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STATEMENT OF THE ISSUE

[¶1] Whether there was sufficient evidence presented to sustain the verdicts.

STATEMENT OF THE CASE

[¶2] The Defendant, Jose Rivera-Rieffel, was charged on August 10, 2018 with the crimes of Murder, Child Abuse, and Disobedience of a Judicial Order. (Appellant's Appendix (hereinafter "App.") p. 9-10 and 13-16).

[¶3] Rivera-Rieffel pled guilty to the charge of Disobedience of a Judicial Order on February 4, 2020. (App. pp. 6, 17-18). A jury trial was held on the remaining charges of Murder and Child Abuse on March 2-5, 2020 and Rivera-Rieffel was convicted on both charges. (App. p. 19).

[¶4] Rivera-Rieffel was sentenced on August 7, 2020. (App. pp. 20-22). He filed timely notice of appeal on August 11, 2020. (App. pp. 23-24).

STATEMENT OF THE FACTS

[¶5] Rivera-Rieffel was the father of S.R-L., an infant. Tr3 p. 212:3-14. S.R-L.'s mother, J.L., worked at North Walmart. Tr3 pp. 211:13-20, 216:4-7. While J.L. was at work, her brother and his girlfriend would take care of the children. Tr3 p. 217:8-12. J.L. could not find daycare as she worked overnight and was not able to find anyone to take her children overnights, especially a newborn. Tr3 p. 218:2-8. Approximately a week before S.R-L. was injured, J.L.'s brother complained about having to babysit the girls and stopped providing for their care. Tr3 pp. 218:14 – 219:6. After her brother stopped watching the children, J.L. took some time off work and Rivera-Rieffel watched the girls on the days J.L. did work. Tr3 p. 219:15-25.

[¶6] J.L. went to work on the evening of April 18th from 10 p.m. to April 19th at 7 a.m. Tr3 p. 221:4-13. She left the apartment at 9 p.m. and Rivera-Rieffel had come earlier than that to watch the girls while J.L. was at work. Tr3 p. 221:14-23. Before leaving for work, J.L. fed the girls and put K.R-L. to bed. Tr3 pp. 221:24 – 222:9. S.R-L. “drank a little bit of milk” before J.L. left for work. Tr3 p. 223:18-22. J.L. left for work at 9 p.m. and stayed at Walmart throughout her entire shift until it ended at 7 a.m. Tr3 pp. 224:23 – 225:16. After work, J.L. bought groceries at Walmart and went to the DMV for license plates for her vehicle. Tr3 p. 226: 8-23. She was there approximately twenty minutes and then went to a gas station. Tr3 p. 229:4-11. She arrived home sometime after 8:20 a.m. Tr3 p. 230:12-20. A review of J.L.'s phone and phone company records corroborated her timeline. Tr4 pp. 43:14-21, 47:6-24.

[¶7] When J.L. got home, she took a moment and then carried groceries into the house. Tr3 p. 232:11-22. J.L. noticed that the apartment was quiet and assumed the girls were still sleeping. Tr3 p. 235:9-23. She then heard a noise and saw Rivera-Rieffel performing CPR on S.R-L. Tr3 pp. 236:14 - 237:2. J.L. called 911 and stated Rivera-Rieffel was concerned they would get in trouble and the girls would be removed from their care. Tr3 p. 239:7-21. At some point during the call, J.L. began performing CPR on S.R-L. Tr3 pp. 242:22 - 243:4. Rivera-Rieffel left the apartment after the call was made but before police arrived. Tr3 p. 246:18-24. Rivera-Rieffel was the only person in the apartment with the girls after J.L went to work. Tr3 p. 282:8-11.

[¶8] S.L-R. was taken to St. Alexius Hospital and treated in the emergency department. Tr3 pp. 246:7-11, 248:21-23, 250:9-10. Ambulance crew continued resuscitation efforts on the way to St. Alexius. Tr3 pp. 290:22 – 291:5. S.L-R. arrived at the hospital unresponsive, not breathing and with no pulse. Tr3 p. 291:9-15. Externally, S.L-R. had bruising to her forehead and her cheeks, a significant amount of swelling around her eyes, and petechiae around her eyes. Tr3 p. 298:22-25. A CT scan was done which revealed S.L-R. had internal injuries consisting of bruising on the outside of the skull on the soft tissue, bleeding on her brain, a skull fracture on the right side of her head, a fracture on the back right bone of her head, and blood in the middle ear. Tr3 p. 295:11-25. X-rays of her body were taken which showed “multiple old and /or acute new fractures”. Tr3 p. 296:11-22. She was diagnosed with having multiple skull fractures, a subdural hematoma, and acute respiratory arrest. Tr3

p. 300:22-24. She also had fractures to the long bones of her arm. Tr4 p. 97:18-23. The injuries were indicative of significant force, either from shaking, swinging her against a wall or a hard object, punching or kicking from an adult. Tr3 p. 302:5-10, Tr4 pp. 97:27 – 98:3. A pediatric hospitalist testified with the severity of S.R-L.'s injuries, external symptoms would have included irritability, poor feeding, pale complexion. Tr4 pp. 96:24 – 97:9. A nurse practitioner who specializes in child abuse cases testified that with the severity of the injuries, it is “strongly unlikely” that a child could eat or exhibit normal behavior after infliction of the injuries and that external signs of trauma observable to a layperson would have “pretty acute onset” and behavioral changes are noted right after the injuries occur. Tr4 pp. 102:22 – 103:10, 115:8 – 116:18. The behavioral changes or external signs of trauma could be unresponsiveness, crying, not eating, not exhibiting normal behaviors. Tr4 pp. 115:8 – 116:18.

[¶9] S.R-L. had been brought into the emergency department for another incident in February 2018 when J.L. reported she tripped and fell while holding S.R-L. who, it was discovered, had a broken leg from the incident. Tr4 pp. 87:18 – 88:17, 89:3-9. A skeletal survey, or full body X-ray, a CT scan, and baseline lab work were done on S.R-L. at that time. Tr4 p. 89:3-18. S.R-L. did not have any other injuries except the broken femur. Tr4 p. 89:19-24. There was no evidence of rib fractures, no evidence of concerns in any other bones, no evidence of head bleed, and no evidence of retinal hemorrhage during the examination in February 2018. Tr4 p. 92:1-9.

[¶10] S.R-L. was examined by an ophthalmologist. Tr3 pp. 337:1, 338:25 – 339:2. He observed both eyes had “bilateral severe retinal hemorrhages and preretinal hemorrhages and vitreous hemorrhages” or bleeding in all three areas of the eye. Tr3 p. 340:13-24. The ophthalmologist testified he had only seen retinal hemorrhaging this extensive in people with severe diabetic retinopathy in much later years and there was nothing in S.R-L.’s medical record to indicate she had diabetes. Tr3 pp. 343:21 – 344:8. He opined the injuries were caused by nonaccidental head trauma, a blow to the head, or “shaken baby” caused by shaking a child and causing the head to move back and forth rapidly enough that injuries occur to the brain and the eye. Tr3 p. 344:9-19. Performing CPR on an infant can cause retinal hemorrhages but studies indicated these are usually very mild, only in one eye, and not multi-layered. Tr3 pp. 344:20 – 345:8.

[¶11] She was eventually air-lifted to Sanford in Fargo where she was admitted to the ICU. Tr3 pp. 250:13 – 251:3; Tr5 pp. 10:13-19, 12:4-7. She was “critically ill” at that time as her heart was not functioning properly, she was not breathing on her own, not opening her eyes, having seizure-like activity, had kidney issues, and was nonresponse to pain, touch, or sound. Tr5 pp. 12:8 – 13:4. It was determined, as S.R-L. was not recovering from her injuries, that a do-not-resuscitate (DNR) order was appropriate. Tr5 p. 16:9-18. The pediatric intensivist, Dr. Minso, spoke with the parents by phone to obtain permission for the DNR order. Tr5 pp. 10:13-19, 16:9-23. During that phone call, when the extent of S.R-L.’s injuries was explained to the parents, the

mother's "grief was profound" and the father, Rivera-Rieffel, was worried about legal implications if the infant died. Tr5 pp. 16:24 – 17:14. The mother, J.L., was "wailing" on the phone and the father's reaction was to state "if she dies, then isn't that going to be on us". Tr5 pp. 17:22 – 18:8. Dr. Minso thought Rivera-Rieffel was more concerned about himself than S.R-L. and J.L. was begging for her child's life to be saved. Tr5 p. 18:5-15. A DNR order was put in place. Tr5 p. 18:16-19. S.R-L. continued to deteriorate and life support was withdrawn. Tr5 p. 19:6-22.

[¶12] S.R-L. died on April 27, 2018. Tr3 p. 310:9-13. An autopsy was done on April 28, 2018. Tr3 p. 309:19-22. The autopsy examination showed external injuries consisting of abrasions and contusions on the forehead, ecchymosis on the eyelids, and a superficial abrasion on the left thigh. Tr3 pp. 313:13 – 315:1. There were also internal injuries consisting of bleeding on the skull, a large skull fracture, bleeding on the surface of the brain, necrosis of brain tissue to the extent that S.R-L.'s brain was "largely totally dead". Tr3 pp. 315:12 – 316:23, 318:13-19, 319:21 – 320:2, 320:22 – 321:3. There were also healing fractures on the tenth rib and the left femur and other possible fractures of right ribs two, three, and four. Tr3 pp. 321:11-15, 321:21 – 322:16. She also had retinal hemorrhages in both eyes. Tr3 pp. 323:12 – 324:11. The medical examiner who performed the autopsy testified that all the injuries, taken as a whole, was caused by "non-accidental trauma". Tr3 p. 326:2-5. The cause of death was "delayed consequences of blunt force head trauma" and the manner of death was homicide, indicating that the injuries were "not part of the

normal care of an infant and that they were inflicted by another individual”.
Tr3 p. 327:7-20.

[¶13] Detectives spoke with Rivera-Rieffel initially at St. Alexius hospital. Tr4 pp. 16:11-19, 17:15-23, 18:9-16, 138:4-18. Rivera-Rieffel was completely emotionless. Tr4 p. 18:17-21. He claimed he had last seen S.R-L. within the week but had not seen her that day. Tr4 p. 19:10-14. He also said he hadn’t spent the night at J.L.’s apartment one to two months but later admitted he had spent two nights there when the temperatures had gotten colder. Tr4 pp. 19:20 – 20:2. He stated he was never alone with S.R-L. and was never solely responsible for her care. Tr4 pp. 19:15-18, 20:8-14. He then acknowledged that he had been solely responsible for both girls for the two nights he stayed at J.L.’s residence. Tr4 p. 20:14-18. He stated he had spent the night of April 18th in his car in the Menards parking lot. Tr4 p. 140:11-17. He provided a specific timeframe he was at Menards and a specific location within the parking lot that he had been during that time. Tr4 pp. 140:18 – 141:3. Officers contacted employees at Menards to review surveillance video of the parking lot to corroborate the information provided by Rivera-Rieffel. Tr4 p. 141:6-24.

[¶14] He further stated he had been living out of the car and had a fender inside of the vehicle to replace the damaged one on the car. Tr4 p. 142:2-21. The items found in the vehicle were not consistent with the officer’s experience in seeing the condition of vehicles people are living in. Tr4 pp. 142:22 – 143:11. At the end of the interview, Rivera-Rieffel provided detectives with keys he wanted delivered to J.L. which consisted of vehicle and

apartment keys. Tr4 pp. 145:16 – 146:3. A video of that interview was played for the jurors. Tr4 pp. 205:2-25, 207:6 – 208:12, Tr5 p. 3:7-14. During that interview, Rivera-Rieffel detailed for detectives when and how much he had fed S.R-L. throughout the night, when she had slept, when she had woken up, and what she had done while awake. There were no indications in his description of S.R-L.'s activities of the night which showed the external signs of trauma testified to by the doctors.

[¶15] J.L. was interviewed by detectives at the police station where she was “distraught”, “destroyed”, “worried”, and “upset”. Tr4 pp. 148:11-17, 149:6-21. Another interview with Rivera-Rieffel was conducted by detectives in which he stated he was at Kirkwood mall near GameStop using Wi-Fi. Tr4 p. 162:4-12. However, detectives were never able to obtain any video to corroborate that statement. Tr4 pp. 162:13 – 163:11. Rivera-Rieffel said he next went to the Baptist Church area in north Bismarck and uses the unlocked Wi-Fi on a house in that area and, while detectives did find unlocked Wi-Fi access at a residence in that area, there was no way for them to corroborate that Rivera-Rieffel had been there. Tr4 pp. 163:12 – 164:2.

[¶16] Detectives also reviewed communications made by Rivera-Rieffel while he was in jail. Tr4 pp. 174:8-14, 175:3-10. Detectives found text messages between Rivera-Rieffel and his mother, Ann Cannon. Tr4 p. 175:6-24. The text messages were around the time life support was removed from S.R-L. where Ann Cannon requested Rivera-Rieffel to call “them” and “demand they put her back on the respirator!” Tr4 p. 178:1-13. Rivera-Rieffel

indicated he could not because he didn't have "theor" number. Tr4 p. 178:14-22. According to J.L., she had requested Ms. Cannon to contact Rivera-Rieffel and have him call the hospital to reconnect S.R-L. to life support. Tr3 pp. 253:21 – 254:19. Meanwhile, around the same time as the text conversation between Rivera-Rieffel and his mother, J.L. had called her brother who was at the hospital with S.R-L. Tr3 pp. 254:20 – 255:2. During that phone call, J.L. sang S.R-L. a song that she would sing when putting S.R-L. to sleep. Tr3 p. 255:5-16.

ARGUMENT

[¶17] **Whether there was sufficient evidence presented to sustain the verdicts.**

[¶18] A defendant challenging sufficiency of the evidence has the burden of showing the evidence presented at trial shows no reasonable inference of guilt when the evidence is viewed in the light most favorable to the verdict. State v. Christian, 2011 ND 56 ¶ 8, 795 N.W.2d 702. Sufficiency of the evidence challenges are only preserved at a jury trial if the defendant makes a motion for judgment of acquittal. State v. Himmerick, 499 N.W.2d 568, 571-572 (N.D.1993). Rivera-Rieffel did make a motion for judgment of acquittal on both counts at the close of the State's case. Tr5 p. 22:3-13. This Court has stated the following regarding the standard of review on a challenge for sufficiency of the evidence:

In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find Rivera-Rieffel guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses. A verdict based on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt. Moreover, a jury may find a defendant guilty even though evidence exists which, if believed, could lead to a not guilty verdict.

State v. Corman, 2009 ND 85, ¶ 8, 765 N.W.2d 530.

[¶19] Rivera-Rieffel was charged with Murder pursuant to N.D.C.C. § 12.1-16-01(1)(b) or 12.1-16-01(1)(c), specifically, “the defendant willfully caused the death of another human being under circumstances manifesting extreme indifference to the value of human life or acting either alone or with one or more other persons, committed or attempted to commit treason, robbery, burglary, kidnapping, felonious restraint, arson, gross sexual imposition, a felony offense against a child under section 12.1-20-03, 12.1-27.2-02, 12.1-27.2-03, 12.1-27.2-04, or 14-09-22, or escape and, in the course of and in furtherance of such crime or of immediate flight therefrom, the person or any other participant in the crime causes the death of any person. App. p. 9. He was also charged with Child Abuse pursuant to N.D.C.C. § 14-09-22(1), specifically, “the defendant, a parent, adult family or household member, guardian, or other custodian of any child, willfully inflicted or allowed to be inflicted upon a child, mental injury or bodily injury, substantial bodily injury, or serious bodily injury, and the child was under the age of six”. App. p. 9.

[¶20] As stated above and cited in the transcripts in the Statement of Facts, the testimony indicated S.R-L. suffered nonaccidental trauma which led to her death. The trauma was of “significant force” at the hands of another person. The extent and severity of her injuries indicated she was shaken or beaten severely. Behavioral changes, including possible unconsciousness, lack of appetite, or crying would have been evident shortly after the injury was inflicted. J.L. stated S.R-L. had eaten and was behaving normally when

she left for work at 9 p.m. In his interview with detectives, Rivera-Rieffel described S.R-L.'s behavior throughout the night, indicating she was eating and behaving normally. Rivera-Rieffel was the only person who had access to S.R-L. when the injuries were inflicted, which occurred after she was seen behaving normally. The State summarized the three days' worth of evidence which supported a finding of guilty on both counts. Tr5 pp. 25:3 – 42:12.

[¶21] When viewing the evidence in the light most favorable to the verdict, the evidence at trial was clear that the injuries were inflicted upon S.R-L. by a person. It was not a fall or a bump that caused the multiple broken bones or skull fractures and brain bleed. It was significant force used against this three-month-old child. External signs would have been evident shortly after the injury was inflicted. The only person capable of using significant force against the infant was Rivera-Rieffel, her father. There was sufficient evidence presented to prove each element of each crime.

CONCLUSION

[¶22] Based upon the foregoing, the State respectfully requests that the jury verdict be affirmed.

ORAL ARGUMENT

[¶23] As this appeal is on sufficiency of the evidence, the State believes the matter can be decided on the briefs as the facts that support the verdicts have been discussed in the brief and are also available to the Court in the transcripts. However, if the Court wishes to hold oral argument, the State will participate.

Dated this 9th day of December, 2020.

/s/ Julie Lawyer
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	
-vs-)	
)	
Jose Javier Rivera-Rieffel,)	Supreme Ct. No. 20200210
)	District Ct. No.08-2018-CR-02497
Defendant-Appellant)	

[¶1] I hereby certify that on December 9, 2020, the following documents:

Corrected Brief of Plaintiff-Appellee

was filed electronically with the Clerk of Court through the North Dakota E-Filing Portal and service will be made via electronic service through the portal to the following:

Benjamin C. Pulkrabek
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the above being the last known address of the addressee.

/s/ Julie Lawyer _____
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	
-vs-)	
)	
Jose Javier Rivera-Rieffel,)	Supreme Ct. No. 20200210
)	District Ct. No.08-2018-CR-02497
Defendant-Appellant)	

[¶1] I hereby certify that on December 15, 2020, the following documents:

Brief of Plaintiff-Appellee;

was filed electronically with the Clerk of Court through the North Dakota E-Filing Portal and service will be made via electronic service through the portal to the following:

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the above being the last known address of the addressee.

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