, this is child abuse, and we ask that you convict her of that.

TR. Vol. 7, p. 131. This was the last statement made by the prosecution before the jury retired to deliberate.

Preservation: Counsel for Defendant preserved this issue for appeal through a motion in limine which was argued to the court just prior to opening statements. TR. Vol. 5, p. 17. In arguing his motion, counsel objected to the admission of Defendant's comment on the basis that it was not relevant to the Defendant's mental state at the time of the accident and was highly prejudicial, citing Rule 11-403.

Trial court's ruling: The trial court ruled that Defendant's comment is relevant to establish Defendant's state of mind at the time of the accident, and that its probative value outweighed the evident prejudice from its admission. TR. Vol. 5, p. 17. In the court's view, the statement showed Defendant's "indifference to the

safety, or the public safety in general, as she was operating a motor vehicle." *Id.* at 20.

Standard of Review: A trial court's ruling regarding admission or exclusion of evidence is reviewed for abuse of discretion. *State v. Martinez*, 2008-NMSC-060, ¶ 8, 145 N.M. 220, 195 P.3d 1232.

A. Defendant's Comment Made Hours After the Accident is Not Probative of Her Mental State Prior to the Accident

In reviewing the district court's ruling on the admissibility of this evidence, this Court must first determine whether the Defendant's comment is relevant to any issue in the case. Evidence is relevant only if it tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

It is difficult to understand how Defendant's comment about the victim that "he was probably a little shit anyway," establishes anything other than perhaps defendant's mood at that moment. Such a statement does not show that Defendant was indifferent to the child's safety at the time of the accident. *See State v. Garcia*, 114 N.M. 269, 275, 837 P.2d 862, 868 (1992) (defendant's comment hours later that he would kill victim again if given a second chance does not show that he intended to kill his victim before the stabbing).

This comment's relevance to Defendant's state of mind at the time of the accident is further undercut by the circumstances under which the comment was made. Hours had passed since the accident. Defendant had been injured in the accident and treated in the hospital's trauma unit. She had just said that she did not recall being in an accident. Under these circumstances, there is no reason to believe that Defendant's mental state at the time of the comment mirrored her mental state at the time of the accident.

B. Even if the Comment Had Relevance, Its Prejudice Far Outweighed Its Probative Value

Even if this Court determines that Defendant's comment had some probative value, that value was far outweighed by the prejudice created by its introduction into evidence. In this case, the prosecution was attempting to convince a jury to convict Defendant of child abuse, even though her conduct on its face did not seem to satisfy the Legislature's definition of child abuse. Without this comment in evidence, there is nothing which suggests to the jury that the Defendant had engaged in the highly morally reprehensible conduct directed at a child generally required for a conviction of child abuse. Indeed, it was this argument – that the jury should not convict for child abuse where the Defendant was unaware of the child's

presence and, therefore, could not have acted with disregard for that child's safety – which was Defendant's only defense.

The introduction of this comment, then, although irrelevant to any element of child abuse, allowed the State to portray the Defendant as someone of bad character, someone who didn't care when told she had hurt a child. It was but one small step from this view of Defendant's character to a conviction for child abuse. The Defendant became someone who, in the jury's eyes, deserved to be punished for the reprehensible offense of child abuse. *State v. Aguayo*, 114 N.M. 124, 131, 835 P.2d 840, 847 (Ct. App. 1992) (need for special care in applying rules of evidence in child abuse cases because of potential for jury prejudice against the defendant).

C. This Was Not Harmless Error

There is a reasonable probability that the admission of Defendant's comment, combined with the prosecution's reliance on it in closing to claim that "this is child abuse, and we ask that you convict her of that," unreasonably prejudiced the minds of the jurors, resulting in Defendant's conviction of two counts of child abuse. Without this evidence, Defendant might well have prevailed on her argument to the jury that her conduct did not amount to child abuse, but instead should be punished under the Motor Vehicle Code. Remand for a new trial on this basis is, therefore,

required if this Court does not vacate the convictions of child abuse on the other grounds argued. *State v. Holly*, 2009-NMSC-004, ¶ 28, 145 N.M. 513, 201 P.3d 844.

POINT 5

PURSUANT TO DUE PROCESS PRINCIPLES AND THE NEW MEXICO CONSTITUTION'S BAR ON PLACING A DEFENDANT TWICE IN JEOPARDY, THIS COURT SHOULD ADDRESS THE CHARGES OF INTENTIONAL CHILD ABUSE IN THIS APPEAL

Although the order declaring a mistrial in this matter on intentional child abuse would not generally be appealable, Defendant asks this Court to apply the arguments made here on appeal to both Defendant's conviction of negligent child abuse and to the charges of intentional child abuse, even though those ended in a mistrial. *State v. Lobato*, 2006-NMCA-051, ¶ 34; 139 N.M. 431, 134 P.3d 122.

Defendant contends that barring her from appealing and subjecting her to retrial because the jury could not agree on a verdict, when, for the very same reasons applicable to the counts of negligent child abuse, reversal would be required had Defendant been convicted, is patently unfair, violating her right to due process and subjecting her to double jeopardy under the New Mexico Constitution. *See State v. McClaugherty*, 2008-NMSC-044, ¶ 26, 144 N.M. 483, 188 P.3d 1234 (recognizing a defendant's strong interest in not being tried twice); *Richardson v.*

U.S., 468 U.S. 317 (1984) (Brennan, J. concurring in part and dissenting in part) (pointing out that the majority decision under the United States' Constitution's double jeopardy clause, refusing to allow appeal from a mistrial even when the defendant is plainly entitled to acquittal, leaves the defendant worse off than if he were convicted).

As our Supreme Court recognized in *State v. Apodaca*, 1997-NMSC-051, ¶¶ 15-16, 123 N.M. 372, 940 P.2d 478, in a case similarly involving an appeal from a mistrial, the right to appeal must be given a practical construction. *Apodaca* recognizes that there are some interests, including the right to not be unnecessarily subjected to a second trial, which override the countervailing interest of the judiciary in preserving judicial resources. Here, of course, judicial resources will be better preserved by resolving this matter in this appeal, so there is no countervailing interest preventing resolution of all issues in this appeal.

On the merits of the charge of intentional child abuse, the same principles that make the evidence insufficient to convict Defendant of criminally negligent child abuse apply with equal or greater force to the charge of intentional child abuse. The State argued to the jury, and the jury was instructed, that if it found that the Defendant had purposely done the acts she was accused of – drank to excess, drove after drinking, drove fast, swerved in and out of traffic, failed to brake or swerve to

avoid the car in front of her – that Defendant should be convicted of intentional child abuse. TR. Vol.7, pp. 101-102. Because, based on the arguments in this brief, it is apparent that intentional child abuse requires evidence that the defendant's conduct was intentionally directed against a child, rather than against the general public, Defendant asks this Court to rule that the evidence in the record was insufficient to support a charge of intentional child abuse, so that Defendant will not face retrial on these two counts if her conviction of negligent child abuse is vacated.

POINT 6

IF DEFENDANT'S CONVICTIONS OF CHILD ABUSE ARE REVERSED, THIS COURT MUST REMAND FOR ENTRY OF A JUDGMENT OF ACQUITTAL

If this Court agrees with the Defendant that her conviction of one count of negligent child abuse resulting in the death of the child and one count of negligent child abuse without serious bodily injury to the child should be reversed based on insufficient evidence of a material element of the offense of child abuse, or because the child abuse statute is void-for-vagueness as applied to the Defendant's conduct, then this Court should reverse these convictions and remand for entry of a judgment of acquittal on each count of child abuse.

The State is not entitled in this case to a conviction of the lesser-included-offense of vehicular homicide and remand for sentencing on that count. *State v.*

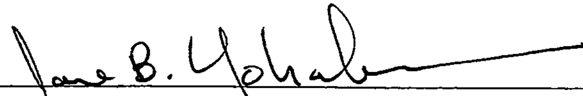
Villa, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017. That is because the State here, although plainly permitted to charge vehicular homicide or and to seek a jury instruction on vehicular homicide, chose not to do so. It is settled law that when the prosecution affirmatively chooses an all-or-nothing strategy, as it did here, it will be bound by that strategic choice. The appellate court may not remand for entry of a judgment of conviction and re-sentencing. *Id.*

As to the conviction for one count of child abuse not resulting in serious bodily harm, vacating that conviction leaves in place Defendant's conviction for aggravated driving while intoxicated, the alternative offense chargeable for driving while intoxicated which endangers a member of the general public but does not result in serious bodily injury or death.

CONCLUSION

For the reasons set forth above, Defendant asks this Court to reverse and remand this matter for entry of a judgment of acquittal on all counts of negligent and intentional child abuse. In the alternative, Defendant asks for reversal and remand for a new trial on the jury instruction and admission of prejudicial evidence issues.

Respectfully submitted,



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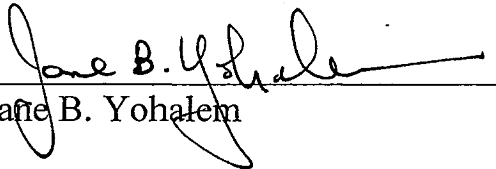
CERTIFICATION

I hereby certify that a true and correct copy of the foregoing was hand-delivered to the Attorney General's Box in the Court of Appeals this 22nd day of May, 2009.



Jane B. Yohalem