IN THE SUPREME COURT OF THE STATE OF NEVADA

DARWYN ROSS YOWELL, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 83577	Electronically Filed Mar 28 2022 08:46 a.m. Elizabeth A. Brown Clerk of Supreme Court

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

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE FACTS

The State's recitation of facts misrepresents the record. Especially by presenting Mikala and Trey Green as corroborating witnesses. The State refers to the Greens and implies that Mr. Yowell was aggressive and looking for a fight. The State cites the *Joint Appendix* on page 418. That is part of Trey Green's testimony, and there is nothing in his testimony that literally or impliedly shows he thought Mr. Yowell was aggressive or looking for a fight. *Joint Appendix (hereinafter abbreviated "App.") 418.*

The State presents another misleading reference by referring to "the Greens" getting a good look at Mr. Yowell and seeing no injuries. The State cites the *Joint Appendix* on pages 394 and 402, which is only testimony from Mikala Green. But the full crucible of cross-examination showed that her testimony was either exaggerated or based on faulty memory.

Mikala Green told dispatch that Mr. Yowell had dirty blonde hair. *App 404-405.* She admitted that Mr. Yowell actually has black hair. *Id.* She also admitted it was dark. *App 404-405.* Mikala Green testified in vague terms about Mr. Yowell being aggressive, balling up and looking for a fight, and swinging his arms. *App 394-395.*Trey Green contradicted her testimony by saying that Mr. Yowell was waving his arms trying to get their attention without threatening them, not swinging his arms

back and forth or swaggering, and did not look like he was balled up or looking for a fight. *App 427-428.*

It's puzzling why the State would present the facts in such a distorted way. But I assume it is to imply that the injuries Mr. Yowell suffered occurred sometime between the roadside stop and the next morning when he was arrested. But several officers noticed the injuries within several hours the next day. And the descriptions they give coincide with the testimony Mr. Yowell gave about receiving these injuries from Ms. Ortega.

ARGUMENT

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

Emphasizing an alleged victim's violent past is clearly within the prerogative of a defendant. And the nature of cross-examination is to probe the witness for deficiencies in honesty, accuracy, and overall reliability. So, by its nature cross-examination has the inherent tendency to embarrass a witness or cause some vague sense of harassment. The legislature's choice of such vague terms as "embarrass" and "harass" are not clarified through caselaw. But a limitation is inherent in NRS § 50.115.

NRS § 50.115(c) tasks the trial court with protecting a witness from *undue* harassment or embarrassment. NRS § 50.115(emphasis added). The plain language implies that the trial court must allow a party to interrogate a witness in a manner

that could be characterized as harassing and embarrassing so long as it is not "unduly" so.

The imprecise and nebulous language in NRS § 50.115 provides no guidance to determine when a witness's subjective feelings of harassment or embarrassment create a limit to a defendant's constitutionally derived right to confront that witness. But a reasonable limit would be what is already provided for in our code of evidence: Relevant evidence.

NRS § 48.015 tells us that relevant evidence has *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS § 48.015(emphasis added). Most importantly, the limitations in our State evidence code clearly cannot supersede the protections afforded to defendant's in criminal cases. The Court's construction of the Confrontation Clause and its limit place the clearest parameters for a court to limit confrontation. And the weight of the caselaw is in favor of guaranteeing procedures that enable wide latitude in questioning a witness. *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370(2004). *Pa. v. Ritchie*, 480 U.S. 39, 53, 107 S. Ct. 989, 999(1987).

Here, the violent impulses of Jean Ortega were paramount to the issue of Mr. Yowell's self-defense. Showing the jury the number of times that she stabbed her father and her capacity for violence clarifies to the jury just how violent she could

be in an instance of rage. Stabbing ten times is not at violent as stabbing fifteen times. Stabbing fifteen times is not as violent as stabbing twenty times. The level of violence is clearly distinguishable, and the trial court improperly limited Mr. Yowell's Confrontation of Ms. Ortega.

Finally, the State confounds two discrete issues: Ms. Ortega's violent character that the jury can know and Mr. Yowell's specific knowledge about it. Mr. Yowell testified that Ms. Ortega stabbed her father "12 times." *App. 739.* Knowing about those specific acts is required to establish the reasonableness of self-defense. *See*, *Daniel v. State*, 119 Nev. 498, 78 P.3d 890(Nev. 2003). But the violent character of the alleged victim, specifically the specific types and magnitude of violence, are proper for the jury to consider. NRS § 48.045, NRS § 48.055.

Ms. Ortega and Mr. Yowell testified that Mr. Yowell knew about this stabbing. App. *499, 739*. Neither Mr. Yowell nor Ms. Ortega said that Mr. Yowell witnessed that event. The State baldly claims that the Defendant was engaging in a knowingly false line of questioning simply because Mr. Yowell believed the number of times was twelve. That misses two important points. First, Ms. Ortega testified prior to Mr. Yowell, so how is it possible that Mr. Yowell or his attorney knew the line of questioning was false? Secondly, what we, and more importantly the jury, do not know is exactly how many times Ms. Ortega stabbed her father

because Ms. Ortega did not have to answer that line of questioning. And the reason we do not know is because the trial court infringed on Mr. Yowell's right to confront Ms. Ortega on that very issue.

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

i. The Admitted Video Did Not Meet the Requirements of NRS § 50.135.

The State wanted the entire video admitted despite only pointing out that the video intermittently contained perceived inconsistencies. The plain language of NRS § 50.135 indicates that *each* statement must be contradictory before admitting those statements as extrinsic evidence. NRS § 50.135(emphasis added). The State made no record during the objection to this video indicating that each statement was inconsistent. The State should have presented a more precise exhibit that did not include any other statement that was not contradictory.

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

The State never resolved the inherent paradox of claiming that the contents of the admitted video were simultaneously inconsistent and consistent with prior testimony. The State argues that Ms. Ortega had such clarity of mind in the present moment at the hospital that her prior statements detailing a particular hotel, a particular room number, a particular way the car came to a stop, etc. are admissible

as inconsistent statements from her failure of memory at trial. Yet, the State also argues that Ms. Ortega's clarity of mind stops just short of being capable of lying about events that only she and Mr. Yowell witnessed. If Ms. Ortega could recall details the State thought were so important while suffering from her injuries, then her ability to lie was firmly intact as well.

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

The State encourages this Court to consider Ms. Ortega's injuries to determine how immediate her statement was. The plain language of NRS § 51.085 does not make concessions for deficiencies in perception. NRS § 51.085. It is a temporal limit, not a cognitive one, that allows for hearsay to become admissible under this exception. Ms. Ortega's statements were not during or immediately after the perceived event or condition.

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

The State argues, "Ms. Ortega's interview at the hospital seems to clearly fit … an excited utterance as she is still suffering from the effects of the incident." This tells us nothing of the stress or excitement Ms. Ortega was experiencing at the time she made the statements at the hospital. As argued before, Ms. Ortega is subdued and at times unresponsive. The State failed to articulate a single fact that supports the idea that Ms. Ortega was under the stress of excitement caused by the event or condition when interviewed at the hospital.

The State also ends its argument about the admissibility of the video with a red herring. The State argues that the video was excellent evidence of substantial bodily harm. That may show how the video was relevant, but it says nothing about how this exhibit was not inadmissible hearsay.

CONCLUSION

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

DATED this 27th day of March, 2022.

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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 2013 in size 14 Times New Roman font.

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:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 1,923 words; or

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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 the 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 found.

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

DATED this 27th day of March, 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 28th day of March, 2022.

(b) I further certify that on the DATED this 28th day of March, 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 28th day of March, 2022, I mailed, postage paid at Elko, Nevada, one (1) copy to DARWYN ROSS YOWELL, NDOC # 1249369, SDCC, P.O. Box 208, Indian Springs City, NV 89070.

DATED this 28th day of March, 2022.

SIGNED: /s/ Matthew Pennell

Employee of the Elko County Public Defender