

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 **No. 74581**

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Elizabeth A. Brown
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4
5 **CALVIN ELAM**
6 Appellant,

7 v.

8 **THE STATE OF NEVADA**
9 Respondent.

10 Appeal from a Judgment of Conviction
11 Eighth Judicial District Court, Clark County
12 The Honorable Valerie Adair, District Court Judge
 District Court Case No. C-15-305949-1

13 **APPELLANT’S OPENING BRIEF**

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1 **I.**
2 **JURISDICTIONAL STATEMENT**

3 On June 27, 2017, a jury rendered guilty verdicts on Counts 1, 2, 3, and 5
4 of the Indictment filed against Appellant Elam (AA1114-15). The jury rendered
5 not guilty verdicts on Counts 4, 6, and 7. The State elected not to proceed on
6 Count 8, and the State requested that the Court dismiss it. (*Id.*)

7 On October 31, 2017, the district court entered the Judgment of
8 Conviction. AA1126. On November 13, 2017, the Appellant filed a timely Notice
9 of Appeal. AA1129.
10

11 This Court has jurisdiction over this appeal from the Judgment of
12 Conviction under NRS 177.015.

13 **II.**
14 **NRAP 26.1 DISCLOSURE**

15 The undersigned counsel of record certifies that the following are persons
16 and entities as described in NRAP 26.1(a), and must be disclosed. These
17 representations are made in order that the judges of this court may evaluate
18 possible disqualifications or recusal.

19 **NONE.**

20 Attorney of Record for Calvin Elam:

21 /s/ Thomas A. Ericsson
22
23
24

1 **III.**
2 **STATEMENT OF THE CASE**

3 This is an appeal from the district court's Judgment of Conviction entered
4 against the Appellant on October 31, 2017.

5 **IV.**
6 **ROUTING STATEMENT**

7 Pursuant to the Nevada Rules of Appellate Procedure (hereinafter,
8 "NRAP") 17, this case should be assigned to the Supreme Court because it
9 involves a category A felony.

10 **V.**
11 **STATEMENT OF THE ISSUES**

- 12 1. The trial court abused its discretion when it denied Appellant's motion to
13 remove a prospective juror for bias in favor of law enforcement.
- 14 2. The trial court abused its discretion by eliciting and allowing extremely
15 prejudicial hearsay evidence to be presented to the jury.
- 16 3. The trial court erred when it allowed Mr. Elam's statement to the police to be
17 presented at the trial over objection.
- 18 4. The cumulative effect of these errors necessitates the reversal of the
19 Appellant's convictions.
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VI.
PROCEDURAL HISTORY

On April 17, 2015, a grand jury charged Appellant Calvin Elam with the following crimes: (1) Conspiracy to Commit Kidnapping; (2) First Degree Kidnapping with Use of a Deadly Weapon; (3) Assault with a Deadly Weapon; (4) Unlawful Use of an Electronic Stun Device; (5) Battery with Intent to Commit Sexual Assault; (6) Sexual Assault with Use of a Deadly Weapon; (7) Attempt Sexual Assault with Use of a Deadly Weapon; and (8) Ownership or Possession of Firearm by Prohibited Person. AA0001.

Appellant Elam proceeded to trial on June 19, 2017, and the jury rendered guilty verdicts on Counts 1, 2, 3, and 5 on June 27, 2017. The jury rendered not guilty verdicts on Counts 4, 6, and 7. AA1113-14. The State elected not to proceed on Count 8, and the State requested that the district court dismiss Count 8.

On October 19, 2017, the District Court sentenced the Appellant as follows: Count 1- 24 to 72 months in NDOC; Count 2- 5 years to Life in prison, plus a consecutive term of 60 to 180 months for the use of a deadly weapon, Count 2 to run concurrent with Count 1; Count 3- 12 to 72 months in NDOC, Count 3 to run consecutive to Count 2; Count 5- 2 years to Life in prison, Count 5 to run consecutive to Count 3. Counts 4, 6, and 7 are dismissed. Count 8 was

1 dismissed without prejudice. AA1126. The aggregate total sentence is 13 years to
2 Life in prison.

3 The District Court imposed a special sentence of lifetime supervision upon
4 release of any term of imprisonment, probation, or parole. Additionally, the
5 Appellant must register as a sex offender after release from custody. The District
6 Court filed the Judgment of Conviction on October 31, 2017. AA1126.

8 Appellant filed a timely Notice of Appeal on November 13, 2017.
9 AA1129.

10
11 **VII.**
STATEMENT OF THE FACTS

12 The jury found Mr. Elam guilty of four counts, acquitted him of three
13 counts, and the State of Nevada voluntarily dismissed one count. As outlined in
14 detail below, there were many substantial inconsistencies in the testimony of
15 Arrie Webster, the main witness presented against Mr. Elam at trial.

16 The following evidence was presented at Mr. Elam's trial:

17
18 1. **Arrie Webster**: testified that in the around 11 am or 12 pm on March
19 10, 2015, she visited her friends Annie and Pamela, who live in apartments very
20 near to Mr. Elam. AA0559 and AA0557. Ms. Webster testified that she saw Mr.
21 Elam, and she said, "What's up?" And Mr. Elam motioned for her to come over
22 to his apartment. AA0560. Mr. Elam was standing outside his apartment at the
23 time. *Id.* She further testified that she had previously been to Mr. Elam's
24

1 apartment prior to the day of the alleged criminal activity (AA0563) and that she
2 would refer to Mr. Elam as “Cuz” or “cousin” because Mr. Elam had children
3 with Ms. Webster’s cousin by marriage, Joanique Mack. AA0565-66.

4 On the day of the incident, Ms. Webster wanted to explain to Mr. Elam
5 that she did not have anything to do with the disappearance of two dogs Mr. Elam
6 had been missing from a few days earlier. AA0567-68 and AA0569. She testified
7 that when she got to his apartment, Mr. Elam was in the apartment, and she
8 walked into the kitchen, and Mr. Elam accused her of being involved with the
9 disappearance of his dogs. AA0570. She said that he became loud and aggressive
10 and he told her to turn around and get on her knees. AA0571. She testified that
11 Mr. Elam tied her up with “electrical cords and tape, and stuffed my mouth with
12 – with fabric and covered my eyes up, and then finished it with a pillow case.”
13 AA0572. She alleged that her “arms were tied behind my back connected to my
14 feet.” *Id.*

15 The prosecutor then prompted Ms. Webster by asking:

16 Q: You said that he had put stuff in your mouth and tape
17 around you. Before he did that, did he do something else?

18 A: I mean, before he did that he –

19 Q: Did he put something else in your mouth?

20 A: At what particular time? I mean, the –

21 Q: You tell me.

22 A: Okay. Yes, he did, and it was – it was the gun.

23 AA0573.

1 She testified that Mr. Elam then called another male, and two or three
2 women to come over to his apartment. AA0575.

3 At the trial, she testified that after the other people arrived, they began
4 videotaping the assault on Ms. Webster. She testified that Mr. Elam beat her with
5 a belt and tased her with a taser. AA0578. She testified on direct examination that
6 Mr. Elam was the only one who struck her with a belt, the only one who used a
7 taser on her, and the only one who assaulted her with a broomstick. AA0578-79
8 and AA0581. She testified that her shorts and underwear were pulled down and
9 she was beaten with a belt on her bare skin. AA0584. She testified that she was
10 threatened with a broomstick and that she “was exhausted” and blanked out when
11 she thought she might be assaulted with the broomstick. AA0580-81. She testified
12 that she was tied up and assaulted for “at least a couple of hours.” AA0581.
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15 She testified that she thought she might be assaulted with the broomstick,
16 but she didn’t know if she was because “she passed out” and she doesn’t
17 remember. AA0583.
18

19 She testified on direct that she escaped the apartment when she no longer
20 could hear anyone in the apartment. AA0586.

21 On cross-examination, Ms. Webster testified that on the day of the alleged
22 incident she filled out a handwritten voluntary statement. AA0612. She
23 acknowledged after reviewing her voluntary statement that she did not mention
24

1 anything about being threatened with a gun, having a gun placed in her mouth, or
2 being threatened with a broomstick. AA0613.

3 She testified that she remembered being interviewed by Detective Nelson.
4 AA0616. She told Det. Nelson, when talking about the alleged use of a
5 broomstick, "He – they didn't put no penetration. . . . But they, like, act like they
6 wanted to do it. You know, I thought they were going to do it." AA0621, ll. 4-20.
7 She also told Det. Nelson, when he asked if the suspects had sexually assaulted
8 her, "No, but I just thought they would." AA0626-27.

9
10 She testified that she told Det. Nelson that the paramedics "saw marks on
11 [her] rear end from being whipped with a belt" (AA0622) and that she was hit
12 with a belt "over 25 times." AA0623. She told Det. Nelson that she thought she
13 had been tased "six or seven times" (AA0624) on "my legs, back of my neck, my
14 back." AA0626, ll. 2-4. She further testified that she told Det. Nelson that it was
15 the other alleged male suspect who threatened her with a broomstick, rather than
16 Mr. Elam. AA0624, ll. 13-18.

17
18 She testified that she was examined by a UMC nurse on March 12, 2015
19 (two days after the alleged incident).

20
21 She testified that she was then interviewed by female Detective Ryland
22 about the allegations.

1 2. **Bradley Grover**: He is a senior crime scene analyst with LVMPD.
2 AA0672. He was asked to take photographs of the alleged victim on the March
3 10, 2015, the date of the alleged incident. AA0705. He believes he was made
4 aware that Ms. Webster alleged she had been beaten by a belt. He was not asked
5 to take “photographs attempting to document any injury from the beating.”
6 AA0707. He did not recall being asked to try to take photos related to any tasing
7 injuries on Ms. Webster. AA0707.
8

9 3. **Theodore Weirach**: LVMPD robbery detective. AA0714.
10 He interviewed Appellant Elam during the investigation. At the time of the
11 interview, Mr. Elam was at the LVMPD headquarters building in an interview
12 room and handcuffed and chained to a bar attached to the table in the interview
13 room. AA0715-16.
14

15 Mr. Weirach read Mr. Elam a *Miranda* warning from a LVMPD issued
16 card that had been updated by the time Mr. Weirach was testifying at the trial.
17 Mr. Weirach testified he read the warning to Mr. Elam from the old card he had
18 been issued. He testified he believed that the change between the old card read to
19 Mr. Elam and the new card Mr. Weirach had with him at the trial was that the
20 new card added the language “you have the right to consult with an attorney
21 before questioning.” AA0718, ll. 17-25. Mr. Weirach testified that he did would
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1 not have given that warning to Mr. Elam at the time he was questioned as Mr.
2 Weirach “would’ve read it just verbatim off the card of the day.” AA0719, ll. 1-2.

3 Detective Weirach testified that his updated *Miranda* card read as follows
4 on the day he testified at trial:

5
6 You have the right to remain silent. Anything you say can be used
7 against you in a court of law. You have the right to consult with an
8 attorney before questioning. You have the right to the presence of an
9 attorney during questioning. If you cannot afford an attorney, one will
be appointed to you before questioning. Do you understand these
rights?

10 The trial judge refused to suppress the statement Mr. Elam gave to the
11 police. AA0719.

12 4. **Heather Gouldthorpe**: is a forensic scientist in the latent print unit in
13 the LVMPD forensic laboratory. AA0760. She was not able to recover any latent
14 fingerprints that could be compared with any known samples. AA0075-76.

15
16 5. **Jeri Dermanelian**: is a sexual assault nurse examiner. AA0818. She
17 performed an examination of Arrie Webster on March 12, 2015, at the University
18 Medical Center in Las Vegas, Nevada. AA0827. Ms. Dermanelian personally
19 interviewed Ms. Webster. AA0861. In the “history of the event,” Ms.
20 Dermanelian reported that Ms. Webster stated the male “forced penis, finger, and
21 tongue to her vagina.” AA0862, ll., 3-6.

22
23 Ms. Dermanelian asked Ms. Webster, “Was there oral penetration with a
24 penis or other object?” Ms. Webster answered, No. AA0862, ll. 7-12.

1 Ms. Dermanelian checked the boxes on the interview sheet indicating that
2 the alleged victim reported that she was vaginally penetrated by a penis, by a
3 finger, by a tongue, and “possible broomstick.” AA0862-63.

4 Ms. Dermanelian did a visual inspection of Ms. Webster’s body. When
5 asked, “Did you observe any marks on her rear end that would indication to you a
6 possible beating with a belt?” Ms. Dermanelian replied, “No. She had no bruises
7 or contusions or lacerations . . . on her buttocks.” AA0863, ll. 20-24. Ms.
8 Dermanelian used a special light tool in examining Ms. Webster for injuries and
9 still did not see any injuries to Ms. Webster’s vaginal area, rectal area, or rear
10 end. AA.0864. Ms. Dermanelian did a “head to toe” examination and “did not see
11 any signs of injuries that would have been caused by a Taser.” AA0868, ll. 2-7.

12 Ms. Webster declined to give a urine sample during the examination.
13
14 AA0866.

15
16 6. **Detective Jesse Ryland**: is a LVMPD detective with the sexual assault
17 section. She interviewed Ms. Webster, with another female detective, on March
18 13, 2015 [three days after the alleged incident]. AA0895. Ms. Webster told her
19 that Ms. Webster “smoked spice and methamphetamine” and, on the day of the
20 interview, Ms. Webster estimated that she had used methamphetamine “four to
21 five days earlier”. AA0897.

7. **Detective Jason Nelson**: is a LVMPD detective. He interviewed Ms. Webster on the day of the alleged incident. At the trial, he reviewed the AMR report from the medical examination conducted by AMR personnel on the day of the alleged incident. AA1004. He testified that the AMR report did not identify injuries consistent with a beating with a belt or tasing with a stun gun. AA1005.

VIII. ARGUMENT

1. The trial court abused its discretion when it denied Appellant's motion to remove a prospective juror for bias in favor of law enforcement.

Under the fifth, sixth, and fourteenth amendments to the United States Constitution, a criminal defendant is entitled to be tried by an impartial jury. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....”); U.S. Const. amend. V (“No person ... shall ... be deprived of life, liberty, or property, without due process of law....”); U.S. Const. amend. XIV, § 1 (“[No State shall] deprive any person of life, liberty, or property, without due process of law....”); *Ristaino v. Ross*, 424 U.S. 589, 595 n. 6, 96 S.Ct. 1017, 1020 n. 6, 47 L.Ed.2d 258 (1976) (“Principles of due process ... guarantee a defendant an impartial jury.”); *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it....”).

1 During *voir dire* of the prospective jury panel, the following questions and
2 answers were presented:

3 Defense Counsel: . . . You've heard me ask lots of questions
4 about evaluating the testimony of police officers; how would you
5 personally go about doing that if you were called to serve on this jury?

6 Prospective Juror No. 395: Yeah, and I've thought about this
7 because one of the things that I in my job is expected to have a high
8 level of integrity, high level of honesty, fairness, because you also, as a
9 project manager, we have to deal with a lot of different things,
10 sometimes conflict, a lot of times resolution. I have those qualities –

11 Defense Counsel: Uh-huh.

12 Prospective Juror No. 395: -- very proud of them, and I believe I
13 would be able to use them here.

14 Defense Counsel: Okay. Do you feel that you would be able to
15 evaluate the testimony of police officers like you would any other type
16 of person testifying in the case?

17 Prospective Juror No. 395: You know, and I've heard this before,
18 I would think and I would expect that Metro would have a little higher
19 integrity than the normal common person that walks the streets. So
20 again, I would start out with that in mind, and if there was some reason
21 to lower that in my mind from things that say or, you know, things that
22 have been proven, then that would lower. But it's higher than normal
23 in my opinion.

24 Defense Counsel: Okay. And that's a fair, fair answer. So is it
accurate to say then, that a police officer would, in your mind, start with
a higher level of credibility than somebody off of the street?

Prospective Juror No. 395: Correct.

Defense Counsel: Okay. So if all things being equal from two
witnesses, if everything else that the said you matched up and it seemed
similar but one was a police officer and one was not, you would believe
the police officer over the other witness?

Prospective Juror No. 395: I would unless something made me
change my mind.

AA0453-0054.

Defense counsel asked additional questions of Prospective Juror No. 395 on
other topics and then asked the trial judge to remove the prospective juror for cause

1 at an unrecorded bench conference. AA00456. The trial judge asked defense counsel
2 to place the motion to remove on the record outside the presence of the jury which
3 is recorded below:

4 Court: We're on the record out of the presence of the jury.

5 And, Mr. Ericsson, you wanted to make a record regarding jury
6 selection and your challenge for cause, which was denied by the Court.

7 Defense Counsel: Thank you, Your Honor. Yes. I had at the
8 bench done a challenge for cause on potential juror, Badge No. 13-
9 0395, named [KPD]. He was the individual – another one who indicated
10 that he would basically believe the testimony of a police officer over
11 somebody – a nonpolice officer if all other factors were the same, and
12 it was my position that that bias that he has towards the testimony of
13 law enforcement would make him an inappropriate juror for this type
14 of case.

15 At the bench you had denied the motion – the motion to strike or
16 remove for cause, and so we had to exercise one of our peremptory
17 challenges on that prospective juror.

18 Court: Ms. Luzaich.

19 CDDA Luzaich: All he said was that – the question was if all else
20 was equal and one police officer and nonpolice officer testified, would
21 you believe the police officer, and he said, yes, unless there was –
22 unless there was something different or whatever. So he qualified that,
23 and pretty much anybody on the planet, except for potentially a
24 defendant, would say the same thing. So I don't think that it rises to a
challenge for cause.

25 Court: Yeah, that's how I heard it. That if everything else was
26 equal between the witnesses, he would favor the police officer if
27 everything else was equal, but if there was a reason that – not to believe
28 the police officer, he wouldn't. So I – you know, that would be things
29 like inconsistencies and ability to perceive, whatever. So I don't think
30 it rose to the level of a for-cause challenge.

31 AA0545-0546.

32 The instant trial involved the critical testimony of numerous detectives, patrol
33 officers, crime scene analysts, and DNA technicians. The clear, stated bias that
34

1 Prospective Juror 395 had in favor of the testimony of police officers due to their
2 position and the trial court's refusal to remove the prospective juror for cause due to
3 the bias is a clear violation of Appellant Elam's right to be tried by an impartial jury.
4 Mr. Elam's counsel was forced to waste a peremptory challenge on Prospective Juror
5 395 due to the trial judge's refusal to remove for cause. This prejudiced Mr. Elam's
6 right to a fair trial and requires a new trial.
7

8 **2. The district court abused its discretion by eliciting and allowing**
9 **extremely prejudicial hearsay evidence to be presented to the jury.**

10 During the testimony of Ms. Webster, the trial judge accepted and asked a
11 juror question and the following testimony was presented:

12 Court: All right. We have some juror questions up here, in no
13 particular order. How did you know the defendant suspected you of
taking his dogs?

14 Webster: He paid a visit to a friend which was Edward Brown,
the neighbor that stayed a building – well, the next building to him –

15 Court: Okay.

16 Webster: -- and he went over there and kicked the door in.

17 Court: And did –

18 Ms. Luzaich: Um –

19 Court: – did then Mr. Brown tell you that the defendant
suspected you of taking the dogs?

20 Defense counsel: Objection, Your Honor. Her response, and
that would be hearsay from Mr. Brown.

21 Court: Well, based on something Mr. Brown told you, is that
why you went to explain the dogs to –

22 It's not being offered for hearsay purpose, Counsel.

23 Webster: Well, I went to a friend's house, and they was like,
Calvin –

24 Court: Oh –

Webster: -- came over here and kicked the door in, put a – put
the shotgun –

1 Court: Okay. Well, wait a minute. Did you – let me –
2 Defense counsel: Your Honor, if we may –
3 Court: -- move on. That is hearsay. So it's sustained.

4 AA0649-50.

5 **Bad Act Evidence Is Presumed Inadmissible**

6 A presumption of inadmissibility attaches to all prior bad act evidence.

7 *Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005). The principal concern with
8 admitting this type of evidence is that the jury will be unduly influenced by it and
9 convict a defendant simply because he is a bad person. *Walker v. State*, 116 Nev.
10 442, 997 P.2d 803 (2000). The presumption of inadmissibility cannot be overcome
11 until the District Court conducts a hearing outside the presence of the jury and
12 establishes that (1) the prior bad act is relevant to the crime charged; (2) the act is
13 proven by clear and convincing evidence; and (3) the probative value of the prior
14 bad act is not substantially outweighed by the danger of unfair prejudice to the
15 defendant. *See, Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503 (1985),
16 superseded in part by statute as stated in *Thomas v. State*, 120 Nev. 37, 44–45, 83
17 P.3d 818, 823 (2004). Even where the state can overcome its burden of
18 inadmissibility as to prongs 1 and 2, the evidence may still be inadmissible where
19 the probative value of the prior bad act is substantially outweighed by the danger
20 of unfair prejudice to the defendant. *Daly v. State*, 99 Nev. 564, 567, 665 P.2d 798
21 (1983).
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1 Pursuant to NRS 48.045, evidence of a person's character or a trait of his
2 character is not admissible for proving that he acted in conformity therewith on a
3 particular occasion. The intent of this rule is to prevent the State from introducing
4 evidence to show that the defendant has a criminal character in general or a
5 propensity to commit a certain type of crime in particular. However, evidence of
6 other bad acts may be admissible for purposes other than showing propensity, such
7 as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or
8 absence of mistake or accident. NRS 48.045(2).
9

10 This Court has stated that the admission of prior bad or criminal acts at trial
11 "is disfavored and should be strictly limited." *Weber v. State*, 121 Nev. 554, 589,
12 119 P.3d 107, 131 (2005), distinguished on other grounds by *Farmer v. State*, 405
13 P.3d 114, (Nev. 2017). Because prior bad act evidence "forces the accused to
14 defend himself against vague and unsubstantiated charges and may result in a
15 conviction because the jury believes the defendant to be a bad person," it is
16 commonly reversible error to use uncharged bad acts to show criminal propensity.
17 *Diomampo v. State*, 185 P.3d 1031, 1041, 185 P.3d 1031 (Nev. 2008).
18
19 Furthermore, the *Weber* Court stated, "too often, the district courts are willing to
20 permit the admission of prior bad act evidence." *Weber v. State*, 121 Nev. 554,
21 589, 119 P.3d 107, 131.
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1 In the instant case, the trial judge belatedly upheld defense counsel's
2 objection that the question called for hearsay and the court allowed testimony that
3 Mr. Elam had allegedly broken into another residence with a shotgun. There was
4 obviously no vetting of this information for reliability or prejudicial effect prior to
5 the court allowing the witness to testify to the extreme and highly prejudicial
6 allegations of criminal conduct by Mr. Elam in a completely separate incident.
7 There was no way to effectively "unring" the bell of such prejudicial testimony
8 during the trial and Mr. Elam was unable to receive a fair trial due to the court's
9 introduction of bad act evidence over the defense's objection. Consequently, the
10 trial verdict is unreliable and must be vacated.
11

12
13 **3. The trial judge erred when she allowed Mr. Elam's statement to the police**
14 **to be presented at the trial over objection.**

15 The Fifth Amendment provides in part that no person shall be "compelled in
16 any criminal case to be a witness against himself..." U.S. Const. Amend. V. The
17 United States Supreme Court has established guidelines for protecting suspects
18 from compulsory self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966).
19 During a custodial interrogation, law enforcement officers may not elicit
20 statements without first providing procedural safeguards to protect the suspect
21 right against compulsory self-incrimination. *See, Miranda*, 384 U.S. at 444.
22

23 Although the Supreme Court has not provided specific language that law
24 enforcement must use to convey *Miranda* warnings to a suspect, the Supreme

1 Court has provided specific components of *Miranda* that law enforcement officers
2 must provide to a suspect before conducting an interrogation. *Duckworth v. Eagen*,
3 492 U.S. 195, 202, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). To advise a suspect of
4 his rights, law enforcement officers must advise the following components: (1) the
5 suspect has the right to remain silent; (2) anything he says could be used against
6 him in court; (3) he has the right to speak to an attorney before and during
7 questioning; (4) he has the right to the advice and presence of a lawyer even if he
8 cannot afford to hire one; and (5) he has the right to stop answering at any time
9 until he speaks with a lawyer. *Id.* at 203 (Internal citation omitted).
10

11 Here, the warning provided to Mr. Elam did not contain all of the requisite
12 components of *Miranda*. At the time of the interview, Mr. Elam was at the
13 LVMPD headquarters building in an interview room and handcuffed and chained
14 to a bar attached to the table in the interview room. AA0715-16.
15

16 Detective Weirach read Mr. Elam a *Miranda* warning from a LVMPD
17 issued card that had been updated by the time Mr. Weirach was testifying at the
18 trial. Mr. Weirach testified he read the warning to Mr. Elam from the old card he
19 had been issued. He testified he believed that the change between the old card
20 read to Mr. Elam and the new card Mr. Weirach had with him at the trial was that
21 the new card added the language “you have the right to consult with an attorney
22 **before questioning.**” AA0718, ll. 17-25 (emphasis added). Mr. Weirach testified
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1 that he did would not have given the new language to Mr. Elam at the time he
2 was questioned as Mr. Weirach “would’ve read it just verbatim off the card of the
3 day.” AA0719, ll. 1-2. Detective Weirach testified that his updated *Miranda*
4 card read as follows on the day he testified at trial:

5
6 You have the right to remain silent. Anything you say can be used
7 against you in a court of law. You have the right to consult with an
8 attorney before questioning. You have the right to the presence of an
9 attorney during questioning. If you cannot afford an attorney, one will
be appointed to you before questioning. Do you understand these
rights?

10 AA0717.

11 This rendition of the *Miranda* warnings provided to Mr. Elam failed to
12 apprise him that he had the right to speak with a lawyer *before* questioning.
13 Furthermore, the warnings did not make him aware that he had the right to cease
14 questioning at any time until he spoke with a lawyer.

15 Although the U.S. Supreme Court has not designated particular language to
16 be required in the warnings, that Court clearly determined that the warnings as
17 provided to the suspect must “reasonably conve[y] to [a suspect] his rights as
18 required by *Miranda*.” *Duckworth*, 492 U.S. at 203, *citing California v. Prysock*,
19 453 U.S. 355, 361, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). Moreover, the
20 warnings must adequately warn the defendant of his right. *People of the Territory*
21 *of Guam v. Snaer*, 758 F.2d 1341, 1343 (9th Cir. 1985). The warnings provided to
22 Elam did not meet this standard because they did not reasonably convey that he
23
24

1 would have the right to speak with an attorney *before* the interrogation.

2 Furthermore, the warnings in this case completely abandoned the requirement to
3 advise Mr. Elam that he had the power to terminate the interrogation at any point.

4 Additionally, a valid waiver of *Miranda* warnings must be knowing,
5 voluntary, and intelligent. *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir.
6 1998). A reviewing court must consider the totality of the circumstances to
7 determine the validity of the waiver. *Id.* In the case of determining the validity of a
8 waiver, there is a presumption against the waiver, to which the Government bears
9 the burden of overcoming by a preponderance of the evidence. *United States v.*
10 *Crews*, 502 F.3d 1130, 1139-40 (9th Cir. 2007), citing, *Garibay*, 143 F.3d at 536.
11 To meet the burden, “the Government must prove that, under the totality of the
12 circumstances, the defendant was aware of the nature of the right being abandoned
13 and the consequences of such abandonment.” *Crews*, 502 F.3d 1140. To overcome
14 a showing by the preponderance of the evidence, the Government has a duty to
15 show that there is a reasonable presumption against waiver of the fundamental
16 rights. *Garibay*, 143 F.3d at 537.

17 Here, Mr. Elam could not have voluntarily, knowingly, or intelligently
18 waived his rights under *Miranda* because he did not have the requisite warnings to
19 be advised properly regarding his decision to speak with the detectives.
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1 Accordingly, he was unaware of the right being abandoned because he could not
2 have known the nature of the right without the warning being properly read to him.

3 Along the same lines, considering the fact that Mr. Elam was unaware of the
4 nature of the right, he was also unaware of the consequences of abandoning that
5 right. Thus, Elam did not voluntarily, knowingly, and intelligently waive his rights
6 because the defective LVMPD *Miranda* card did not contain all of the required
7 rights.
8

9 As the Supreme Court has held, law enforcement officers have a duty to
10 advise a suspect of their Fifth Amendment rights in order to protect him from
11 compulsory self-incrimination. Accordingly, these components serve to protect a
12 suspect's Fifth Amendment right against self-incrimination. Consequently, the fact
13 that the warnings contained in the LVMPD *Miranda* Rights Card were deficient
14 under *Miranda* and *Duckworth*, thus rendering the warning provided to Mr. Elam
15 defective. Accordingly, Mr. Elam cannot be deemed to have provided a valid
16 *Miranda* waiver.
17

18 The trial court violated Mr. Elam's 5th Amendment right against self-
19 incrimination when she denied his motion to suppress the statement he gave to law
20 enforcement while in handcuffs at the LVMPD headquarters. The statement
21 contained prejudicial, incriminating information that in no way should have been
22 presented to the jury in this matter.
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24

1 **4. The cumulative effect of these errors necessitates the reversal of the**
2 **Appellant's convictions.**

3 Appellant has outlined the trial testimony of critical trial witnesses in detail
4 to show the inherent untrustworthiness of Ms. Webster's story. The record is
5 replete with testimony that there was no physical evidence whatsoever
6 corroborating her story of being beaten and tased with a stun gun. Ms. Webster
7 failed to mention anything about being threatened with a shotgun during all of
8 her initial written and verbal statements and interviews. Ms. Webster admitted to
9 detectives that she had been using methamphetamine and spice during the days
10 prior to the alleged incident. The jurors acquitted Mr. Elam of three of the seven
11 counts presented at trial due to a lack of credible evidence.
12

13 In *Dechant v. State*, this Court held that if the cumulative effect of errors
14 committed at trial denies the appellant his right to a fair trial, this court will
15 reverse the conviction. *Dechant*, 116 Nev. 918, 927, 10 P.3d 108 (2000) (citing
16 *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).
17

18 “The cumulative effect of errors may violate a defendant's constitutional
19 right to a fair trial even though errors are harmless individually.” *Valdez v. State*,
20 124 Nev. 1172, 1195, 196 P.3d at 481 (2008) (quoting *Hernandez v. State*, 118
21 Nev. 513, 535, 50 P.3d 1100, 1115 (2002)). When evaluating a claim of
22 cumulative error, we consider the following factors: “(1) whether the issue of
23 guilt is close, (2) the quantity and character of the error, and (3) the gravity of
24

1 the crime charged.” *Id.* (citing *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845,
2 854-55 (2000). Most importantly, “[t]his court must ensure that harmless-error
3 analysis does not allow prosecutors to engage in misconduct by overlooking
4 cumulative error in cases with substantial evidence of guilt.” *Id.* (citing *Kelly v.*
5 *State*, 108 Nev. 545, 559-60, 837 P.2d 416, 425 (1992).
6

7 The United States Supreme Court has stated that, “Harmless-error analysis
8 thus presupposes a trial, at which the defendant, represented by counsel, may
9 present evidence and argument before an impartial judge and jury.” *Rose v.*
10 *Clark*, 478 U.S. 570, 578 (1986). Therefore, if *any* of those features is absent,
11 “. . . constitutional errors require reversal without regard to the evidence in the
12 particular case.” *Id.*, at 577, citing *Chapman v. Cal.*, 386 U.S. 18, 23, n. 8
13 (1967).
14

15 **IX.**
16 **CONCLUSION**

17 Appellant respectfully requests that this Court vacate his conviction and
18 order a new trial.

19 Respectfully submitted this 30th day of May, 2018.

20 Respectfully submitted,

21 By: /s/ Thomas Ericsson
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24 *Attorneys for Appellant*

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I further certify that this brief complies with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains 6,445 words. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,

By: /s/ Thomas Ericsson
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