IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

No. 62835

E-File

FAST TRACK STATEMENT

1. **Name of party:** Bennett Grimes ("Bennett").

2. **Name of attorney submitting this fast track statement:**

DEBORAH L. WESTBROOK, #9285
Clark County Public Defender's Office
309 S. Third St., Ste. 226
Las Vegas, Nevada 89155
(702) 455-4685

3. **Name of appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C276163.

5. **Name of judge issuing order appealed from:** Michelle Leavitt.

6. **Length of trial.** Four days.

7. **Conviction(s) appealed from:** Ct. 1 – Attempt Murder With Use of a Deadly Weapon in Violation of Temporary Protective Order; Ct. 2 – Burglary While in Possession of a Deadly Weapon In Violation of a Temporary Protective Order; Ct.

3 – Battery With Use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of a Temporary Protective Order.

8. **Sentence for each count:** $25 Admin. fee; $150 DNA analysis fee; genetic testing; Ct. 1 – 8-20 years plus a consecutive term of 5-15 years for use of a deadly weapon; as to Cts. 2 and 3, habitual criminal treatment; Ct. 2 – 8-20 years in prison; Ct. 2 concurrent with Ct. 1; Ct. 3 – 8-20 years; Ct. 3 consecutive to Cts. 1 and 2; 581 days CTS.

9. **Date district court announced decision:** 02/12/13.

10. **Date of entry of written judgment:** 02/21/13.

11. **Habeas corpus:** N/A.

12. **Post-judgment motions:** N/A.

13. **Notice of appeal filed:** 03/18/13.

14. **Rule governing the time limit for filing the notice of appeal:** NRAP4(b).

15. **Statute which grants jurisdiction to review the judgment:** NRS 177.015.

16. **Disposition below:** Judgment upon verdict of guilt.

17. **Pending and prior proceedings in this court:** N/A.

18. **Pending and prior proceedings in other courts:** N/A.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Procedural history.** The State filed a Criminal Complaint on July 26, 2011, charging Bennett with three felony counts: attempt murder with use of a deadly weapon,[1] burglary, and battery with use of a deadly weapon constituting domestic violence. (Appellant's Appendix, Vol. I: 1-3).[2] These counts stemmed from a July 22, 2011 incident involving Bennett and his former wife Aneka Grimes at an apartment located at 4325 West Desert Inn, Las Vegas, NV. *Id.*

At the preliminary hearing on August 25, 2011, the state filed an Amended Criminal Complaint in open court charging Bennett with: (1) attempt murder with use of a deadly weapon in violation of a temporary protective order, (2) burglary while in possession of a deadly weapon in violation of a temporary protective order; and (3) battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. (I: 8). After the preliminary hearing, Bennett was bound over to District Court as charged. (I: 8, 52).

Bennett was charged by way of Information filed September 14, 2011. (I: 9-11). At his arraignment on September 20, 2011, he pled not guilty. (I: 230; II: 266). The

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[1] The deadly weapon identified in the Criminal Complaint was a "knife". (I: 1-3).

[2] Hereinafter, citations to the Appellant's Appendix will start with the volume number, followed by the specific page number. For example, (AA Vol.I: 1-3) will be shortened to (I: 1-3).

State filed an Amended Information on September 21, 2011 and a Second Amended Information on October 25, 2011. (I: 14-16, 65-67). The Second Amended Information charged Bennett with the following: (1) attempt murder with use of a deadly weapon in violation of a temporary protective order, (2) burglary while in possession of a deadly weapon in violation of a temporary protective order, and (3) battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. (I: 65-67).[3]

Trial commenced on October 10, 2012. (I: 250-51). On October 15, 2012, a jury convicted Bennett of all three charges against him. (I: 211-12). On October 22, 2012, Bennett filed a Motion for New Trial based on the Court's failure to notify the parties that the jury had a question about the law during deliberations. (I: 213-16). After the Court denied that motion, Bennett was sentenced on February 13, 2012 and a Judgment of Conviction was filed on February 21, 2013. (I: 224-25; II: 258, 263-64). On March 8, 2013, Bennett timely filed his Notice of Appeal.

21. **Statement of facts.** Bennett and his former wife Aneka were married for seven years before they divorced in April of 2012. (III: 654-55). By July of 2011, the two were estranged and living apart. (III: 656-57) Aneka, who then lived in an apartment at 9325 West Desert Inn Road in Las Vegas, had obtained a TPO against Bennett which required him to stay away from her. (III. 655-57). On the evening of

[3] On October 10, 2012, the State filed a Third Amended Information, designating Steven B. Wolfson as the District Attorney instead of David Roger. (I: 173-75).

July 22, 2011, between 6:30 and 6:45 p.m., Aneka and her mother Stephanie Newman returned to Aneka's apartment. (III: 657; 709). When Aneka walked into the apartment, her mother yelled for her to come to the door because Bennett was trying to get inside. (III: 659). Although Aneka and Stephanie tried to hold the door closed, Bennett eventually pushed his way into the apartment. (III: 660). Once inside, Bennett told Aneka he was sorry, that he loved her and that he wanted to be with her. (III: 660). Bennett pleaded with Aneka's mother Stephanie, telling her he was sorry and that he loved her daughter. (III: 660, 741). Stephanie recalled Bennett asking Aneka to "let him come back, please let him come back". (III: 715). Bennett also told her "he got a job, he can take care of the kids now." (III: 715). When he came into the apartment, Bennett did not threaten Aneka or her mother, and neither of them felt threatened. (III: 683-84, 741-42). He simply stood in the entry way for about five minutes, pleading with Aneka to take him back. (III: 682-88). Aneka testified that Bennett's demeanor was "sad", not angry, and that he was trying to "resolve things" between the two of them. (III: 683, 685). At one point, Bennett broke down and cried. (III: 741). Bennett did not have a knife, gun or any other weapon when he came into the apartment. (III: 683). He did, however, bring a copy of his Walmart schedule with him, showing he had a job. (IV: 794-95 & V: 1077).

When Bennett pleaded for his wife to come back, Aneka told him she "didn't really care". (III: 661). Aneka and her mother asked Bennett to leave and to "just get

out" but he did not do so. (III: 661, 715). At some point, Aneka walked over to the counter bar and called the police while Stephanie called Aneka's father. (III: 661-62, 668). During the 911 call, Aneka was calm because she was "just at the point where I just wanted him to be gone." (III: 665, 675). When the 911 dispatcher asked Aneka if anyone had access to weapons, she said, "no". (III: 699).

When Stephanie went outside to the balcony to wait for the police, Aneka either called or texted a friend. (III: 666). Bennett was still standing by the front door. (III: 689). Then, Aneka claims that Bennett walked five-to-seven feet to where she was standing at the counter bar, reached across the counter, grabbed a knife from out of her dish rack (which was sitting below the counter next to the sink) and pulled her five-to-seven feet back to the front door, where he stabbed her in the head, arms and chest more than 20 times. (III: 669-70, 689). Stephanie admitted that she did not see how the encounter began; she only saw Aneka and Bennett when they were already on the floor near the front door. (III: 735-38).

It is undisputed that the knife had recently been cleaned and was sitting in a drying rack below the counter. (III: 692). In that location, the knife would not have been readily apparent to someone who did not already know it was there. (*See* III: 692; V: 1068-69, 1081-85). In Stephanie's statement to the police, she told officers that she did not think there was any way that Bennett could have gotten the knife from the kitchen. (III: 744-45). Aneka was admittedly standing next to the knife when the

encounter began and she knew the knife was there because she had just washed those dishes. (*See* III: 692, 747). Although Aneka denied ever holding the knife during the incident (III: 692-93), her skin cells – but not Bennett's – were found on the knife handle. (IV: 991-92, 904). While Stephanie testified that Aneka was neither aggressive nor threatening to Bennett before the incident (III: 720), Officers heard arguing and yelling right as they arrived on the scene. (III: 571; 606-07). On the 911 tapes, Aneka and her mother can be heard yelling at Bennett, while he sobs and pleads for her to take him back. (V: 1087-88). Aneka admitted that she "wanted him to just be gone . . . out of my life forever, gone". (III: 674).

Following the incident, Aneka did not have any stab wounds on her hands; rather, her injuries were localized to her upper chest, neck, face and scalp. (*See* III: 630-31). Bennett had a cut on his right hand which had bled profusely. (III: 582). Both Aneka and Bennett received medical treatment following the incident. (III: 618; 628, 634). Having seen both Aneka and Bennett in court, jurors could clearly see the difference in their respective sizes. (V: 936). Jurors also knew from photographs presented that Aneka wore a size "small". (V: 1078).

22. **Issues on appeal.**

I. The court violated the Fifth, Sixth and Fourteenth Amendments and the Nevada constitution by forcing Bennett to choose between his right to remain silent and his right to present a self defense theory to the jury despite evidence of self defense; the court penalized Bennett for not testifying by denying proposed jury instructions on self defense; the court prohibited Bennett from arguing self defense

after allowing the State to rebut self defense in its case in chief with an unnoticed expert.

II. The court committed reversable constitutional error by refusing to notify the parties that the jury had a question during deliberations about when the intent to commit a burglary needed to be formed (before or after entry).

III. The State failed to present sufficient evidence to sustain a conviction for burglary beyond a reasonable doubt.

IV. Bennett's federal and state constitutional right to a fair trial was violated by the cumulative error in this case.

23. **Legal argument, including authorities:**

I. THE COURT VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND THE NEVADA CONSTITUTION BY FORCING BENNETT TO CHOOSE BETWEEN HIS RIGHT TO REMAIN SILENT AND HIS RIGHT TO PRESENT A SELF DEFENSE THEORY TO THE JURY DESPITE EVIDENCE OF SELF DEFENSE; THE COURT PENALIZED BENNETT FOR NOT TESTIFYING BY DENYING PROPOSED JURY INSTRUCTIONS ON SELF DEFENSE; THE COURT PROHIBITED BENNETT FROM ARGUING SELF DEFENSE AFTER ALLOWING THE STATE TO REBUT SELF DEFENSE IN ITS CASE IN CHIEF WITH AN UNNOTICED EXPERT.

At trial, Bennett's theory of the case was self defense. The defense theory – as outlined in the defense's opening statement – was that after Bennett came into the house and pleaded with Aneka to take him back, Aneka took the knife from the dish rack by the counter bar (where she was standing), approached Bennett at the door with the knife, and the two struggled over the knife; however, because Bennett was bigger than Aneka, Aneka received the majority of injuries during the struggle. (III: 564-67).

After the close of evidence, the defense requested seven jury instructions explaining self defense. (V: 957-59 & 1055-61). The Court agreed that the proposed

instructions were legally correct; however, the Court declined to instruct the jury on self defense. (V: 958-59). The Court stated repeatedly that it was denying the instructions because, **without Defendant's testimony**, there was insufficient evidence to support an inference of self-defense:

- There's "no evidence from anybody that's testified that she went towards him . . . . Somebody has to testify that she was the initial aggressor and everything that makes that up." (V: 943 (emphasis added)).

- If defense counsel is allowed to argue self defense, they can "basically tell the jury what the defendant would have said had he taken the stand." (V: 946).

- "[I]n all fairness, it is extraordinarily difficult to assert a self-defense theory if there isn't something from your client, either a statement made to the police. I mean, I've had cases where statements made to the police, but then – well, that's a whole other story about how that gets in or doesn't get in. Or the defendant has to take the stand. (V: 947 (emphasis added)).

- "I don't know how in the world you get those jury instructions if – it's very, very difficult. There has to be something from the defendant, something. We don't have anything." (V: 947-48 (emphasis added))

After ruling that Bennett would not get any self defense instructions unless he testified, the Court told Bennett that it was "up to [him]" whether or not to testify. (V: 949-951). When Bennett stated that he was not going to take the stand, the Court advised him, "All right. And you understand I'm not going to instruct the jury on self-defense?" (V: 951). The Court's ruling that Bennett could not present his theory of the case unless he testified violated the Fifth, Sixth and Fourteenth Amendments and the Nevada Constitution and warrants reversal. The defense preserved these arguments by making a detailed record before the court. (V: 931-52).

A. There was sufficient evidence -- even without Bennett's testimony -- to warrant a self defense instruction.

A criminal defendant has the "right to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." **McCraney v. State**, 110 Nev. 250, 254, 871 P.2d 922, 925 (1994) (citing **Margetts v. State**, 107 Nev. 616, 818 P.2d 392 (1991)) (emphasis added). It is reversible error for a court to fail to instruct the jury on a theory of the case supported by the evidence. **McCraney**, 110 Nev. at 255, 871 P.2d at 925; accord **Rosas v. State**, 122 Nev. 1258, 147 P.3d 1101 (2007) (where some evidence supported a theory of self defense, defendant was entitled to have jury instructed on that theory).

In this case, even without Defendant's testimony, there was sufficient circumstantial evidence from which a jury could infer that Aneka was the initial aggressor, thereby warranting a self-defense instruction:

- Aneka admitted that she "wanted [Bennett] to just be gone . . . out of my life forever, gone". (III: 674).
- While Stephanie testified that Aneka was neither aggressive nor threatening to Grimes before the incident (III: 720), Officers heard arguing and yelling right as they arrived on the scene. (III: 571; 606-07).
- On the 911 tapes, Aneka and her mother can be heard screaming and yelling at Bennett to leave, over and over, while Bennett sobs and pleads for her to take him back. (V: 1087-88).
- The knife used in the encounter was taken from a drying rack behind the counter in an area not immediately accessible or apparent to someone who did not already know it was there. (*See* III: 692; V: 1068-69, 1081-85).

- Aneka was standing right next to the knife and knew the knife was there because she had just washed those dishes. (*See* III: 692, 747; V: 933).

- Aneka's DNA was found on the newly-cleaned knife handle but Bennett's was not. (IV: 991-9, 904; V: 934).

- Testimony and evidence placed Bennett almost exclusively by the front door. (*See* III: 685, 735-36, 750; V: 933, 1069, 1081-85).

- Stephanie did not see how the encounter began and only saw Aneka and Bennett when after they were lying near the front door. (III: 735-38).

- It does not make sense that Bennett would have dragged Aneka five-to-seven feet only to stab her at the front door. (III: 669-70, 689; V: 934)

- Bennett received an injury to his hand during the encounter which bled profusely. (III: 582).

- Aneka did not have any wounds on her hands. (III: 630-31).

- Jurors could see that Bennett was larger than Aneka, and that she wore a size small, and the size differential supports that Aneka would have been injured in a struggle over the knife. (V: 936, 1078).

Under existing law in Nevada, regardless of how "weak or incredible" the evidence may have been, Bennett had a right to receive a jury instruction on his theory of self defense. **McCraney**, 110 Nev. at 254, 871 P.2d at 925. Based on the evidence presented, Bennett should have been permitted to argue that after five minutes of Aneka and her mother screaming and yelling at him to leave, Aneka picked up the knife and came at him where he was standing at the door, resulting in the struggle that led to her injuries. Because there was sufficient circumstantial evidence to suggest that Aneka was the initial aggressor, the court committed reversible error by failing to

instruct the jury on self-defense. **Id.**; accord **Williams v. State**, 915 P.2d 371 (Ok. Cr. 1996) ("a defendant may raise self defense sufficiently to justify an instruction through circumstantial evidence alone").

B. A defendant need not testify to obtain a self defense instruction.

The trial court's ruling was based, in part, on an erroneous belief that a defendant cannot obtain a self defense instruction unless he either testifies or introduces evidence of a prior statement that he made to the police. That ruling is error as a matter of law. In Nevada, a defendant does not have to testify or even present any evidence in order to obtain a specific jury instruction. See, e.g., **McCraney**, 110 Nev. at 255, 871 P.2d at 925. Likewise, other states have recognized that it is error for a court to require a defendant to testify to obtain a jury instruction on self defense. **State v. Walker**, 164 Wash.App. 724, 729 n.5, 265 P.3d 191 (2011) (internal citations omitted) (evidence warranting a self defense jury instruction may come "from 'whatever source' and . . . the evidence does not need to be the defendant's own testimony"); **State v. Heiskell**, 666 P.2d 207, 213 (Kan. App. 1983) (citing, inter alia, **1 Wharton's Criminal Evidence § 27** (13th Ed. 1972) ("there is no requirement a defendant must rely upon his own testimony to merit a self defense instruction"); **Cordray v. State**, 268 P.2d 316 (Ok. Cr. 1954) (reversible error to refuse requested self defense instruction although defendant did not testify). Because the law does not require a defendant to testify or even present evidence obtain a jury instruction on self

defense, the trial court erred in refusing to instruct the jury on self defense on the basis that defendant did not testify.

C. The Court impermissibly required Bennett to choose between two constitutional rights.

This Court has previously stated that requiring a criminal defendant "to introduce evidence in order to be entitled to a specific jury instruction on a defense theory would violate the defendant's constitutional right to remain silent by requiring that he forfeit that right in order to obtain instructions." **McCraney**, 110 Nev. at 255, 871 P.2d at 925. Moreover, a "trial court cannot explicitly or effectively force a defendant to choose between his Sixth Amendment right to present a defense and his Fifth Amendment right not to testify." **Williams**, 915 P.2d at 377. Unfortunately, that is exactly what the trial court asked Bennett to do in this case when it said that he could not receive any instructions on self defense unless he first testified.

Bennett's "choice" to forfeit his entire defense theory was not a voluntary one. As the Supreme Court recognized in **Brooks v. Tennessee,** 406 U.S. 605 (1972), a criminal defendant cannot "voluntarily" choose between asserting two constitutional rights. Here, Bennett had an illusory choice – either waive his Fifth Amendment right to remain silent, or waive his Sixth Amendment right to present a defense. See **U.S. Const. amend. V, VI, XIV;** see also **Nev. Const. Art. 1 § 8.** By forcing Bennett to choose between two constitutional rights, the trial court committed reversible error.

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D. The Court deprived Bennett of his right to counsel and violated Bennett's due process and fundamental fairness rights by preventing his attorneys from arguing his theory of the case in closing.

The defense's closing argument "is a basic element of the adversary fact finding process in a criminal trial." **Herring v. New York,** 422 U.S. 853, 858 (1975). As a result, even though a court may limit closing arguments, "denying an accused the right to make final arguments on his theory of the defense denies him the right to assistance of counsel." **Conde v. Henry**, 198 F.3d 734, 739 (9th Cir. 2000) (citation omitted) ("trial court violated defendant's right to counsel by precluding his attorney from arguing his theory of the defense in closing arguments"). In this case, the Court told defense counsel in no uncertain terms, "you cannot get up and argue to the jury what [Bennett] may have said had he taken the stand". (V: 947) The Court later informed Bennett, "I'm just not going to let the attorneys basically make up a story. And if it's the truth, I'm not going to let them tell it because it wasn't testified to up there." (V: 950). By preventing Bennett from arguing that he acted in self defense – a theory presented by the defense in its opening statement and supported by the evidence – the trial court violated Bennett's due process rights, his fundamental right to assistance of counsel and his right to present a defense, relieving the State of its burden to prove its case beyond a reasonable doubt. **Conde,** 198 F.3d at 739; see also **U.S. Const. amend. V, VI, XIV; Nev. Const. Art. 1 § 8.**

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E. The Court improperly allowed the State to refute Bennett's self-defense theory in its case in chief with an unnoticed expert, compounding the constitutional error in this case.

Prior to trial, the State identified Crime Scene Analyst ("CSA") Louise Renhard as an expert "in the area of crime scene investigation and the identification, documentation, collection and preservation of evidence". (I: 103-104). Despite the limited scope of Renhard's expertise as a CSA, and over defense objection, the State elicited testimony from Renhard on direct examination on the subject of self-inflicted knife wounds. (IV: 797-98). Specifically, the trial court allowed Renhard to testify that she was familiar with "self-inflicted knife wounds to the knife wielder's hand" and that, based on her review of State's Exhibit 73, the wound on Bennett's hand was "consistent" with what would "happen when a knife slips in a person's hand" (as opposed to a wound obtained during a struggle, which was the defense contention). (IV: 797-99). When the State later tried to elicit testimony from Renhard about so-called "defensive" wounds on Aneka, defense counsel again objected and argued that allowing Renhard to testify about the cause of various knife wounds improperly bolstered other testimony in the record, allowed her to testify as to an ultimate issue, and prejudiced the defense because it had received no CV/notice to prepare for cross examination on the subject. (IV: 799-801, 803-08). The trial court sustained the objection, finding that the State's expert witness notice was defective. (IV: 814, 816). Although defense counsel requested a curative instruction that the jury disregard all

testimony by Renhard about the cause of injuries in this case, the court denied the request and told the jury only to disregard the "last question and response." (IV: 818, 820-21). As a result, the court improperly allowed the testimony about Bennett's so-called "self-inflicted" knife wound to stand.

The court's ruling violated Bennett's due process and confrontation clause rights to confront the witnesses against him by allowing an expert witness to testify outside of her area of expertise without prior notice to the defense and depriving counsel of a meaningful opportunity for cross-examination of the unexpected testimony.[4] See **U.S. Const. amend. V, VI, XIV Nev. Const. Art. 1 § 8**; see also **Grey v. State**, 124 Nev. 110, 178 P.3d 154 (2008) (due process clause violated by improper notice of expert witness). The ruling was particularly prejudicial in this case because Bennett was subsequently prevented from even arguing self-defense in closing and via jury instructions while the State was free to present "evidence" that this was not a case of self-defense in its case-in-chief.

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[4] Although the court was of the opinion that the testimony was not "expert" in nature (IV: 813), even if that were true, by allowing the testimony to stand as "expert" testimony, it was given heightened importance in the eyes of the jury and undermined the defense argument that Bennett's injury was obtained during a struggle over the knife and was a defensive wound.

II. THE COURT COMMITTED REVERSABLE CONSTITUTIONAL ERROR BY REFUSING TO NOTIFY THE PARTIES THAT THE JURY HAD A QUESTION DURING DELIBERATIONS ABOUT WHEN THE INTENT TO COMMIT A BURGLARY NEEDED TO BE FORMED (BEFORE OR AFTER ENTRY).

After the jury returned its verdict of guilty on all counts, the Court advised the parties that it had received a note from the jury during deliberations which asked the following question: "Does criminal intent have to be established before entering the structure, or can intent change during the chain of events for the charge of burglary?" (V: 1008, 1067). The Court stated that it "didn't respond to it because my only response would have been to continue to deliberate and look at the instructions." (V: 1008). Bennett subsequently filed a Motion for New Trial based on the Court's failure to inform the parties of this question, arguing that "more clarification would have aided the jury in coming to an accurate verdict" and that the Court's failure to notify the parties of the question deprived Bennett of his constitutional rights to a fair trial and due process under state and federal law. (I: 213-16). The Court denied that motion. (V: 1011-12). In this case, by refusing to even notify the parties that the jury had a question of law, the Court deprived Bennett of counsel at a critical stage of the proceedings and violated his state and federal constitutional rights to a fair trial and due process of law. **See U.S. Const. amend. V, VI, XIV; see also Nev. Const. Art. 1 § 8.**

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Although the Nevada Supreme Court has not yet ruled on this issue,[5] the Ninth Circuit has held that it is constitutional error for a trial court to fail to notify defense counsel of messages from the jury and provide an opportunity to be heard before responding. **U.S. v. Barragan-Devis**, 133 F.3d 1287, 1289 (9th Cir. 1998). As the Ninth Circuit explained in **Barragan-Devis**, "counsel for Appellant could have used such a conference to try and persuade the judge *to* respond. The trial judge's failure to provide that opportunity was error. . . . [which] implicates defendant's constitutional rights." **Id.** at 1289.

Although the court applied harmless error analysis in **Barragan-Devis**, a subsequent Ninth Circuit decision found that automatic reversal would be necessary if a trial court failed to notify the defense that the jury had a question of law during deliberations. See **Musladin v. Lamarque,** 555 F.3d 830, 843 (9th Cir. 2009) (relying on **United States v. Cronic**, 466 U.S. 648 (1984) (automatic reversal required where defendant is denied counsel at a "critical stage")). In **Musladin**, the Ninth Circuit explained that a "missed opportunity to influence the trial court's response to a jury

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[5] To date, the Nevada Supreme Court has not addressed the constitutional aspect of a court's failure to advise counsel about the existence of a jury note, confining its discussion of the law regarding jury communications to an analysis of NRS 175.451, which codifies Nevada state law regarding responses to jury questions. See, e.g., **Daniel v. State,** 119 Nev. 498, 78 P.3d 890 (Nev. 2003); **Cavanaugh v. State,** 102 Nev. 478, 729 P.2d 481 (1986); **Varner v. State,** 97 Nev. 486, 634 P.2d 1205 (1981); **Tellis v. State**, 84 Nev. 587, 445 P.2d 938 (Nev. 1968). To the extent the Court is inclined to make a ruling on this substantive matter, Bennett would request full briefing on this issue.

question" is a "critical stage" of proceedings and, as a result, the failure to notify counsel of a jury question would trigger automatic reversal under **Cronic** on direct review.[6] The Ninth Circuit observed that "counsel is most acutely needed before a decision about how to respond to the jury is made – because it is the substance of the response – or the decision whether to respond substantively or not – that is crucial." 555 F.3d at 842 (emphasis added).

Here, Bennett's attorneys were completely unaware that the jury had a question about the intent necessary for the burglary charge until the court notified the parties after the verdict was delivered. (See I: 213-16; V: 1008). Had the court advised the parties of the note during deliberations, defense counsel would have had an opportunity to try to convince the judge to respond to the question. However, counsel never even had that opportunity, which deprived Bennett of counsel at a critical stage of proceedings warranting automatic reversal in this case. **Musladin**, 555 F.3d at 842.

Nevertheless, even if this Court applied a harmless-error analysis, it cannot be sure "beyond a reasonable doubt that the error did not contribute to the verdict obtained." **Barragin-Devis**, 133 F.3d at 1289 (quoting **U.S. v. Frazin**, 780 F.2d 1461, 1469 (9th Cir. 1986)). In assessing harmless error, the court considers: (1) the probable effect of any message actually sent; (2) the likelihood that the court would

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[6] Because the Ninth Circuit was reviewing the case in a habeas proceeding under AEDPA (rather than on direct review), the Court was unable to grant the defendant's request for relief, notwithstanding its conclusion that defendant was denied counsel at a "critical stage" of trial. **Musladin**, 555 F.3d at 842.

have sent a different message had it consulted with the defense beforehand; and (3) whether any changes in the message to the jury would have affected the verdict. **Id.** (quoting **Frazin**, 780 F.2d at 1470-71).

During deliberations in this case, the jury asked the court, "Does criminal intent have to be established before entering the structure, or can intent change during the chain of events for the charge of burglary?" (V: 1008, 1067). By asking this question, the jury demonstrated that it did not understand instructions 18, 20 and 22 which described burglary as entering "with the intent" to commit an assault, battery or other felony. (I: 194, 196, 198) (emphasis added). Although the jury was clearly confused about that issue, the court did not respond. Because the evidence presented at trial demonstrated that Bennett lacked the requisite criminal intent at the time he entered Aneka's apartment (see Section 23 (III), infra.), the probable effect of the court's failure to respond to this jury question is that the jury improperly relied on criminal intent that formed after Bennett entered Aneka's apartment.

There is a strong likelihood that the court would have responded to the jury question had defense counsel been given an opportunity to weigh in on the issue. No one disputes that for a burglary to occur, the necessary criminal intent must be present "at the very moment of entering". See, e.g., **People v. Hamilton**, 251 Cal.App.2d 506, 508, 59 Cal.Rptr. 459, 460-61 (Cal. App. 1967) ("it is a necessary element of burglary to prove that at the very moment of entering the building in question there

was an intent to commit theft or some felony"); **People v. Gaines**, 74 N.Y.2d 358, 363, 546 N.E.2d 913, 915-16, 547 N.Y.S.2d 620, 622-23 (N.Y. 1989)) ("defendant was entitled to a charge clearly stating that the jury must find that he intended to commit a crime at the time he entered the premises unlawfully.") However, rather than clearly spelling this out, Nevada's burglary statute uses legalese to describe the point in time when the requisite criminal intent must be present:

> A person who, by day or night, enters any . . . apartment . . . with the intent to commit . . . assault or battery on any person or any felony . . . is guilty of burglary"

NRS 205.060 (1) (emphasis added). Here, the jury instructions used similar legalese since they were based on the statute. (I: 194, 196, 198). This Court knows all too well that jurors "should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law". **Crawford v. State**, 121 Nev. 744, 754, 121 P.3d 582, 488 (2005). In this case, had the court discussed the jury's note with defense counsel, it would have determined that an additional instruction was necessary to explain what entry "with intent" meant – namely, that criminal intent must have been present "at the very moment of entry" for Bennett to be found guilty of the crime of burglary. See, e.g., **Hamilton**, 251 Cal.App.2d at 508, 59 Cal. Rptr. at 460-61; **Gaines**, 74 N.Y.2d at 363, 546 N.E.2d at 915-16, 547 N.Y.S.2d at 622-23.

Finally, as set forth in Section 23 (III), infra, had the jury been instructed in this manner, the verdict would have been "not guilty" on the burglary count, because the

evidence presented at trial demonstrated that Bennett lacked the requisite criminal intent at the time he entered Aneka's apartment in light of the jury's note.

III. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR BURGLARY BEYOND A REASONABLE DOUBT.

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **Carl v. State**, 100 Nev. 164, 165, 678 P.2d 669 (1984). The Nevada Supreme Court will reverse a conviction when the state fails to present evidence to prove an element of the offense beyond a reasonable doubt. **In re Winship**, 397 U.S. 358 (1970); **Martinez v. State**, 114 Nev. 746, 961 P.2d 752 (1998). The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" **McNair v. State**, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.C6. 2781 (1979)). Here, even viewing the evidence in the light most favorable to the prosecution, no rational juror could have found, beyond a reasonable doubt, that Bennett possessed the necessary criminal intent when he entered Aneka's apartment. See **NRS 205.060(1)**.

Even assuming the truth of Aneka's testimony that five minutes after Bennett arrived in her apartment, he walked over to where she was standing, grabbed a knife from her dish rack and pulled her back to the front door where he began stabbing her,

no reasonable juror could have found beyond a reasonable doubt that Bennett intended to commit an assault, battery or felony when he entered her apartment. Bennett and Aneka were still married at the time of the incident. (III: 654-57). Although there was a TPO in place and Bennett was not supposed to be at Aneka's apartment, the only reasonable inference that can be drawn from the evidence is that Bennett intended to try to win his wife back when he barged into her apartment on July 22nd.

Bennett brought no weapons with him, only a backpack with proof that he had just gotten a new job. (III: 683; IV: 794-95; V: 1075-77). Both Aneka and Stephanie confirmed that Bennett spent five minutes begging and pleading with Aneka -- telling her he loved her, telling her he was sorry, telling her he wanted to be with her. (III: 660, 741). Aneka knew that Bennett was trying to resolve things with her. (III: 683, 685). Bennett simply wanted Aneka to take him back into his life, and he tried desperately to prove to her that he was worthy -- an effort that proved futile when Aneka and Stephanie repeatedly shut him down and yelled at him to leave. (V: 1087-88). If Bennett had intended to attack Aneka when he entered the apartment, there would have been no reason for him to try to reconcile with Aneka, let alone spend five minutes crying, begging and pleading with her to take him back. Because there was insufficient evidence that Bennett possessed the requisite criminal intent when he

entered Aneka's apartment, the Court must reverse Bennett's conviction of burglary in this case.[7]

IV. BENNETT' FEDERAL AND STATE CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY CUMULATIVE ERROR IN THIS CASE.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." **Valdez v. State**, 124 Nev. 1172, 1195-96, 196 P.3d 465, 480-81 (2008) (quoting **Hernandez v. State**, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). When evaluating a claim of cumulative error, this Court will consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Id. (quoting **Mulder v. State**, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

Viewed as a whole, the combination of errors in this case warrants reversal of Bennett's conviction because the quantity and character of errors are so serious that they deprived Bennett of a fair trial. See **Walker v. Fogliani**, 83 Nev. 154, 157, 425 P.2d 794 (1967) ("no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial"). Here, the trial court forced Bennett to

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[7] Despite the presumption set forth in Jury Instruction No. 22 that a person who "unlawfully enters any apartment or house may reasonably be inferred to have broken and entered or entered it with [the necessary criminal intent]", the presumption should have been rebutted in this case because the "unlawful entry [was] explained by evidence satisfactory to the jury to have been made without criminal intent". (I: 198) As set forth in Section II, *supra*, the jury was confused about when the criminal intent to commit a burglary had to exist for the crime to occur. Had the jury been properly advised that the necessary criminal intent had to exist at the moment of entry, the jury would have concluded that the necessary criminal intent was lacking in this case.

choose between his constitutional right to remain silent and his right to present a defense (which was fundamentally unfair and a denial of due process), then penalized him for choosing to remain silent by eviscerating his entire defense. In addition, the Court improperly allowed the State to refute Bennett's self-defense theory in its case-in-chief with an unnoticed expert, in violation of Bennett's due process and confrontation clause rights. Finally, the trial court denied Bennett his right to counsel at a critical stage of proceedings and violated his rights to due process and a fundamentally fair trial by failing to notify the defense that the jury was confused about the burglary jury instructions during deliberations when the confusion could have been cured. In combination, these errors violated Bennett's right to a fair trial and warrant reversal of all counts.

24. **Preservation of issues:** As set forth in Section 23, *supra*, counsel preserved each of the issues raised on appeal with timely objections and, in some cases, written motions. In addition, issues involving constitutional violations may be raised at any time, even on appeal. See, e.g., **Grey**, 124 Nev. at 120, 178 P.3d at 161 (the Nevada Supreme Court "may address plain error and constitutional error *sua sponte*").

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25. **Issues of first impression or of public interest:** The constitutional implications of a trial court's failure to advise counsel about the existence of a jury note is an issue of first impression for this Court.

Respectfully submitted,

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VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

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3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the

information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 19th day of August, 2013.

PHILIP J. KOHN
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of August, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY */s/ Carrie M. Connolly*
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