IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY HARRIS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 76774

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY HARRIS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 76774

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ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(b)(2), because it is an appeal from a judgment of conviction based on a jury verdict involving Category A and Category B felonies.

STATEMENT OF THE ISSUES

1. Whether there was a factual basis for Appellant's kidnapping charge
2. Whether Appellant was properly convicted of kidnapping with substantial bodily harm
3. Whether the district court properly admitted the victim's statements as an excited utterance

4. Whether the district court properly instructed the jury on the basis of flight
5. Whether the admitted kidnapping instruction was proper.
6. Whether there was cumulative error.

STATEMENT OF THE CASE

On January 18, 2018, Barry Harris (Hereinafter "Appellant") was charged by way of Information with one count BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - NOC 50426); one count FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50056); one count ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201); one count BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony - NRS 200.481; 200.485; 33.018 - NOC 57935); one count BATTERY CONSTITUTING DOMESTIC VIOLENCE - STRANGULATION (Category C Felony - NRS 200.481; 200.485; 33.018 - NOC 54740); one count BATTERY RESULTING IN SUBSTANTIAL BODILY HARM CONSTITUTING DOMESTIC VIOLENCE (Category C Felony - NRS 200.481; 200.485; 33.018 - NOC 57937); one count PREVENTING OR DISSUADING WITNESS OR VICTIM FROM REPORTING CRIME OR COMMENCING PROSECUTION (Category D Felony - NRS 199.305 - NOC 52996); one count CARRYING

CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350 (1)(d)(3) - NOC 51459) and one count OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460) for acts committed on or about August 22, 2017. Appellant's Appendix Vol. 1 ("1AA"), at 52-55. Appellant plead not guilty to the charges.

On April 9, 2018, the State filed an Amended Information containing the same charges except OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460). That same day, Appellant's jury trial began. 1 AA 133- 6 AA 1223

Appellant's trial ended on April 16, 2018, and the jury found Appellant guilty of Count 2— First Degree Kidnapping Resulting in Substantial Bodily Harm; Count 3—Assault ; Count 4 –Battery Constituting Domestic Violence; and Count 6 – Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence. 6 AA 1224-27.

On August 14, 2018, Appellant was sentenced as to Count 2— Life with the possibility of parole after fifteen (15) years in the Nevada Department of Corrections; Count 3— six (6) months in the Clark County Detention Center, to run CONCURRENT with Count 2; Count 4— six (6) months in the Clark County Detention Center, to run CONCURRENT with Count 3; and Count 6— a minimum

of twenty-four (24) months with a maximum term of sixty (60) months in the Nevada Department of Corrections, to run CONCURRENT with Count 2, with three hundred fifty one (351) days credit for time served. 6 AA 1228-53. The Judgement of Conviction was filed August 16, 2018. 6 AA 1254-56.

On August 21, 2018, Appellant filed a Notice of Appeal. 6 AA 1257-58.

STATEMENT OF FACTS

BLAKE FERRON

Officer Ferron is a police officer with the Las Vegas Metropolitan Police Department. 3 AA 486. On August 22, 2017, Officer Ferron responded to a possible domestic violence issue at an apartment at 11:25 pm. 3 AA 489. Once Officer Ferron arrived he noticed a silver vehicle behaving strangely, so he took down the license plate number. 3 AA 490. Officer Ferron then parked his car and proceeded to approach the apartment. 3 AA 492. Once there, he observed a woman exit the apartment and walk down the stairs. 3 AA 493. She was shaking, hysterically crying, and having a hard time breathing. 3 AA 494. She also had visible swelling on the left side of her eye, and she was unable to even open her eye. Id. Officer Ferron asked her if she was okay, and she responded that she went to the bedroom with her boyfriend, Appellant, and an argument transpired. 3 AA 497-98. During the argument she told him she no longer wanted to be with him, and Appellant started to strangle her with two hands around her neck. 3 AA 498. He then punched her in

the face and abdomen, and kicked her, causing her to fall off of the bed. 3 AA 499. After that, he grabbed his black handgun, put it to her mouth, and told her if she were to scream for help he would kill her. Id. At some point she made it to the living room where Appellant pointed the handgun at her and told her to go into the bathroom. 3 AA 499-500. Once she was in the bathroom she began to scream for help. 3 AA 500. Appellant then racked a round into the handgun, pointed it at her again, and told her if she tried to scream for help or leave he would kill her. Id. The victim then just sat on the floor silent, and Appellant left the apartment. Id. After waiting for a minute she walked out of the apartment where she saw Officer Ferron. Id. After telling him what happened, the victim complained of abdominal pain and stated that Appellant left in a silver Honda Sedan. 3 AA 501; 504.

NICOLE DOTSON

Nicole Dotson is the Appellant's girlfriend. 3 AA 516-17. She was living in the apartment with him and her daughter in August of 2017. Id. On the night in question, the victim was at work and got into an argument with Appellant about him not coming home. 3 AA 521. The victim believed he was cheating on her. Id. She told the Appellant not to come home, but when she arrived at the apartment Appellant was there. 3 AA 522-23. The victim's daughter was with her dad at the time. 3 AA 523. When she entered the apartment, she walked into the kitchen. 3 AA 524. Appellant then went into the kitchen and they started arguing. Id. At some point

during the argument the victim told Appellant she did not want to be with him anymore, and the argument moved to the master bedroom. 3 AA 524-25. While in the bedroom the argument escalated and Appellant punched the victim in the left side of her face. 3 AA 529. After he punched her the victim fell on the floor. 3 AA 530. Appellant was on top of her and they were tussling. 3 AA 531. At some point the victim was able to get up and run into the living room. Id. At that time she screamed for help. Id. Appellant followed the victim into the living room and they began to tussle again. 3 AA 532. Then the victim went into the bathroom. Id. While in the bathroom Appellant hit the victim in the head and then she watched as Appellant paced between the bathroom and other areas in the apartment. Id. At one point the victim saw Appellant go into his pocket and pull out what appeared to be a black gun. 3 AA 533-534. Appellant then went into the bathroom and poured soda on the victim. 3 AA 534. He also told her to stop yelling. 3 AA 535. After pouring soda on the victim, Appellant left the apartment. 3 AA 537. The victim then waited 15 minutes before leaving the bathroom. 3 AA 538. She grabbed her keys and her phone and headed downstairs to her car where she was met by cops. 3 AA 539. They encouraged her to seek medical attention for her eye, and from there she went to sunrise hospital. 3 AA 541-43. They gave her pain medication, and some time later she had to get blood clots removed from her eye. 3 AA 543-44. The victim admitted

that she did not want to get involved with the police and that she was not happy with Appellant's charges. 3 AA 559.

GABRIELLE GUERRERO

Gabrielle Guerrero is a crime scene analyst with the Las Vegas Metropolitan Police Department. 4 AA 709. Guerrero took photos of the victim and saw that she has swelling to her left eye, and her right eye appeared to be swollen as well. 4 AA 713-14. The victim also had an injury to her wrist, and was complaining of injuries to her neck. 4 AA 719.

NICHOLAS BIANCO

Nicholas Bianco is a patrol officer with the Las Vegas Metropolitan Police Department. 4 AA 747. Officer Bianco arrived at the scene and was told by the victim that she had an argument with her boyfriend and that he punched her in the face and took out a black handgun and put it in her mouth. 4 AA 757. Officer Bianco also had body cam footage of the victim describing the gun that was placed in her mouth. 4 AA 775-76.

KEN KRMPOTICH

Ken Krmpotich is a detective with the Las Vegas Metropolitan Police Department. 4 AA 794. Detective Krmpotich searched Appellant's car and found an extended magazine and box of ammo in the trunk. 4 AA 812-13. Additionally, there was paperwork in the car indicating that Appellant had ownership of the vehicle. 4 AA

815. There were two types of ammunition; one was .38 caliber and the other was 9 mm caliber. 4 AA 847.

LISA GAVIN

Lisa Gavin is a forensic pathologist medical examiner in Clark County. 4 AA 848. She provides consulting regarding strangulation. 4 AA 850. She informed they jury that sometimes victims of strangulation have no visible injuries on the outside. 4 AA 853. She also stated that petechial hemorraghes are consistent with strangulation, which are small blood vessels that burst in the whites of the eye or on the face. 4 AA 854. Dr. Gavin did not have enough information to decide whether the victim had been strangled. 4 AA 872-73.

KEVIN CAREY

Kevin Cary is a police detective for the Las Vegas Metropolitan Police Department. 4 AA 888. When he arrived at the scene he observed the victim's swollen eye, and the victim complained of having pain in her head, on top of her head, and on her hands. 4 AA 896. Detective Carey also conducted a taped interview of the victim. 4 AA 897. During the interview the victim told Detective Carey that she had got in an argument with Appellant and threatened to call the police because he would not leave. 4 AA 900. At that point he began strangling her and punched her until she fell on the floor. Id. He continued hitting her and she ran out of the bedroom into the living room area and screamed for help. 4 AA 900-01. Once there, Appellant

grabbed a handgun out of his pocket and hit the victim on top of the head. 4 AA 901. He then put the gun in her mouth and told her he was going to kill her. Id. The victim also told Detective Carey that Appellant forced her into her daughter's bathroom at gun point. 4 AA 902. He threatened her with the gun again, grabbed some juice, and poured it all over her head while calling her names. Id. She did not feel as though she could leave the bathroom. 4 AA 903.

SHELIA TOWNS

Shelia Towns was a defense witness and testified that she owned the silver vehicle that was linked to Appellant. 5 AA 974. Appellant is her children's uncle. 5 AA 977. She would allow Appellant as well as several other family members use the car. 5 AA 975. She did not recognize the bag in the trunk or the ammunition, and stated that she did not own a gun. Id. She also testified that she would allow Appellant to have her car unless someone else needed it, and that he drove the car more than the other family members. 5 AA 979.

SUMMARY OF THE ARGUMENT

First, there was a factual basis for Appellant's kidnapping charge. Appellant was charged with the primary crime of kidnapping, and the State added an additional enhancement for Appellant's use of a deadly weapon. Appellant was subsequently acquitted of using a deadly weapon, but that did not preclude the jury from finding Appellant guilty of any other types of kidnapping. The jury found sufficient evidence

that Appellant was guilty of kidnapping resulting in substantial bodily harm, and that conviction must stand as it does not require the use of a deadly weapon.

Second, Appellant was properly convicted of kidnapping resulting in substantial bodily harm. The kidnapping began when Appellant exerted force on the victim, and that occurred when Appellant punched the victim in the eye. From the time the crime began until Appellant left the apartment, the victim was unable to escape. Moreover, the substantial bodily harm component of Appellant's conviction is also a sentencing enhancement, and therefore, Appellant's kidnapping conviction must stand even if this Court finds the crime occurred before the kidnapping.

Third, the district court properly admitted the victim's statements as an excited utterance. Appellant spoke with law enforcement minutes after the crime occurred and she was visibly under a state of distress, trembling, shaken up, and crying. She had no motive to fabricate her statements, and Appellant was not prejudiced by these statements as the victim testified during Appellant's trial as to what happened inside the apartment. Thus, the district court did err by admitting these statements as excited utterances.

Fourth, the district court properly instructed the jury on the basis of flight. The State provided evidence that Appellant was still at the scene when law enforcement arrived, yet he made the decision to continue to leave the premises. Moreover, evidence of flight on its own was not enough to justify any of Appellant's

convictions and therefore, Appellant was not prejudiced by the admittance of a flight instruction.

Fifth, the admitted kidnapping instruction was proper as it relates to incidental movement. Appellant proffered a jury instruction that misstated the law, and Appellant has failed to show that a different result would have been reached even if the court allowed his instruction.

Last, there was no cumulative error. The issue of guilt was not close as the jury found Appellant guilty of half of the crimes he was charged with. The quantity and character of the error favors the State as all the claims brought in this appeal are insufficient to warrant reversal, and the Appellant committed several grave crimes.

As such, this Court should find that Appellant's claims do not warrant reversal and affirm the Judgement of Conviction.

ARGUMENT

I. THERE WAS A FACUTAL BASIS FOR APPELLANT'S KIDNAPPING CHARGE

Appellant claims that the State only alleged that he committed kidnapping with a use of a firearm, and since he was acquitted of using a firearm his kidnapping conviction is invalid. Appellant's Opening Brief ("AOB") at 28. This claim is belied by the record and suitable for only summary denial under Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

In the Information the State charged Appellant with kidnapping with use of a deadly weapon resulting in substantial bodily harm under NRS 200.310, 200.320, and 193.165. NRS 193.165 outlines the penalty enhancements For crimes committed with the use of a deadly weapon and states:

> 1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years. In determining the length of the additional penalty imposed, the court shall consider the following information:
>
> (a) The facts and circumstances of the crime;
> (b) The criminal history of the person;
> (c) The impact of the crime on any victim;
> (d) Any mitigating factors presented by the person; and
> (e) Any other relevant information.
>
> The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.
>
> 2. The sentence prescribed by this section:
>
> (a) Must not exceed the sentence imposed for the crime; and
> (b) Runs consecutively with the sentence prescribed by statute for the crime.
>
> 3. *This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.*

> 4. The provisions of subsections 1, 2 and 3 do not apply where the use of a firearm, other deadly weapon or tear gas is a necessary element of such crime.

(Emphasis Added).

Therefore, the use of a deadly weapon was not an element or necessary factual theory of Appellant's charge; it was merely a sentencing enhancement for the crime of kidnapping. As such, the State only needed to prove that a kidnapping occurred and it was proper for the jury to find Appellant guilty of Kidnapping resulting in substantial bodily harm although Appellant was acquitted of possessing a firearm. Indeed, the jury was instructed that Appellant could be found guilty of several different theories of kidnapping, including those that did not involve the use of a deadly weapon:

> If you find beyond a reasonable doubt that Defendant committed First Degree Kidnapping with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, then you are instructed that the verdict of First Degree Kidnapping with Use of a Deadly Weapon Resulting in Substantial Bodily Harm is the appropriate verdict.
>
> If, however, you find beyond a reasonable doubt that a kidnapping occurred, but if the State did not prove some or all of the remaining elements beyond a reasonable doubt, then you shall return the appropriate verdict based on your findings.
>
> For instance, if you find beyond a reasonable doubt that a first degree kidnapping did occur and that a deadly weapon was used in the commission of the kidnapping, but that the kidnapping did not result in substantial bodily harm to the victim, then you are instructed that First Degree Kidnapping with Use of a Deadly Weapon is the appropriate verdict.

> If you find beyond a reasonable doubt that a first-degree kidnapping did occur and that the kidnapping resulted in substantially bodily harm to the victim, but you do not find that a deadly weapon was used in commission of the kidnapping , then you are instructed that First-Degree Kidnapping Resulting in Substantial Bodily Harm is the appropriate verdict.
>
> If you find beyond a reasonable doubt that a first degree kidnapping did occur, but you do not find that a deadly weapon was used in the commission of the kidnapping or that the kidnapping resulted in substantial bodily harm to the victim, then you are instructed that first degree kidnapping is the appropriate verdict.
>
> If you do not find beyond a reasonable doubt that a first-degree kidnapping did occur, then you are instructed that Not Guilty is the appropriate verdict.
>
> You are instructed that you may only select one of the options above. You may not return more than one verdict for each count.

5 AA 1119.

That Appellant was subsequently convicted of kidnapping resulting in substantial bodily harm proves that the jury did not find that Appellant used a firearm in the commission of the kidnapping. Nonetheless, the lack of a firearm did not negate that fact that a kidnapping occurred.

Accordingly, this Court should find that there was a factual basis for Appellant's kidnapping charge, and affirm the Judgement of Conviction.

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II. APPELLANT WAS PROPERLY CONVICTED OF KIDNAPPING WITH SUBSTANTIAL BODILY HARM

Appellant claims that he could not be found guilty of kidnapping with substantial bodily harm because the harm was inflicted prior to the kidnapping of the victim. AOB 28.

Appellant was found guilty of first-degree kidnapping resulting in substantial bodily harm pursuant to NRS 200.320 which states:

> A person convicted of kidnapping in the first degree is guilty of a category A felony and shall be punished:
>
> 1. Where the kidnapped person suffers substantial bodily harm *during the act of kidnapping or the subsequent detention and confinement or in attempted escape or escape therefrom*, by imprisonment in the state prison:
>
> (a) For life without the possibility of parole;
> (b) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served; or
> (c) For a definite term of 40 years, with eligibility for parole beginning when a minimum of 15 years has been served.

(Emphasis Added).

Appellant claims that since he punched the victim in her eye before she was forced to go into the bathroom, he cannot be found guilty of Kidnapping resulting in substantial bodily harm. This is not so.

Appellant's kidnapping of the victim began with the use of force against her, not her movement. All accounts of the crime illustrate that Appellant punched the

victim in the bedroom, and from the time he inflicted harm on her until he left the apartment, the victim was unable to leave. After punching the victim in the bedroom, the victim made her way into the living room, but she never made it to the door in order to exit the apartment. Appellant continued to inflict harm on her to prevent her escape. The victim testified that a tussle occurred when she was in the living room which is how she ended up in the bathroom, and that Appellant inflicted more harm on her when she was confined to the restroom by hitting her on the head. 3 AA 531-34. Thus, it was the initial harm in the bedroom that started the kidnapping, not the sole movement of the victim from the living room into the bathroom.

Moreover, even if this Court finds that the substantial bodily harm occurred before the act of kidnapping, the substantial bodily harm component is merely a sentencing enhancement for the act of first-degree kidnapping and not a theory for Appellant's charge. Therefore, Appellant's kidnapping conviction must stand.

As such, this Court should find that Appellant was properly convicted of kidnapping resulting in substantial bodily harm and affirm the Judgement of Conviction.

III. THE DISTRICT COURT PROPERLY ADMITTED THE VICTIM'S STATEMENTS AS AN EXCITED UTTERANCE

Appellant claims that the victim's statements to officers were improperly admitted as excited utterances because a significant amount of time passed between

the crime and her relay of it to the officers, and because she had motive to fabricate her story. AOB 39.

A trial court's decision to admit evidence will not be reversed on appeal unless it is manifestly erroneous. Lucas v. State, 96 Nev. 428, 431–32, 610 P.2d 727, 730 (1980). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. NRS 51.065. The proper focus of the excited utterance inquiry is whether the declarant made the statement while under the stress of the startling event. Medina v. State, 122 Nev. 346, 143 P.3d 471 (2006). The elapsed time between the event and the statement is a factor to be considered but only to aid in determining whether the declarant was under the stress of the startling event when he or she made the statement. Id.

In Medina, the victim's statements made a day after her rape were considered excited utterances based on the condition of the victim as well as the fact that she remained under the stress of excitement caused by the event. On appeal, this Court found:

> NRS 51.095 does not limit the statute's application to those statements made shortly after a startling event. Instead, NRS 51.095 states that an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." While the time elapsed between the startling event and the statement is an important factor, the absence of an express time requirement in the statute demonstrates that the Legislature did not intend to limit the statute's application to those

> statements made within a specified time after a startling event.14 The Legislature's only limit to the statute's application is that the statement is made while the declarant is still under the stress of excitement caused by the event. Therefore, district courts must examine all of the facts and circumstances surrounding a statement in addition to the time elapsed from the startling event.

Therefore, Appellant's claim that the victim was no longer under the stress of the event because she waited fifteen minutes before leaving her apartment, and remained in an excited state for hours after the crime lacks merit. Multiple witnesses testified that the victim was under a state of distress and she was trembling, shaken up, and crying. Additionally, she met with law enforcement minutes after she was attacked. The victim had no motive to fabricate her story because she did not want Appellant to even be criminalized for his acts. 3 AA 559. If it was not for the neighbor calling the police, the victim would not likely have even given a statement. Furthermore, Appellant's statements were in response to general questions as to what happened. Appellant provides no evidence that the victim's statement was improperly solicited by law enforcement. Last, Appellant suffered no prejudice by these statements as the victim testified as to what exactly happened inside the apartment. Which version of events the jury found credible rested within their discretion.

As such, this Court should find that the victim's statements were properly admitted as excited utterances and affirm the Judgement of Conviction.

IV. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE BASIS OF FLIGHT

Appellant claims that the district court improperly admitted a flight instruction because it was based solely on Appellant gathering his belongings and leaving the scene. AOB 42.

It is proper to instruct on flight where it is reasonable to infer flight from the evidence presented. Hutchins v. State, 110 Nev. 103, 113, 867 P.2d 1136, 1143 (1994). Flight is more than merely leaving the scene of the crime. It embodies the idea of going away with a consciousness of guilt and for the purpose of avoiding arrest. Theriault v. State, 92 Nev. 185, 547 P.2d 668 (1976).

In the instant case, the State provided sufficient evidence to justify a flight instruction. After Appellant committed the crime he grabbed his belongings and put them into the silver car he was driving. Before he could leave, however, he came into contact with law enforcement. Officer Ferron testified that when he arrived at the scene he saw the silver vehicle acting strangely. 3 AA 490. In fact, the car was acting so strange that he decided to write down the license plate of the vehicle. Id. Officer Ferron stated that the vehicle came to a sudden halt before proceeding to leave the apartment complex. Id. This is more than enough evidence for the jury to reasonably infer that Appellant stopped, thought about his next steps, and then decided to leave the apartment for the purpose of evading the police.

Moreover, even if this Court were to find that the flight instruction was improper, reversal is not warranted because the record shows neither a miscarriage of justice nor prejudice to Appellant's substantial rights occurred, and it is apparent that the same result would have been reached without the error. Potter v. State, 96 Nev. 875, 619 P.2d 1222 (1980), citing Ogden v. State, 96 Nev. 258, 607 P.2d 576 (1980); Carr v. State, 96 Nev. 238, 607 P.2d 114 (1980).The jury was given the following flight instruction :

> The flight of a person is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence.
>
> The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which such circumstance is entitled is a matter for the jury to determine.

5 AA 1137.

Therefore, evidence of Appellant's flight alone was not enough to justify any of his convictions, and the jury's determination was based on the overwhelming evidence the State presented to prove that Appellant committed these crimes independent of the fact Appellant left the scene.

As such, this Court should find that the flight instruction was proper and affirm the Judgement of Conviction.

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V. THE ADMITTED KIDNAPPING INSTRUCTION WAS PROPER

Appellant claims that the final jury instruction for kidnapping only partially stated the law, and did so in a confusing manner as it relates to incidental movement. AOB 42.

This Court reviews a decision to admit or refuse jury instructions for an abuse of discretion or judicial error. Ins. Co. of the W. v. Gibson Tile Co., 122 Nev. 455, 463, 134 P.3d 698, 702–03 (2006). This Court reviews de novo whether a jury instruction accurately states Nevada law. Cook v. Sunrise Hosp. & Med. Ctr., LLC, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008). Although "a party is entitled to jury' instructions on every theory of [its] case that is supported by the evidence," the offering party must demonstrate that the proffered jury instruction is warranted by Nevada law. Johnson v. Egtedar, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996); NRCP 51(a)(1).

To reverse a district court judgment based on an erroneous jury instruction, prejudicial error must be established. Mainor v. Nault, 120 Nev. 750, 768, 101 P.3d 308, 320 (2004). This is accomplished when the complaining party demonstrates that the error substantially affected the party's rights. Carver, 121 Nev. at 14–15, 107 P.3d at 1285; Driscoll, 87 Nev. at 101–02, 482 P.2d at 294; Truckee–Carson Irr. Dist. v. Wyatt, 84 Nev. 662, 666–68, 448 P.2d 46, 49–50 (1968); Boyd v. Pernicano, 79 Nev. 356, 360, 385 P.2d 342, 344 (1963); Peterson v. Silver Peak, 37 Nev. 117,

138, 140 P. 519, 527 (1914). That standard is met when the complaining party provides sufficient-record evidence showing that, but for the error, a different result might have been reached. Carver, 121 Nev. at 15, 107 P.3d at 1285; Driscoll, 87 Nev. at 102, 482 P.2d at 294; Wyatt, 84 Nev. at 666–67, 448 P.2d at 50.

The court provided the standard first -degree kidnapping instruction as well as this instruction regarding dual convictions for kidnapping and battery :

> In order for you to find the Defendant guilty of First Degree Kidnapping in addition to the associated offenses of battery, you must also find beyond a reasonable doubt considering all the facts and circumstances in this case:
>
> (1) That any movement of the victim was not incidental to the battery; or
> (2) That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the battery; or
> (3) That any incidental movement of the victim substantially exceeded that required to complete the battery; or
> (4) That the victim was physically restrained and such restraint substantially increased the risk of harm to the victim; or
> (5) The movement or restraint had an independent purpose or significance.
> Physically restrained includes but is not limited to tying, binding, or taping.

5 AA 114.

Appellant wished to add the following paragraph to the jury instruction:

> With regards to movement, it is the fact, not the distance, of forcible movement of the victim that constitutes kidnapping. However, when a Defendant is accused of First Degree Kidnapping with the specific intent to commit an unlawful act and is also accused of the unlawful act itself. The defendant may not be convicted of kidnapping if the

movement and/or confinement of the victim was merely incidental to the unlawful act.

In this case, whether the movement and/or confinement of the victim is incidental to the offense of Battery or whether the risk of harm was increased thereby is a question for you to determine after considering all the facts and circumstances in this case.

AOB 43.

The judge denied Appellant's request for the following reasons:

THE COURT: Okay. You know, this – this [State] instruction seems to outline the specific conditions set by the State Supreme Court as to what you need for first degree kidnapping.

…

MR. SHEETS: With – just with regards to the law does not require the person being kidnapped or carried away for a minimal distance. The reason why my proposed instruction exists is because of the fact that in this case there are incidental offenses, and the jury has to make that determination. So, I mean, I guess if we include that language from the State's, I'd ask that we include my instruction as maybe a separate instruction. Because the one thing that the State's proposed instruction, the very next one, *it doesn't indicate that they must find him not guilty of kidnapping if that movement or confinement was merely incidental*. That's specific language from the case.

THE COURT: Well, and – and it has to be something, but this says that any movement of the victim was not incidental, that any incidental movement of the victim. I mean, so it can be incidental. That's the issue. *It can be incidental if it causes substantial risk or harm to the victim, or that above necessary to do the battery, or it's – you know, and so it can be incidental*. So that's my issue here.

> I'm going to do 20 and I'm going to -- I think 20 outlines what has to be shown, and so I'm not going to use No. 3. *I think it would confuse the jury because it seems to indicate that if it was merely incidental to the unlawful act, then you can't have first degree kidnapping, where it can be incidental*. But if it increases the risk of harm, exceeds the – substantially exceeds that required to complete the battery, then it can't be incidental movement, which if it – if it meets those different categories. So, I'm not going to give the defense proposed instruction.

5 AA 1017-18 (emphasis added).

Therefore, Appellant's jury instruction was denied because it completely eliminated the possibility for the jury to find a conviction for kidnapping if there was any incidental movement, which is a misstatement of the law. The law suggests that there cannot be dual convictions for both kidnapping and battery if the movement required for kidnapping was incidental to the battery. Moreover, Appellant has failed to show that a different result would have been reached if his proffered jury instruction had been submitted to the jury.

As such, this Court should find that the admitted kidnapping instruction was proper and affirm the Judgement of Conviction.

VI. THERE WAS NO CUMULATIVE ERROR

Appellant claims that the cumulative effect of errors in this case warrant reversal. AOB 48. This claim is belied by the record and suitable for only summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

In addressing a claim of cumulative error, the relevant factors are: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000).

First, the issue of guilt was not close in this case. The jury found Appellant guilty of half of the charges brought against him. AA 1224-27.

Second, the quantity and character of the error favors the State because there was no error. The use of a deadly weapon was a sentencing enhancement of Appellant's kidnapping charge and therefore, the jury was not precluded from finding Appellant guilty of kidnapping although he was acquitted of using a deadly weapon. The substantial bodily harm Appellant complains of occurred during his act of kidnapping, and therefore his conviction must stand. The court properly admitted the victim's statements as an excited utterance as she was still under the stress of the event when she made those statements, and the victim testified during trial so Appellant was not prejudiced by the admission of these statements. The court properly instructed the jury in regard to flight as Appellant did leave the scene upon coming in contact with law enforcement, and the kidnapping instruction Appellant offered was properly denied as a misstatement of the law.

Last, Appellant committed several grave crimes as the crimes charged carry high maximum sentences.

As such, this Court should find that there was no cumulative error and affirm the Judgement of Conviction.

CONCLUSION

WHEREFORE, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 28th day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 6,063 words and 26 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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.

Dated this 28th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 28th day of May, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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