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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 24, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	) ND Supreme Court No. 20190054
	) District Court No. 2017-CR-03594
Plaintiff/Appellee,	)
	)
vs.	)
	)
Michelle Vetter,	)
	)
Defendant/Appellant.	)

ORAL ARGUMENT REQUESTED

APPEAL FROM THE JURY VERDICT, ENTERED ON AUGUST 28, 2018, THE AMENDED ORDER DEFERRING IMPOSITION OF SENTENCE, ENTERED ON JANUARY 19, 2019 AND ALL PREVIOUS ORDERS DENYING RELIEF
CRIMINAL NO. 08-2017-CR-03594
THE HONORABLE CYNTHIA FELAND, PRESIDING

DEFENDANT/APPELLANT BRIEF

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1. Is the statute under which the Defendant was convicted, N.D.C.C. § 12.1-01-04, unconstitutional?

2. Is the evidence in this case sufficient to sustain a jury verdict of guilty?

II. STATEMENT OF THE CASE

¶ 1 This case began as a "contentious" divorce case. It was accurately characterized as such by the trial judge. (Memorandum and Order, Case No. 08-2017-DM-00587, P 4, ¶ 11 and P 7, ¶ 21) The divorce was commenced by a husband, Kyle Vetter, who plotted out in writing, a check list of things to do to achieve his ends. He was essentially an absentee father working "shift work" at the mines. His wife had been Primary Caretaker of their child, B.V., since the child's birth 8 years earlier. His plot included one of trying to find some incident or excuse to accuse his wife of abuse. This is the entire subject matter of this appeal. An incident occurred on the evening of November 11, 2019 that was essentially a minor accident while the child and her mother were cuddling and horse playing. Two days later on November 13, 2017 Klye decided to use that incident to accuse Michelle of Felony child abuse. Kyle reported the incident to a deputy sheriff he knew, Rebecca Kopp. Kyle attempted to have school officials call in an abuse report but the school declined doing so. Kyle did not give up. He continued working behind the scenes with the Sheriff's Deputy and was able to arrange behind the scenes investigations with various local child care protection agencies and the incident took on the process of a full blown child abuse investigation with one exception. Michelle Vetter's input was never requested. She was totally unaware of what her husband and the deputy and the agiencies were doing. Instead she was arrested at her place of work, the U.S. Bureau of Reclamation. No warrant or complaint was served on her. She was incarcerated for 28 hours before being released on bond. The bond order contained a vague provision that there be no contact allowed whatsoever between the mother and her daughter unless someone at Social Services made recommendations for doing so.

¶ 2 It took 3 months for the Michelle to obtain a one hour supervised visitation. It was scheduled during her known regular work hours but she attended. She had not seen nor heard from her daughter for 3 months, through the holidays of Thanksgiving and Christmas. After her initial one hour visitation, she was given 3 additional one hour supervised visitation opportunities until another District Judge in the Divorce action that was pending provided for 50-50, every other week, parenting time and possession of the family home.

III. STANDARD OF REVIEW

¶ 3 Is the challenged statute void beyond a reasonable doubt? State v. Blue, 2018 ND 171, ¶ 19, 915 N.W.2d 122.

¶ 4 Has a serious injustice occurred? State v. Clark, 2004 ND 85, ¶ 6, 678 N.W.2d 765. (See also, State v. Anderson, 2003 ND 30, ¶ 8, 657 N.W.2d 245; State v. Evans, 1999 ND 70, ¶ 9, 593 N.W.2d 336.)

¶ 5 Is the evidence sufficient to sustain a judgment of conviction? N.D.R.Crim.P. Rule 29(a) and State v. Skjonsby, 319 N.W.2d 764 (N.D. 1982)

IV. STATEMENT OF THE FACTS

¶ 6 On Saturday evening, November 11, 2017, between 7 and 8 p.m., the child, B.V., was sitting on a family room sofa in her mother's lap. Various versions of what happened have been told by the child, her father, Kyle, and her mother, Michelle. If you sort through these versions, you will learn there was in fact some kind of 2 to 5 second incident that two days later Kyle used to report as child abuse to a Deputy Sheriff he knew, Rebecca Kopp. He has sworn in Court twice it is the only time he had seen any abuse of the child by its mother since the child had been born 7 years earlier. All versions, with some variances, show the child and her mother were cuddling on a family room sofa, engaged in "horseplay" when an incident that could best be described as a minor accidental occurrence took place. (Jury Trial, P 35, line 10)

¶ 7 Putting all versions together, it would appear that, during horseplay, B.V. saw a "booger" in her mother's nose and teased her about it. Her mother teased her back saying, "I'm going to wipe it on you." B.V. then punched her mother in the nose. Her mother instantaneously reacted reflexively in a way that has been variously described as a "tap", a "high five", a "hit", a "swat", or a "punch". There was virtually no time interval between the child' punch to her mother's nose and the mother's reflective reaction to it. The sentencing judge called it a "reflex of action" and noted there was no ongoing pattern of conduct by this parent or something which indicates this parent did what the court would call an intent to place the child in danger. The Judge repeated, "Just didn't see it." (Sentencing P 24, lines 4-9).

¶ 8 In one version told by B.V., she said they were sitting on the couch snuggling when she decided to "resituate" herself. In the course of so doing, she says she bumped

her mom in the nose with her elbow. (Jury Trial, P 15, line 25 through P 16, line 2). Elsewhere, she says she had been throwing a soft football with her dad when she spilled some water, slipped on the wet floor, and, accidentally, hit her mother in the nose with her elbow as she tripped. (Index # 138, P 2, line 24 through P 3, line 6) In yet another, she was laying on her mother's lap when she saw a bugger in her mother's nose and teased her about it and punched her mother in the nose. (Jury Trial, P 23, line 19 through P 24, line 3)

¶ 9 Although this 8 year old's story varies throughout her testimony, cross-checking it with the story told by the parents the most likely version that emerges is that Kyle and B.V. were playing with a soft football, when B.V. spilled some water on the floor. Kyle went to get something to wipe it up. It was while he was doing this that B.V. sat in her mother's lap and teased her about having a booger in her nose. Her mother teased her back and said she was going to wipe it on her. B.V. hit her mother in the nose, and, in an instantaneous reflex reaction, her mother made some kind of contact with B.V. There is some disagreement as to which side. (Index #141, P 6, lines 11-13, P12, lines 22-25, P 18, lines 14-17, and P 30, line 7 and Jury Trial, P 35, lines 1-3) Michelle avers that it was on B.V.'s left side. Two days later, Kyle claims he saw a small yellow bruise on B.V.'s right side where an alleged hit had taken place. It has been variously described by the state's witnesses including Kyle as being quarter size, a dime size, and the size of a nickel. (Jury Trial, P 42, lines 1-5, P 76, lines 19-21, and Index #141, P 6, lines 16-18 respectively).

¶ 10 After this 2 to 5 second incident, Michelle told B.V. "no don't do that". (Index #141, P 18, line 1 and P 19, line 3). She sent B.V. to take a shower. After the shower,

B.V. returned to the family room. Although it varies a bit from B.V's version, there is consistency in the version told by the parents that at some point after her shower B.V. returned to the family room and watched TV with her parents until both accompanied her to her bed. There is no mention of the booger incident. There was no sign of injury. There were no complaints of pain. The child slept well that night. (Index #141, P 21, lines 17-20, Jury Trial, P 37, lines 20-22)

¶ 11 The following day was a Sunday, and the family went to church together. There were no complaints of pain from B.V. There were no visual signs of any injury. In the afternoon, Kyle went hunting. Michelle went to a Pampered Chef's home party. B.V. had a play date at a friend's house. That evening, the family ate dinner together. There were no arguments between child and parent[s] or between parents. There were no complaints or signs of injury. There were no resentments mentioned by anyone of the hit to Michelle's nose by B.V., or that of the attempted "booger" wipe by Michelle precipitated it. There was no discussion of Michelle's instantaneous reflex once she was hit. There were no complaints by the child of feeling hurt. Although B.V. denies it, both parents agree B.V. took her normal Sunday evening shower, watched T.V. once again both parents participated in putting her down in her bed for the night.

¶ 12 The next day, Monday morning, November 13, 2017, B.V. left for school by bus. Both Kyle and Michelle were present to say goodbye. Kyle claims he picked B.V. up and gave her a squeeze. (Jury Trial, Page 39, lines 9-12 and lines 19-20) He testified he may have squeezed her too hard. Kyle claims the child winced and, when he asked why, she said it was where mom hit her. (Index #140, P 9, line 23 through P 10 line 2) Michelle was there. She denies there was any such event or discussion. (Index #140,

P 43, lines 1-16) Kyle was asked questions regarding this Monday morning exchange at the Jury Trial, counsel for Defendant objected multiple times, and the Court cautioned the prosecutor to watch her wording and the witness to only answer the question being asked. (Jury Trial, P 39, lines 9-18) The questions and subsequent answers were in direct violation of the *In Limine* Order. (Index #112, P 1, ¶2)

¶ 13 At noon that Monday, Michelle went to B.V.'s school, as she often did, to have lunch with B.V. (Index #140 P 43, lines 20-25) That afternoon, November 13, 2017 at 2:45 p.m., some 40 hours after the "booger" incident, Kyle called an acquaintance of his, Deputy Officer Rebecca Kopp, to report abuse. (Jury Trial, P 53, lines 19-22). He said there had been an incident at their home the previous Saturday evening in which B.V. had been hit by Michelle. Michelle was never contacted and asked about it. No problem was ever brought to the attention of Michelle until she was handcuffed at work and hauled off to jail. There was no call or visit to a doctor, nurse, or other medical care worker to look at B.V. None was ordered. Nothing was reported to the school administration, counselors, or nurses. No abuse was seen or reported by the school administration, counselors, or nurses at the school B.V. attends. Kyle requested that the school have B.V. report abuse to Child Protective Services. The school refused, and, unbeknownst to mother, Michelle, Deputy Kopp then took someone from social services to the school and interviewed her daughter, B.V.. (Index #139, Exhibit No. 1, P 41, S2017-07872, ¶ 2)

¶ 14 It was at noon the following day, November 14, 2019, that Michelle was handcuffed at her place of work at the Bureau of Reclamation. It was a no-warrant arrest brought to her workplace by Deputy Kopp and two other officers. Michelle was

taken to the Burleigh County Detention Center where she remained for the next 28 hours. She appeared in court from the jail by video and was charged with child abuse. She was released on bond with vague directions she have no contact with the child except under such conditions as might be recommended by Social Services. Try as she did over the next 3 months, neither she nor her lawyer were able to arrange even supervised visitation. During that time, Kyle took possession of B.V. and their home and even took B.V. on a vacation to Texas.

¶ 15 As stated in paragraph 13 above, on the day of the arrest, Tuesday, November 14, 2017, Deputy Kopp and Janette Yoder, a Social Worker from Burleigh County Social Services Office, went to B.V.'s school and met with B.V. Michelle was never notified. No school counselors, nurses, teachers, or administrators were involved. Initially, when confronted, the child could not even remember the event. (Index # 138, P 1, lines 14-15 and P 6, lines 8-10). When Kyle was asked why he had made no inquiry of a doctor or nurse of some medical examination of his daughter his answer was "As of Tuesday after I talked to her, she said it didn't hurt no more, so I didn't know if I needed a – I mean, there was a bruise there, but I didn't think it was – it was midsection, it wasn't her ribs, so I figured I didn't know if I needed to. She didn't complain about it too much anymore." (Index #140, P 27, lines 5-11) No medical exam was ever ordered, not even from the school nurse. When interviewed by Deputy Kopp and social worker Yoder on the 14th of November, 3 days after the alleged abuses the child was subjected to suggestive questioning contrary to the protocol for initial interviews of an alleged child abuse victim. Deputy Kopp testified she has experience interviewing people but no training in the specialized field of interviewing abused

children. She had taken no applicable courses in college. She subscribes to no professional journals on the subject. (Index #139, P 10, lines 1-5) It's not what she does, and she was not qualified to do a forensic interview for this type of case.

¶ 16 But on 14th of November, the Deputy did take pictures. She claimed to have found a slightly yellowed spot on the right side of the child's abdomen. (Index #s 25-30 and Index #s 129-132) Kyle told her that was where the child had been struck 3 days earlier. Contrary to all forensic child abuse interviews protocol, before the child was asked to tell her side of the story she was told by Deputy Kopp what her father had said happened. The Deputy then reported back that B.V. response then was that that was "pretty matter of fact" what happened. (Jury Trial, P 56, lines 7 to 15)

¶ 17 At the Preliminary Hearing, the presiding Judge, Cynthia Feland, said, "This is an unusual case". (Index #141, P 34, line 21) She noted that in the typical abuse case "the injuries are much more elevated than what we are dealing with here…" (Index #141, P 35, lines 1-2). The judge said we normally see much more injury in these cases, but went on to say the legislature in its wisdom has added "pain" as an element of the crime and the charge here included "pain" so it had lowered the standard from what it had been. In prior cases the court had overcome challenges based on vagueness because of the use of clarifications such as "severe pain or proof of mental injury, bodily injury, substantial bodily injury, or serious bodily injury as defined in N.D.C.C. § 12.1-01-04." With the new statute, the Court believed the measuring stick now can be mere "pain". So the court declared it to be solely a jury matter and Michelle was bound over for trial of Class C Felony Child Abuse. She said that a parent who inflicts *mere pain* can be found to have committed the crime. She said, "…. the victim just has to indicate that there was mere

pain." (Index #141, P 29, lines 12–20) In short, intent of the defendant, seriousness, intensity of the injury or the totality of the circumstance injury no longer matter. Even length of pain was irrelevant. All that mattered under the statute was whether the "victim" said he or she had experienced "pain". In this case, there was no pain at the time the incident occurred unless perhaps to Michelle's nose. However, later after the child had been sequestered and kept under the influence of her father with his version related to police, child protection advocates, and social services, with no opportunity for input from Michelle, B.V. begin to admit or claim there had been pain. In an interview with a private psychologist, Dr. Jeffery Gregory, B.V. said that her mom never hurt her. (Index #184, P 2, second paragraph under Interview with Ms. Vetter). It is a manipulated story exaggerated by Kyle for purposes of gaining some advantage in a contentious divorce and if anything is infliction of psychological abuse by the father to the child.

¶ 18 After Michelle's arrest at work, for the next 3 months, B.V. (and Michelle's home) were inaccessible to her because of the Court's no-contact order and delegation of authority to Social Services. (See Index #24) Shortly after Michelle's release on bond, the child was flown away by Kyle to Texas for a 10-day, Thanksgiving vacation with his family. After B.V's return, it was more than two more weeks before anything resembling a professional child forensic interview could take place. Michelle was kept totally in the dark as to what was happening to her child and was unaware this was a long term implementation of a "plan" by Kyle. (See Index #150)

¶ 19 On these facts, on August 23, 2018, a Burleigh County Jury found Michelle guilty of Class C Felony Child Abuse. (See Index #135) That was a mistake and a miscarriage of justice.

¶ 20 The judge said it was a "technical crime". (Sentencing, P 23, lines 3-5) She gave a 365-day deferred sentence. Michelle was not required to register as a child abuser or comply with any social service requirements or programs. (Index #s 194 and 196) The Sentencing Judge said, "…… I do not think that there was an intent on the part of the mother to inflict that pain". (Sentencing, P 23, line 7-8) The court said it found nothing in Michelle's history to indicate any "inappropriate physical action in the past". (Sentencing, P 23, lines 14-17) After stating this, the Judge said, "I've never actually seen a situation where it really did appear to this court to be a reflex of action and not an ongoing pattern of conduct by a parent or something which indicates that the parent did what this court is going to call an intent which places that child in danger". The Judge repeated, "Just didn't see it". (Sentencing, P 24, lines 4-9) But this same Judge had said at the Preliminary Hearing that the Legislature in its infinite wisdom added infliction of any "pain" as an element necessary to make the conduct a Class C Felony. (Index #141, P 29, lines 12-20) The Judge, by her own use of adjectives, made clear her reason for letting the case move forward to a jury trial was for a determination of whether any pain, including mere pain, had been inflicted.

V. LAW AND ARGUMENTS

A. THE STATUTE UNDER WHICH THE DEFENDANT WAS CONVICTED, N.D.C.C. § 12.1-01-04, IS UNCONSTITUTIONAL

¶ 21 The North Dakota statute under which the defendant was convicted is unconstitutional for vagueness. The case should have been dismissed at the Preliminary Hearing. It should have been dismissed in response to Defendant's Rule 29 Motion at the close of the prosecution's case for lack of proof beyond a reasonable doubt that child abuse had taken place. It should have been dismissed in response to Defendant's Post Trial Motions.

¶ 22 Defendant has maintained from the inception of this case that N.D.C.C. § 12.1-01-04 is unconstitutional. That statute permits a felony conviction if a parent has caused a child "pain". By that standard, every parent in America is guilty of more than just some level of permissible spanking. "Pain" as a standard does not satisfy the requirements of specificity required in a criminal statute. There must be something more than some undefined "pain" to make it a criminal offense. Infliction of some level of "pain" as prohibited conduct provides a jury with no standard such as intensity, duration, disfigurement, impairment of bodily function, permanency, substantial or any level of seriousness. Adding "unreasonable" to this Statute would not save it either as have under some other statutes in other cases where the jury at least had some boundaries to consider such as "serious", "extreme", "permanent", or "substantial" pain as an element of proof required. But, in the absence of any quantifying standard, it is not sufficient to assume 12 jurors can be expected to decide a case, such as this one, based solely upon a determination that some level of "pain" had been inflicted. Even in those cases that have approved convictions where a challenge has been made that a statute was too vague, the

Court has called for a review based on the "totality of the circumstance". The Judge at the Preliminary Hearing in this case made it clear the legislature's addition of the element of mere "pain" was the reason she was allowing this case to go forward.

¶ 23 The law requires that criminal laws state explicitly and definitely what conduct is punishable. Criminal laws that violate this requirement are void for vagueness. The vagueness doctrine rests on the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

¶ 24 The 5th Amendment says:

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*

¶ 25 The 14th Amendment says:

> "*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

¶ 26 An assertion of "pain" having been inflicted does not provide a sufficient standard from which a reasonable juror can be asked to make a determination of guilt or innocence to a Class C Felony. Neither does it give any reasonable guidance to the police or the public for what conduct is prohibited.

¶ 27 This Appeal is predicated on the simple fact that the words "causing pain" does not "…create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute" nor does it provide "….a reasonable person with

adequate and fair warning of the proscribed conduct." State v. Montplaisir, 2015 ND 237, ¶ 20, 869 N.W.2d 435 (quoting State v. Brown, 2009 ND 150, ¶ 33, 771 N.W.2d 267 (quoting City of Belfield v. Kilkenny, 2007 ND 44, ¶ 10, 729 N.W.2d 120)). Neither does it "…mark boundaries sufficiently distinct for fair administration of the law." State v. Holbach, 2009 ND 37, ¶ 24, 763 N.W.2d 761 (quoting In re Disciplinary Action Against McGuire, 2004 ND 171, ¶ 19, 685 N.W.2d 748).

¶ 28 Neither is any deference given to the "Totality of the Circumstance" given the facts of the incident itself.

¶ 29 This is an unusual case because of the accidental nature of what happened in a few seconds while a mother and daughter were engaged in cuddling and playtime. The jury is not assisted in determining whether "pain" was inflicted to a felony degree by any medical examination, nor by any timely report prior to opportunity for corruption of a minor child's memory, nor any investigation, or intervention by someone trained in child abuse interviewing. There was no timely interview or examination that meets the standards required to allow a decision that the "pain" in this case rose to the level of being unreasonable even if such a standard were to be written into the statute by assumption.

¶ 30 There was an interview by Deputy Sheriff Rebecca Kopp 3 days after the incident. Ms. Kopp admitted she had no training in interviewing children alleged to have been abused. (Index #139, P 10, lines 15-20).

¶ 31 Testimony from the father was that two days after the incident the child cringed when he "squeezed her too hard" as she left for the school by bus. This was 36 hours after the alleged "abuse" had taken place. (Index #140, P 9, lines 23-25). The

child had been under the exclusive possession and influence of her father, relatives, and child protection agencies while totally isolated from her mother for 4 months after the incident in question.

¶ 32 The Order *in Limine* (Index #112) excluded any reports and exhibits from witnesses relating to events prior to or after the November 11, 2017. Notwithstanding this specific exclusion the court allowed Kyle Vetter to testify from a report he had given to Deputy Kopp a few days later and that became a basis of her knowledge of the incident from which she could give testimony as well.

¶ 33 Secondly, Item 5 of the *in Limine Order* (Index #112) prohibited introduction of hearsay statements made by the child to anyone. This Order was violated and the violations were objected to. (Jury Trial, P 45, line 4 through P 46, line 5)

¶ 34 Three days after November 14, 2017, the child herself could not remember the incident. When first questioned by Deputy Sheriff Rebecca Kopp if something "scary" had happened to her recently the child's immediate response was to inquire if she meant the incident where she hit her mother in the nose. (Index #138, P 1, lines 14-18). Her initial response was not that she had been hit or injured. Suggestive questions had to be asked to turn the interview into one of accusations that her mother had hit her. Like "Tell me how your mother hit you". (Index #138, P 1, lines 14-25)

¶ 35 This is not a Montplaisir, supra, case where the jury at least had the benefit of qualifying adjectives like "serious", "substantial", and "extreme". Neither does it have the awful and brutal deliberate beatings testified to in State v Pavlicek, 2012 ND 154, 819 N.W.2d 521. (Where there was no challenge to constitutionality.)

¶ 36 Neither is this a case like Simons v. State, 2011 ND 190, 803 N.W.2d 587 where the defendant and accused abuser argued his use of force was justified under the circumstance of the case. The Supreme Court considered and rejected his argument that the statutes were too void and vague.

¶ 37 This case cannot be compared to Simons, supra where the Court found that Simons use of force was not justified under N.D.C.C. § 12.1-05-05(1). It allowed the "use of force" provisions of that statute to be transported to N.D.C.C. § 50-25.1-02(3) the statute under which Simons was charged. The Court applied a test of "unreasonableness" to the force that was used. The child had been struck 24 times with a wooden backscratcher with sufficient force to create large purple bruises that were still visible days later. The Supreme Court found that a reasoning mind could determine by the weight of the evidence that the Social Service Departments finding the force used by the father was not reasonable. Compare this testimony and exhibit to the unintentional, instantaneous, reactive contact in this case. Here we have a questionable and almost unidentifiable bruise alleged to be an injury to the child with some uncertainty if it is even the right location. A slightly yellowed mark on a picture taken by Deputy Kopp 3 days later is the evidence of abuse. The picture should have been excluded under the Court's *in Limine* Order but wasn't. State witnesses gave the alleged "bruise" the size of a nickel (Index #141, P 6, lines 14-18) while testimony at trial from the father, Kyle Vetter said it was quarter size. (Jury Trial, P 42, lines 1-5).

¶ 38 In Simons, supra, (¶ 11 and ¶ 19, respectively) the Social Services Standards involving the "use of force" that were reviewed by the Court, N.D.C.C. § 12.1-05-05(1) included the following language:

"The use of force upon another person is justified under any of the following circumstances:

1. Except as provided in section 15.1-19-02, a parent, guardian, or other person responsible for the care and supervision of a minor . . . may use reasonable force upon the minor for the purpose of safeguarding or promoting the minor's welfare, including prevention and punishment of the minor's misconduct, and the maintenance of proper discipline. The force may be used for this purpose, whether or not it is "necessary" as required by subsection 1 of section 12.1-05-07. The force used must not create a substantial risk of death, serious bodily injury, disfigurement, or gross degradation."

The Court went on to say:

"We do not construe the last sentence [of N.D.C.C. § 12.1-05-05(1)] to be an exclusive listing, but merely a legislative acknowledgment that use of force creating a substantial risk of death, serious bodily injury, disfigurement, or gross degradation is per se unreasonable when purportedly used for disciplinary purposes. Other degrees of force may be found to constitute unreasonable force under the statute when considering the totality of the circumstances in a particular case."

¶ 39 The case before the Court has been blown out of proportion if any "totality of the circumstance" review is made. What is labeled as "child abuse" was a 2 to 5 second instantaneous reflex reaction by Michelle to being punched in the nose. The results of those 2 to 5 seconds playtime scuffle in the Vetter living room the night of November 11, 2017 do not fit into any reasonable definition of "child abuse" from which a jury could arrive at a fair decision. It was a once in 7 years instance that most correctly would be labeled an accident. The "pain" alleged to have been inflicted here is the handiwork of a vindictive spouse planning and manipulating the system to his advantage in a contentious divorce. One might well argue that it would actually have been unnatural for Michelle to have not reacted as she did. The Parental history of the relationship between parent and child is an important part of child abuse investigations. In pretrial hearings and at trial in this case, Kyle testified he had never in their daughter's

8 years of life seen any physical abuse of the child by her mother. (Index #140, P 11, lines 6-12).

¶ 40 The conviction of these charges has a monumental affect upon Michelle; it affects her eligibility for her employment with the U.S. Government. It affects her other resource for income, a realtor's license. It had the potential of labeling her a registered child abuser. The costs to her in this case have already been great financially, emotionally, and as a matter of reputation. The false charges by Kyle caused her to lose total access to her home and her daughter for 4 months. It impacted evidence in a pending divorce. It is a perverse case where relief should be granted solely to prevent a "manifest injustice". State v. Whitman, 2013 ND 183, ¶ 13, 838 N.W.2d 401.

¶ 41 In other cases such as Montplaisir, supra, there has been some specificity given to the jury to help it in determining whether there had been child abuse. The specificity came from adjectives such as "extreme" pain or "serious" bodily injury. The Supreme Court has found these adjectives are of sufficient general understanding that a reasonable jury may be allowed to make the decision. The Court has said this list is not exclusive and that a jury may act on the basis of the "totality of the circumstances in a particular case". Pavlicek, supra. In the absence of any guideline in this case to some level of undefined "pain" ignoring the "the totality of the circumstance" makes this conviction perverse. As it stands, a mother's reflexive response to being hit in the nose can result in prison for 5 years, imposition of a $10,000 fine, require post-sentence supervision, and require registration as a child abuser.

¶ 42 When the challenge to constitutionality was first raised in this case at the Preliminary Hearing, the Court acknowledged, "This is an unusual case." (Index

#141, P 34, line 21). The Court said "typically when [it] sees abuse charges, the injuries are much more elevated than what is being dealt with here." (Index #141, P 34, line 25 through P 35, line 2). But the Court said under N.D.C.C. § 12.1-01-04 proof of the crime is sufficient based solely upon an alleged victim accusing of *mere* pain. Responsibility for this state of affairs in this case is placed by the Court on the legislature. The Court said in its "infinite wisdom" the legislature had added "pain" as a measuring stick. (Index #141, P 29 lines 15-20). Under this approach, no consideration need be given to the totality of the circumstance. Under this interpretation, the jury need not know how it happened, how much pain there was, if there really was medically diagnosable pain at all, what its duration was, or how serious it may or may not have been. The assertion of an 8 year old child 3 days later when suggestively interviewed that she experienced even pain should never be sufficient as a standard from which a reasonable jury can be asked to make a determination of guilt or innocence. Neither does it give guidance to the public nor law enforcement of what conduct is prohibited.

¶ 43 In explaining the issue of constitutional vagueness in Montplaisir, supra, the Court said, "All laws must meet two requirements to survive a void-for-vagueness challenge: (1) the law must create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute; and (2) the law must provide a reasonable person with adequate and fair warning of the proscribed conduct." Citing State v. Brown, 2009 ND 150, ¶ 33, 771 N.W.2d 267 (quoting City of Belfield v. Kilkenny, 2007 ND 44, ¶ 10, 729 N.W.2d 120).

¶ 44 The Montplaisir, supra, the Court explained that "A statute is not unconstitutionally vague "if the challenged language, when measured by common

understanding and practice, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for fair administration of the law." Citing State v. Holbach, 2009 ND 37, ¶ 24, 763 N.W.2d 761 (quoting In re Disciplinary Action Against McGuire, 2004 ND 171, ¶ 19, 685 N.W.2d 748).

¶ 45 The Montplaisir Court then reviewed the statute in question to determine if these two requirements had been met to be sufficient under a "reasonable person standard." The Court found it necessary to analyze the concept of what constitutes "serious bodily injury" and "substantial bodily injury" since neither term was defined in the statute the defendant was alleged to have violated. To do so the Court looked elsewhere in the Code and found "serious bodily injury" and "substantial bodily injury" defined in Title 12, including N.D.C.C. § 12.1-01-04 (29) and 12.1-01-04 (31). In doing its analysis, the Court even distinguished between the meaning of "serious bodily injury" and "substantial bodily injury". It said "serious bodily injury" means bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, (emphasis added) permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs." It said, "substantial bodily injury" means a substantial temporary disfigurement, loss, or impairment of the function of any bodily member or organ." None of this saves the statute in question here.

B. THE EVIDENCE IN THIS CASE IS INSUFFCIENT TO SUSTAIN A JURY VERDICT OF GUILTY.

¶ 46 There are some variances in the description of what happened on the night of November 11, 2017 in the Kyle and Michelle Vetter home. Michelle Vetter was never

asked by the prosecution for her side of the story. But regardless of which version is most accurate, the facts as alleged by either parent do not make out a plausible case of felony child abuse. She offered to meet with them with her attorney.

¶ 47 Kyle Vetter was present in the room at the time. Whether or not he actually saw the incident is in question. He testified at a Protection Order Hearing on December 22, 2017 that mother and daughter were playing around on the couch when "evidently" she hit her mother on the nose. He didn't say she did, he said "evidently" she did. Kyle's description was that Michelle "…reacted and punched her [B.V.] in the side". (Index #140, P 8, lines12-14) Kyle did not even represent at that time that he saw it happen. He said, "I heard it". (Index #140, P 9, line 1) Later testimony from the child was that her father was wiping up water that she had spilled while they were playing. (Jury Trial, P 27, line 21 through P 28, line 2) Elsewhere, in other interviews, Kyle said he saw Michelle punch B.V. He did not provide that description to anyone until two days after the incident.

¶ 48 Kyle saw no need for medical consultation, not even with a school nurse two days later. No one, not even Kyle, talked to Michelle about it before she was handcuffed at her place of work three (3) days later and led off to jail.

¶ 49 Both Michelle and the child have described Michelle's reaction as a tap or a "high five". (Index #141, P 18, lines 14-15 and line 24 and Index #138, P 9, lines 8 and 9, respectively).

¶ 50 The incident was clearly elevated by Kyle from a split-second freak event to a Class C Felony of Child Abuse case in hopes of gaining some "factor" advantage in a pending divorce case. From his own use of words one cannot be sure Kyle even saw the

actual incident. There is no mention of conduct that was willful, reckless, intentional, or knowing. It was a split second reaction where there was not even time for Michelle to think. The story varies whether the child slipped on a wet floor and accidentally hit her mother in the nose with her elbow to the one in which all three present say B.V. was sitting or lying in her mother's lap when she saw a booger and the two began horseplay over it.

¶ 51 This is not a case in which there are any justified fears of repetition. This exchange took place between Michelle's defense counsel and Mr. Vetter who instigated these charges. (Index #140, P 11, lines 6-9).

> "MR. NODLAND: Now prior to this incident did you ever see Michelle physically hurt your daughter?
>
> MR. VETTER: No. She's always been pretty strict, I mean, but not punch."

VI. CONCLUSION

¶ 52 This is a case in which a plaintiff in a divorce action has attempted to blow an accidental playful incident into a case of Class C Felony Child Abuse. The motivation has been advantage in the divorce as to possession of the family home, primary parental responsibility of a now 10 year old child, retention of a majority of marital assets, and avoidance of child support or spousal support. By Kyle's own admissions under oath, there were no previous histories of abuse. He waited 3 days to make a report to a Deputy police woman and was guided through the various local and state agencies charged with responsibility for child safety all without any discussion with his wife until after he had orchestrated her arrest and incarceration. There were no medical examinations, no opportunity for timely interview of the child by a trained forensic professional during the

time period when child abuse interviews are the industry requirement. There was and is no medical support for any claim of any injury that would rise to the level of a crime let alone a Class C Felony. The conviction of these charges would have monumental affect upon Michelle and her government employment as well as her real estate license. The costs to her in this case have already been great financially, emotionally, and in the loss of her home and daughter for 4 months.

¶ 53 The case should be dismissed.

¶ 54 Dated this 24th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

¶ 55 The undersigned, as attorney for Michelle Vetter and as the author the Appellant's Brief, certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the Appellant's Brief, excluding addendum, footnotes or endnotes, complies with the page limit requirement of thirty-eight (38) pages for appellant's brief as contained in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

¶ 56 Oral Argument is requested because the fundamental issues in this case are complex, fact intensive and are ripe for an engaging, productive discussion about how the law should have been applied to the facts in the case and that such a discussion would be helpful to the court. Rule 28 (h), NDRAppP.

¶ 57 Dated this 24th day of June, 2019.

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CERTIFICATE OF SERVICE

¶ 58 I hereby certify that a true and correct copy of the foregoing Appellant's Brief and the attached Appendix were served on March 4, 2019, by sending via electronic mail to the following:

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¶ 59 Dated this 24th day of June, 2019.

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