

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARWYN ROSS YOWELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 83577

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Elizabeth A. Brown
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Appeal from the Fourth Judicial District Court
County of Elko, State of Nevada
The Honorable Mason Simons, District Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

The State's Criminal Information alleged that Mr. Yowell committed the following offenses on June 5th, 2020: Count 1: Kidnapping in the First Degree, a Category A Felony; Count 2: Kidnapping in the Second Degree, a Category B Felony; Count 3: Coercion, a Category B Felony; Count 4: Domestic Battery Resulting in Substantial Bodily Harm, a Category B Felony; and Count 5: Battery Resulting in Substantial Bodily Harm, a Category C Felony. *App. 11-15*. After the close of evidence, the jury convicted Mr. Yowell on Count 4, Domestic Battery Resulting in Substantial Bodily Harm, a Category B Felony. *App. 112-114*. The District Court sentenced Mr. Yowell to twenty-eight to seventy-two months imprisonment in the Nevada Department of Corrections with four-hundred-sixty-two days credit. *Id.*

STATEMENT OF THE FACTS

This case centers on two witnesses with differing accounts: Jean Ortega ("Ms. Ortega") and Mr. Yowell. Both agreed that they had a sexual relationship as boyfriend and girlfriend over a nine-year period. *App. 464, 735*. During this relationship, Mr. Yowell was aware of several features of Ms. Ortega's life that were ultimately relevant to his theory of self-defense in his trial.

Ms. Ortega had been convicted of a violent felony within a few years of the trial occurring in this case. *App. 477, 495*. The conviction was for assault resulting in

1 serious bodily harm. *App.* 495. The victim was her father. *App.* 495. She attacked him
2 with a knife. *App.* 497. She stabbed him. *App.* 495. Mr. Yowell was aware of this
3 incident. *App.* 499, 739. As of June 5th, 2021, Ms. Ortega was on supervised release
4 from prison for this offense. *App.* 499. Mr. Yowell was aware of this. *App.* 741.

5 Among her conditions of release, Ms. Ortega was not supposed to drink
6 alcohol. *App.* 500. Also, her supervision required her to take prescription medications
7 to treat her mental health disorders. *App.* 500-501. Mr. Yowell was aware of this
8 *App.* 744-750. Those disorders being Bi-Polar Disorder, Major Depression, Anxiety,
9 and Post-Traumatic-Stress-Disorder. *App.* 500-501, 509. Mr. Yowell was aware of
10 this *App.* 744-750. Ms. Ortega knew she was not to mix her medications with
11 alcohol. *App.* 501. The mental health issues and violence tendencies were intertwined
12 with the events of June 5th, 2020.

13 On June 5th, 2020, Mr. Yowell and Ms. Ortega were staying at the American
14 Inn in Elko, Nevada. *App.* 463. It was that day that both Mr. Yowell and Ms. Ortega
15 accused each other of committing violence against one another.

16 Mr. Yowell and Ms. Ortega were the only witnesses to the events that
17 transpired between leaving the American Inn and encountering Trey and Mikala
18 Green on Highway 228 between South Fork, Nevada and Lee, Nevada sometime
19 after 9:30 at night. *App.* 390-391, 721-723. Mr. Yowell and Ms. Ortega had differing
20 accounts of what happened in the time between.

1 Mr. Yowell's account starts with him asking Mr. Ortega to drive him to a
2 graduation party in Lee, Nevada. *App.* 752-754. Ms. Ortega said yes, picked him up,
3 and drove him to her hotel room to stay the night. *App.* 752-754. The next day, Jean
4 went to work at 7 p.m. *App.* 754. Mr. Yowell stayed in the hotel room. *App.* 754-755.
5 Mr. Yowell purchased a twenty-four-ounce beer while he was alone in the hotel
6 room *App.* 755, 781. Mr. Yowell drank three sips of that beer. *App.* 781.

7 According to Mr. Yowell, Ms. Ortega came back shortly after 7 p.m. and
8 stated she did not have to work that day; she saw Mr. Yowell's beer, took it from
9 him, and drank it. *App.* 755 Ms. Ortega denied drinking the beer. *App.* 510. Ms.
10 Ortega then took her prescription medication. *App.* 755. Ms. Ortega then wanted to
11 leave to buy methamphetamine. *App.* 756-757.

12 Mr. Yowell told Jean that he was trying to get his child back, so he did not
13 want to be involved with Ms. Ortega getting high on methamphetamine. *App.* 757.
14 Despite that, Mr. Yowell left the decision to buy drugs to Ms. Ortega's own
15 judgment *App.* 757. Mr. Yowell and Ms. Ortega left in her car with her driving. *App.*
16 466-467, 756.

17 After contacting her drug dealer, Ms. Ortega and Mr. Yowell were told to
18 come back in forty-five minutes. *App.* 757. While waiting, Mr. Yowell showed Ms.
19 Ortega where his children lived. *App.* 757. Ms. Ortega did admit that before any
20 violence occurred, she did talk with Mr. Yowell about his ex-girlfriend. *App.* 469. Ms.

1 Ortega continued to drive and crossed 5th street in Elko, Nevada. *App.* 758. Violence
2 erupted shortly after. *App.* 757. Who initiated and committed the violence was
3 disputed by the only two witnesses who saw it transpire: Mr. Yowell and Ms. Ortega.

4 Mr. Yowell testified that he was watching a video on his personal phone. *App.*
5 758. Ms. Ortega struck Mr. Yowell *App.* 758. Mr. Yowell instinctively struck back.
6 *App.* 758. Ms. Ortega pulled the vehicle over and continued to assault Mr. Yowell
7 with, “[b]arrages of punches. *App.* 758-759. After Ms. Ortega struck Mr. Yowell
8 thirty to fifty times, Mr. Yowell cried out, “[p]lease stop hitting me, stop hitting me.”
9 *App.* 759. Mr. Yowell tucked and covered himself. *App.* 759. Ms. Ortega raked Mr.
10 Yowell’s face. *App.* 759. Ms. Ortega struck Mr. Yowell in his throat and testicles.
11 *App.* 759.

12 Mr. Yowell started to lose consciousness. *App.* 759. His vision going dim.
13 *App.* 759. Mr. Yowell grabbed Ms. Ortega’s arms, attempting to stop the attack. *App.*
14 760. Mr. Yowell told Ms. Ortega to stop hitting him or we would start hitting back.
15 *App.* 760. In response, Ms. Ortega bit down on Mr. Yowell’s left arm, “like a Pitbull
16 ... attack.” *App.* 760. Mr. Yowell pleaded with Ms. Ortega to stop biting his arm.
17 *App.* 760. Mr. Yowell could feel Ms. Ortega’s teeth sinking into his arm. *App.* 760-
18 761. He could feel his flesh ripping open. *App.* 761. Mr. Yowell, again, begged Ms.
19 Ortega to stop ripping open his flesh. *App.* 761. Ms. Ortega started ripping her mouth

1 back and forth. *App. 761*. Mr. Yowell was terrified in that moment. *App. 761*. He
2 could not think clearly. *App. 761*. He did what instinct told him to do.

3 Mr. Yowell struck Ms. Ortega one time. *App. 761*. He verbally warned her
4 again to stop biting him or he would strike her. *App. 761*. Ms. Ortega did not let go.
5 *App. 762*. Mr. Yowell struck Ms. Ortega several more times. *App. 762*. Specifically,
6 Mr. Yowell thought it was between seven to twelve strikes. *App. 762*. It was only
7 after that that Ms. Ortega released her flesh-ripping grip from Mr. Yowell's arm.
8 *App. 761-763*. Ms. Ortega's face started to swell up from her upper lip upwards. *App.*
9 *763*. She could not see. *App. 763*.

10 Mr. Yowell asked Ms. Ortega if she wanted to contact law enforcement. *App.*
11 *763-764*. She declined, worried about her supervised release. *App. 764*. She asked
12 Mr. Yowell to drive her car. *App. 764*. The two switched seats with Mr. Yowell now
13 driving. *App. 763*. Mr. Yowell told Ms. Ortega, "I'll take you to jail or I'm going
14 home." *App. 765*.

15 Disputing that initial episode of violence, Ms. Ortega explained it as a random
16 act of violence initiated by Mr. Yowell. Specifically, "[w]e were going for a ride, and
17 he just all of the sudden looked at me and started hitting me in the face." *App. 466*.
18 Ms. Ortega claimed that Mr. Yowell hit her while she was driving the car. *App. 470*.
19 Ms. Ortega believed Mr. Yowell hit her about eight to ten times. *App. 470*. She also
20 admitted she, "did throw some punches." *App. 513*.

1 In the aftermath, Mr. Ortega admitted that she did not want law enforcement
2 involved. *App.* 472. She also admitted that she wanted Mr. Yowell to drive. *App.* 472.
3 They started driving south after Jean consented to driving to Lee, Nevada. *App.* 514,
4 766. The parties drove for several miles towards Lee, Nevada. *App.* 473-474, 766-
5 769. Both claimed that the other party continued to attack them while driving to Lee.

6 Mr. Yowell testified that he was driving on the highway towards Lee, Nevada
7 when Ms. Ortega struck him again. *App.* 770. Mr. Yowell swerved and almost
8 wrecked the car. *App.* 770. He struck back at Ms. Ortega. *App.* 770. Continuing down
9 the road, Ms. Ortega attacked Mr. Yowell three or four more times. *App.* 770. Ms.
10 Ortega threatened to kill Mr. Yowell. *App.* 770. She threatened to have her brothers
11 or gang members kill Mr. Yowell. *App.* 770. Ms. Ortega claims that Mr. Yowell
12 attacked her and that he said, "I'm holding you captive." *App.* 472.

13 Eventually the car stopped. *App.* 473, 772. Sometime later, Trey and Mikala
14 Green came upon Mr. Yowell, Ms. Ortega, and Ms. Ortega's car. *App.* 413-418. Mr.
15 Yowell left the scene towards Lee, Nevada. *App.* 422. Law enforcement and an
16 ambulance later come on scene. *App.* 424.

17 Deputy Brenda Cortez of the Elko County Sherriff's Office took pictures of
18 Ms. Ortega. *App.* 538. One picture captured the injuries to Mr. Ortega's face. *App.*
19 541. Other than what may have been a minor bruise, there were no visible injuries to
20

1 Mr. Ortega's lower lip. *App.* 552-553. There was swelling to her upper lip but not her
2 lower lip. *App.* 533. There were no injuries to Ms. Ortega's chin. *App.* 533-534.

3 Sgt. Calvern Williams ("Sgt. Williams") of the Elko County Sherriff's office
4 came on scene around 9:30 P.M. *App.* 681-683. Sgt. Williams contacted Ms. Ortega
5 on scene. *App.* 683. Sgt. Williams contacted Ms. Ortega again at the hospital about
6 an hour later. See, *App.* 691-692 (showing a time of around 4:41:29 on the bodycam
7 for the interview on the highway, and a start time of 5:41:03 for Exhibit 3). Sgt.
8 Williams recorded his conversation at the hospital. *App.* 693. The State moved to
9 admit the recording, marked as Exhibit 3. *App.* 693. The trial court admitted the
10 exhibit over the defendant's objection. *App.* 693-698.

11 The recording is 7 minutes and 54 seconds long *App.* 967-970. The recording
12 contains multiple statements that include Ms. Ortega talking about Mr. Yowell
13 attacking her, the dating relationship between them, and where they traveled. During
14 the video, Ms. Ortega is sedate and replying only intermittently to questions.

15 Law enforcement arrested Mr. Yowell the following day on June 6th, 2020,
16 around 8:45 A.M. *App.* 525-526. Chief Andrew Neff of the South Fork Indian
17 Reservation Police ("Chief Neff") went to 6 Cottonwood on the South Fork Indian
18 Reservation to arrest Mr. Yowell. *App.* 525. Chief Neff recorded his interactions with
19 Mr. Yowell over bodycam, marked as State's Exhibit 4. *App.* 526. The State moved
20 for the admission of State's Exhibit 4 with no opposition from the defense. *App.* 526.

1 Chief Neff noticed injuries on Mr. Yowell. *App.* 528. Those injuries included
2 scratches. *App.* 531. Scratches on the left side of Mr. Yowell's face. *App.* 532. One
3 going down near his mouth. *App.* 532. Another vertical scratch going down his left
4 cheek. *App.* 533. Chief Neff also noted a wound on Mr. Yowell's left arm triceps
5 area. *App.* 533-534. Chief Neff immediately transported Mr. Yowell to the Elko
6 County Jail. *App.* 534.

7 Once at the jail, Deputy Tyler Bear of the Elko County Sherriff's Office
8 helped book Mr. Yowell into the jail. *App.* 627. Part of that process included taking
9 photographs of Mr. Yowell's injuries. *App.* 627. Those photographs depicted wounds
10 on Mr. Yowell's left cheek and jawline, injuries to his nose, scratches around an eye,
11 scratches near an ear, scratches on his left collarbone and shoulder, and scratches on
12 his lower torso. *App.* 629-637. The photographs also showed an injury to Mr.
13 Yowell's left arm. *App.* 629-637. There were two wounds with bruising surrounding
14 them. *App.* 637. Sgt. Williams also had two opportunities shortly after June 5th, 2020,
15 to observe wounds on Mr. Yowell.

16 Sgt. Williams met with Mr. Yowell on June 6th, 2020, and again on June 13th,
17 2021. *App.* 700-701. Mr. Yowell showed Sgt. Williams, "what appeared to be a bite
18 mark." *App.* 701. Mr. Yowell described the injury as a bite mark that Ms. Ortega
19 inflicted. *App.* 701. Sgt. Williams also saw many of the same injuries that Deputy
20

1 Tyler Bear documented. *App.* 725-726. Sgt. Williams admitted that Mr. Yowell's
2 description of events was consistent with the injuries her observed. *App.* 714-715.

3 SUMMARY OF THE ARGUMENT

4 The trial court denied Mr. Yowell a fair trial. The United States Constitution
5 and Nevada Constitution provide individuals with a fundamental right to a fair trial.
6 *U.S. Const. Amend XIV, Nev. Const. Art. 1, § 8, Hightower v. State*, 123 Nev. 55, 57,
7 154 P.3d 639, 640 (Nev. 2007). The Confrontation Clause of the Sixth Amendment
8 provides the accused with the right to confront witnesses against them. *U.S. Const.*
9 *Amend. VI, Amend. XIV*. A right to a fair trial includes the inadmissibility of hearsay
10 evidence. NRS § 51.035.

11 ARGUMENT

12 **A. Standard of Review**

13 On appeal, this Court reviews a District Court's legal conclusions de novo
14 while reviewing factual findings for clear error. *Somee v. State*, 124 Nev. 434, 441,
15 187 P.3d 152, 157-158(Nev. 2008). De novo review determines if a trial court
16 infringed upon the constitutional right of confrontation by improperly limiting
17 cross-examination. *Mendoza v. State*, 122 Nev. 267, 130 P.3d 176(Nev. 2006).
18 This Court reviews a district court's decision to admit or exclude evidence for
19 abuse of discretion. *Chavez v. State*, 125 Nev. 328, 344, 213 P.3d 476, 487(Nev.
20 2009).

1 **B. The District Court Infringed Upon Mr. Yowell's Confrontation Rights**
2 **When it Limited the Defense's Cross-Examination of Jean Ortega.**

3 An essential part of a defendant's constitutional right of confrontation is the
4 opportunity to cross-examine witnesses. *Delaware v. Van Arsdall*, 475 U.S. 673,
5 678, 106 S. Ct. 1431, 1435 (1986). The trial court must not only allow the
6 opportunity but ensure an effective opportunity to cross-examine. *See, Davis v.*
7 *Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111 (1974). Denial of the right of
8 effective cross-examination is constitutional error of the first magnitude and no
9 want of prejudice will cure it. *Id.* Any conviction obtained in a trial that denies the
10 federally guaranteed constitutional right to confront witnesses is invalid. *Brookhart*
11 *v. Janis*, 384 U.S. 1, 2-3, 86 S. Ct. 1245, 1246(1966). Abiding by the Framers's
12 design for a fair trial, directed in part by confrontation, avoids a trial that results in
13 an invalid conviction.

14 The inherent design and purpose of the right of confrontation is preventing
15 improper restrictions on the types of questions that defense counsel may ask during
16 cross-examination. *Pa. v. Ritchie*, 480 U.S. 39, 52, 107 S. Ct. 989, 999(1987). That
17 design imparts upon the trial assurances that the most reliable evidence is coming
18 before the jury. Indeed, the Confrontation Clause's ultimate goal is ensuring
19 reliability of evidence. *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354,
20 1370(2004). And producing that substantive outcome of reliable evidence at trial
 comes from the procedural guarantee of cross-examination unencumbered by

1 improper interference. *See, Id.*(holding, reliability of evidence is a procedural
2 rather than a substantive guarantee.). In short, forcing a State's witness to undergo
3 the full crucible of cross-examination is the best procedural guarantee of a jury
4 hearing reliable evidence. *Id.*

5 Since juries are the sole triers of fact and credibility, the full crucible of
6 cross-examination permits the defendant to expose facts that the jury could
7 appropriately draw inferences about. *Davis 415 U.S. at 318, 94 S. Ct. at 1111*. That
8 includes allowing evidence of specific acts showing that the victim was a violent
9 person if a defendant seeks to establish self-defense and was aware of those
10 specific acts. *Daniel v. State*, 119 Nev. 498, 515-516, 78 P.3d 890, 902(Nev.
11 2003). "This evidence is relevant to the defendant's state of mind, i.e., whether the
12 defendant's belief in the need to use force in self-defense was reasonable." *Id.*

13 *Daniel v. State*, points out that a testifying defendant should be allowed to
14 corroborate his knowledge of the violent acts of the alleged victim with specific
15 acts of violence he is aware of. *Id.*, NRS § 48.045, NRS § 48.055. This includes
16 allowing extrinsic evidence of specific acts of the victim's prior violent actions.
17 *Daniel* 119 Nev. at 516, 78 P.3d at 902.

18 To avoid error, the court must allow evidence of the specific acts presented
19 through the defendant's own testimony, through cross-examination of the victim,
20 and through extrinsic proof. *Daniel* 119 Nev. at 516-517 (Nev. 2003). To do

1 otherwise is an abuse of discretion by unduly limiting appellant's cross-
2 examination of the victim. *Id.*

3 Unlike the dimension of character evidence within the confrontation clause
4 analysis that *Daniel* focused on, *Leonard v. State* dealt with impeachment that
5 explored the potential bias of a witness. *Leonard v. State*, 117 Nev. 53, 17 P.3d
6 397(Nev. 2001). There, the Court reiterated that harassment, prejudice, confusion
7 of the issues, witness safety, or interrogation that is repetitive or only marginally
8 relevant are factors considered to decide if the court should limit cross-
9 examination.

10 Contrary to the victim in *Daniel*, evidence of the witness's prior criminal
11 conduct was inadmissible, and, therefore, restricting cross-examination was not
12 improper. *Id.* 117 at 72, 17 P.3d at 409. Though *Daniel* cited *Leonard* for another
13 proposition, the Court did not expressly adopt the same factors test to decide if the
14 trial court improperly limited cross-examination for establishing part of a self-
15 defense argument. *Daniel* 119 at 504 *fn.*3, 78 P.3d at 894 *fn.*3. Instead, the *Daniel*
16 decision clearly states that a trial court abuses its discretion in unduly limiting a
17 defendant's cross-examination of the victim in the context of supporting the
18 reasonableness of the defendant's state of mind at the time of defending himself.
19 *Id.* 119 Nev. at 516-517, 78 P.3d at 902.

1 The trial court in this case abused its discretion by unduly limiting Mr.
2 Yowell's cross-examination into Ms. Ortega's prior violent acts. That impaired Mr.
3 Yowell's ability to demonstrate that his state of mind was such that a reasonable
4 person in like circumstances would have acted as he did. Specifically, the trial
5 court erred when it sustained the State's objections to the following series of
6 questions that Mr. Yowell asked Ms. Ortega on cross-examination:

7 "Q: You attacked your father with a knife?

A: Yes. Like I said before, yes.

8 Q: And you stabbed him?

A: Yes.

9 Q: And you stabbed him more than once?

A: Yes.

10 Q: And you stabbed him multiple times?

A: Yes.

11 [Prosecutor]: Objection, asked and answered.

Q: You stabbed him ...

12 The Court: I'll sustain the objection

Q: You stabbed him over ten times?

13 A: Rough – yes.

Q: You stabbed him fifteen times?

14 [Prosecutor] Objection.

...

15 The Court: I'm going to sustain the repetitive nature of the question.

16 *App. 497-498.*

17 Mr. Yowell argued self-defense in closing argument. *App. 918-924* Both Mr.
18 Yowell and Ms. Ortega testified that Mr. Yowell was aware of Ms. Ortega's attack
19 on her father. *App. 499, 739.* But the court below hampered Mr. Yowell's self-
20 defense argument by closing off the defendant's cross-examination of Ms. Ortega's

1 specific violent acts. Mr. Yowell needed to show that his reaction to Ms. Ortega's
2 attack was reasonable and proportionate based on what he knew about Ms. Ortega
3 violently attacking her own father—stabbing him repeatedly with a knife. The
4 court abused its discretion, and the error was beyond harmless.

5 Harmless error is any error that does not affect substantial rights. *Pimentel v.*
6 *State*, 133 Nev. 218, 221, 396 P.3d 759, 763(Nev. 2017). Harmless error requires
7 asking whether it appears beyond a reasonable doubt that the error complained of
8 did not contribute to the verdict obtained. *Cortinas v. State*, 124 Nev. 1013, 1016,
9 195 P.3d 315, 317(Nev. 2008).

10 Had Mr. Yowell not been hampered, he would have been able to show and
11 argue that in that moment when Ms. Ortega's clamped her teeth down on his arm,
12 ripping his flesh, he knew the true degree of violence Ms. Ortega was capable of.
13 He could have shown that Ms. Ortega stabbed her father over ten times, over
14 fifteen times, over twenty times, or more. The number of times she stabbed her
15 father would have shown that Mr. Yowell reasonably believed that his only escape
16 from that attack was to hit Ms. Ortega back. To hit her multiple times. And,
17 unfortunately, while defending himself cause a grievous yet justified injury. The
18 court below committed error that contributed to the verdict of guilty by preventing
19 Mr. Yowell from showing the jury the full breadth of Ms. Ortega's violent episode
20 and Mr. Yowell's fear from his knowledge of that episode.

1 **C. The District Court Abused its Discretion by Admitting the Video of Jean**
2 **Ortega's conversation with Sgt. Williams at the hospital.**

3 The District Court erred by admitting Exhibit 3, the body cam footage of
4 Jean from the hospital. The Court erroneously ruled that it fell under multiple
5 hearsay exceptions: prior inconsistent statement, rehabilitation, present sense
6 impression, and excited utterance.

7 When beginning her testimony, Ms. Ortega made it clear that she
8 remembered the events of June 5th, 2020, well:

9 Q: Okay. Now, do you recall the day of June 5th when you got hurt?
10 Do you recall that day well?

11 A: Yes, as a matter of fact I do. *App. 465-466.*

12 However, Ms. Ortega did testify that she did not remember the
13 interview at the hospital with Sgt. Williams. *App. 482-483.* Later, Deputy
14 Williams testified about his encounter with Ms. Ortega at the hospital. This
15 is when the State moved to admit exhibit 3; the court admitted it over Mr.
16 Yowell's objection. *App. 693-698.*

17 **i. The Video Does Not Fall Under the Hearsay Prior Inconsistent**
18 **Statement Exception.**

19 The State argued that the video fell within the prior inconsistent statement
20 exception. The relevant law here being NRS 51.035(2)(a). NRS § 51.035.

 Prior to the court admitting the video, Ms. Ortega testified on direct and
 cross-examination. As reflected in the video, nothing said in it was inconsistent

1 with her prior testimony. The State erroneously believed that the mere fact that Ms.
2 Ortega did not generally remember the interview meant that the contents of the
3 interview were admissible.

4 The State confounded the real issue of evaluating the prior testimony at trial
5 and the actual statements and content of what Ms. Ortega said in the video
6 interview. Contrast that with *Crowley v. State*. *Crowley v. State*, 120 Nev. 30, 35,
7 83 P.3d 282, 286(Nev. 2004).

8 The defendant's wife testified about a conversation she had with an
9 investigator. *Id.* She denied telling the investigator that her husband acted
10 inappropriately when intoxicated. *Id.* Specifically, she stated that she did not
11 "remember ever saying anything like that." *Id.* The State then called the
12 investigator as a witness. *Id.* The investigator testified about the comments
13 Crowley's wife made. *Id.* *Crowley* clearly places focus on the discrepancy between
14 particular content between statements over a mere discrepancy between not
15 generally remembering a conversation and admitting all its contents.

16 Ms. Ortega made it clear when she started her testimony that she
17 remembered the events of that day well. Here, nothing in the content of Ms.
18 Ortega's testimony at trial was inconsistent with the content of the video. Instead,
19 the contents of the video unlawfully bolstered a crucial witness.
20

1 This court has previously ruled that admitting hearsay testimony that
2 bolstered the credibility of a lone, crucial witness, is prejudicial error beyond
3 harmless error. *Peterson v. State*, 103 Nev. 455, 458, 744 P.2d 1259, 1261(Nev.
4 1987). Unlike *Peterson*, the need to prevent bolstering evidence was even more
5 important here because the case centered on a battle of credibility between the only
6 two witnesses who witnessed the pertinent events.

7 The error in this case is more egregious than *Peterson*. The battle of
8 credibility being one reason, the admission of extrinsic evidence being the other.
9 The *Peterson* Court considered it reversible error when other officers repeated
10 hearsay testimony. *Id.* Additionally, since there was no inconsistency in the content
11 of the statements, NRS 50.135 did not permit admitting the extrinsic video
12 evidence. NRS § 50.135. Here, the admitted video exhibit not only allowed Sgt.
13 Williams' to bolster Ms. Ortega's testimony while he was testifying but admitted
14 an exhibit that the jury could review repeatedly in jury deliberations.

15 **ii. The Video Does Not Fall Under the Requirements for**
16 **Rehabilitation of a Witness.**

17 The State argued that the video was admissible for rehabilitation. The
18 relevant law here being NRS 51.035(2)(b). NRS § 51.0035. However, the State
19 provided insufficient foundation as to why that hearsay exemption applied.
20

1 The State impeached Ms. Ortega on direct examination. *App.* 477. The fact
2 that she had a felony conviction and that it was for a violent crime came into
3 evidence. Nothing in the plain language of NRS 51.035 demonstrates that a party
4 can impeach its own witness then use that prior impeachment to rehabilitate that
5 same witness to admit otherwise inadmissible hearsay. The case law interpreting
6 this statute involves opposing parties rather than the same party impeaching and
7 rehabilitating the witness. *E.g.*, *Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282,
8 286(Nev. 2004), *Leonard v. State*, 114 Nev. 639, 958 P.2d 1220 (Nev. 1998),
9 *Leonard v. State*, 117 Nev. 53, 17 P.3d 397(Nev. 2001)

10 An additional problem is that the statute makes clear that rehabilitating with
11 a consistent statement is only proper for a, “charge against the declarant of recent
12 fabrication or improper influence or motive.” NRS § 51.035. The State failed to lay
13 proper foundation to show that any such charge was made.

14 Considering, *arguendo*, there was such a charge, the admission of the
15 evidence still cannot stand. If prior consistent statements are made when the
16 witness had a motive to fabricate, the statements do not rehabilitate credibility but
17 only reinforce trial testimony claimed to be false. *Smith v. State*, 100 Nev. 471,
18 472, 686 P.2d 247, 248(Nev. 1984). Here, Ms. Ortega made the statements in the
19 video to Sgt. Williams far outside the time she and Mr. Yowell claim the other
20 person attacked them. At that time, Ms. Ortega would certainly have a motive to

1 fabricate and place blame and criminal liability on Mr. Yowell. Again, this is
2 improper bolstering evidence with an exhibit to support a false claim.

3 **iii. The Video Does Not Fall Under the Hearsay Present Sense**
4 **Impression Exception.**

5 The State argued that the video falls under the present sense impression
6 exception. A present sense impression is a narrative of an event or condition made
7 while the declarant observes it or immediately after. NRS § 51.085. The plain
8 language of the statute does not support the State's argument. An hour or more of
9 time elapsed is not immediate. Understandably, the language does not create a
10 precise quantity of time, but immediate is unambiguous enough to undermine the
11 State's position.

12 The policy for admitting statements under this exception is that the statement
13 is more trustworthy if made contemporaneous with the event described. *Brown v.*
14 *State*, 113 Nev. 305, 933 P.2d 187 (1997). In *Brown*, the Court stated the exception
15 did not apply as there was no evidence that the statement regarding the abuse
16 occurred at the same time as the abuse itself. *Id.*

17 The plain language of the statute, the policy behind it, and common sense do
18 not support the State's interpretation.

19 **iv. The Video Does Not Fall Under the Hearsay Excited Utterance**
20 **Exception.**

The State argued the video falls under the excited utterance exception. An
excited utterance is an unthinking statement made at a moment of great surprise

1 and stress. *See*, NRS § 51.095. If the mental and physical condition of the victim
2 are the same, coupled with the fact that the victim remains under the stress or
3 excitement caused by the incident, it may fall within the excited utterance
4 exception. *Medina v. State*, 122 Nev. 346, 143 P.3d 471(Nev. 2006).

5 In *Medina*, the statements made a day or so after the rape were an excited
6 statement as the, “[victim] was physically and mentally incapable of seeking help
7 because she continued to suffer from trauma of the rape after the rape occurred. *Id*
8 at 353. However, the moment [the neighbor] arrived, [the victim] immediately
9 exclaimed to her that she had been raped and how the rape occurred. *Id*. In essence,
10 [the victim’s] excitement was uttered in response to the appearance of [the
11 neighbor], a rescuer. *Id*.

12 Ms. Ortega’s statements at the hospital are substantially different than the
13 statements made in *Medina*. The incident leading up to the hospital occurred
14 throughout the day. Ms. Ortega was ‘rescued’ by the Greens when they stopped
15 their vehicle and offered her aid. Ms. Ortega spoke with Sgt. Williams, another
16 rescuer. An hour later, Sgt. Williams spoke with Ms. Ortega again. Her speech was
17 slow, and her demeanor calm. She was thoughtful about what she was going to
18 say; there are pauses in between the questions that Deputy Williams asked and her
19 answers. These were not excited utterances. The statements in the video should not
20 have been accepted under the excited utterance hearsay exception.

CONCLUSION

The trial abused its discretion when it improperly limited cross-examination and admitted inadmissible hearsay evidence. Both errors independently were not harmless as they deprived Mr. Yowell of a fair trial. Even so, the Court should still reverse Mr. Yowell's conviction for cumulative error.

The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually. *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (Nev. 2002). Relevant factors to consider in evaluating a claim of cumulative error include whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. *Leonard v. State*, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (Nev. 1998). If the issue of guilt is close, that weighs in favor of finding cumulative error occurred. *See, Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (Nev. 1985). The more serious the crime, the more in favor of reversal this Court should be. *Id.*

The issue of guilt is clearly close because the State had only one witness to testify to the fight that led to Mr. Yowell's conviction. Mr. Yowell was his only witness. The testimony showed that Mr. Yowell did in fact have an injury consistent with a bite. Ms. Ortega only had damage to the upper lip and face area. This supports the idea that she was biting Mr. Yowell while he hit her because her lower face was covered by Mr. Yowell's arm. The outcome of this case rested

1 entirely on the credibility of the witnesses as well as the credibility of Mr.
2 Yowell's belief in support of self-defense. This case was decided on a razor's edge.

3 Though acquitted at trial, the State charged Mr. Yowell with First Degree
4 Kidnapping, a category A felony with a possible sentence of life without the
5 possibility of parole. NRS § 200.310, 200.320. Nevada caselaw does not
6 distinguish between charges acquitted of and convicted of for this analysis. Likely,
7 because the peril of conviction existed through trial but was luckily averted despite
8 trial errors.

9 The number of the errors are few but the prejudicial quality of them together
10 is grave. The facts supporting the credibility of the Ms. Ortega and Ms. Yowell and
11 Mr. Yowell's belief were so intertwined that the abuse of discretion in one error
12 necessarily affected the other. *Big Pond v. State* 101 at 3, 692 at 1289.(reversing
13 the judgment of conviction in part because together the errors had the effect of
14 unfairly undermining appellant's credibility and defense in a rather close case).

15 Mr. Yowell humbly asks this court to reverse the judgment of conviction and
16 grant him a new trial.

1 DATED this 3rd day of February, 2022.

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12 CERTIFICATE OF COMPLIANCE

13 1. I hereby certify that this brief complies with the
14 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
15 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has
16 been prepared in a proportionally spaced typeface using Microsoft Word 2013 in
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2 3. Finally, I hereby certify that I have read this appellate brief, and to the
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5 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
6 which requires every assertion in the brief regarding matters in the record to be
7 supported by a reference to the page and volume number, if any, of the transcript
8 or appendix where the matter relied on is found.

9 I understand that I may be subject to sanctions if the accompanying brief is
10 not in conformity with the requirements of the Nevada Rules of Appellate
11 Procedure.

12 DATED this 3rd day of February, 2022.

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CERTIFICATE OF SERVICE

(a) I hereby certify that this document was electronically filed with the Nevada Supreme Court on the DATED this 3rd day of February, 2022.

(b) I further certify that on the DATED this 3rd day of February, 2022, electronic service of the foregoing document shall be made in accordance with the Master Service List to Aaron D. Ford, Nevada Attorney General; and Tyler J. Ingram, Elko County District Attorney.

(c) I further certify that on the 3rd day of February, 2022,
I mailed, postage paid at Elko, Nevada, one (1) copy to DARWYN ROSS
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89070.

DATED this 3rd day of February, 2022.

SIGNED: /s/ Matthew Pennell

Employee of the Elko County Public Defender