IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 82639

TOYER EDWARDS

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Carli Kierny, District Court Judge
District Court Case Nos. C-17-324805-1

APPELLANT'S OPENING BRIEF

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I. NRAP 26.1 DISCLOSURE

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

NONE

Attorney of Record for Toyer Edwards:

/s/ Christopher R. Oram

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IV. JURISDICTIONAL STATEMENT

This case arose from an Information filed in the Eighth Judicial District Court on July 6, 2017. The case proceeded to trial, and the District Court sentenced Appellant Toyer Edwards on May 10, 2018, and filed the Judgment of Conviction on May 22, 2018. Mr. Edwards filed an untimely pro per Notice of Appeal on October 29, 2018. After this Court dismissed Mr. Edwards' appeal as untimely, Mr. Edwards filed a timely Petition for Writ of Habeas Corpus (Post-Conviction) on April 25, 2019. The District Court granted the Petition, which allowed Mr. Edwards to then file his direct appeal. The District Court filed its Notice of Entry of Order Granting Petitioner's Writ of Habeas Corpus on December 13, 2019, and filed an Amended Order Granting Petitioner's Writ of Habeas Corpus on March 12, 2021. The District Court then filed a Notice of Appeal from the Judgment of Conviction on March 17, 2021, as granted by the District Court's order.

This Court has jurisdiction over the appeal from the Judgment of Conviction pursuant to NRS 177.015.

V. ROUTING STATEMENT

Pursuant to the Nevada Rules of Appellate Procedure (hereinafter, "NRAP") 17(b), the Supreme Court may presumptively assign this case to the Court of Appeals.

VI. STATEMENT OF THE ISSUES

1. Whether Mr. Edwards is entitled to reversal because the State presented insufficient evidence at trial to convict him on Counts 1 and 2 of the Information.

2. Whether the District Court erred by giving improper jury instructions.

3. Whether there was cumulative error in the trial proceedings.

VII. STATEMENT OF THE CASE

This is an appeal from the District Court's Judgment of Conviction issued on May 22, 2018.

On July 6, 2017, the State of Nevada charged Appellant Toyer Edwards with two counts of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm. (A. A. Vol. 1, pg. 1-2). The State filed the State's Notice of Intent to Seek Punishment as a Habitual Criminal on August 2, 2017. (A. A. Vol. 1, pg. 4-6).

The case proceeded to trial from February 26, 2018, through March 2, 2018. The jury returned a verdict of guilty on both counts. (A. A. Vol. 4, pg. 701-702). The District Court sentenced Mr. Edwards under the large habitual criminal statute on May 10, 2018, as follows: Count 1- ten (10) years to twenty-five (25) years; Count 2- ten (10) years to twenty-five (25) years, Count 2 to run concurrent with Count 1; and three hundred and fifteen (315) days of credit for

time served. (A. A. Vol. 5, pg. 795-796). The District Court filed the Judgement of Conviction on May 22, 2018. (A. A. Vol. 5, pg. 795-796).

Mr. Edwards filed a Notice of Appeal on October 29, 2018. (A. A. Vol. 5, pg. 797-802). This Court then dismissed the appeal on November 16, 2018. (A. A. Vol. 5, pg. 803-804).

Mr. Edwards filed a Petition for Writ of Habeas Corpus on April 25, 2019, alleging that counsel deprived him of the right to file an appeal. (A. A. Vol. 5, pg. 812-823). The District Court granted the Petition for Writ of Habeas Corpus on December 11, 2019, (A. A. Vol. 5, pg. 829-831), and filed the Notice of Entry of Order on December 13, 2019. (A. A. Vol. 5, pg. 831). The District Court filed an Amended Order Granting Petitioner's Writ of Habeas Corpus on March 12, 2021. (A. A. Vol. 5, pg. 836-839).

The District Court Clerk filed a timely Notice of Appeal on March 17, 2021, pursuant to the District Court's order. (A. A. Vol. 5, pg. 840-841).

VIII. STATEMENT OF FACTS

At approximately 6:55 a.m., on June 18, 2017, an altercation occurred at the Hawaiian Marketplace, at 3743 Las Vegas Boulevard, Clark County, Nevada. (A. A. Vol. 3, pg. 339; Vol. 4 pg. 479). Mr. Toyer Edwards, a homeless man, walked from the street area into the Hawaiian Marketplace at approximately 6:39 a.m. (A. A. Vol. 4, pg. 471). Mr. Edwards then sat in a seat and fell asleep. (A. A. Vol. 4,

pg. 467). At the time of the incident, Mr. Edwards was approximately fifty-eight (58) years old, was approximately 5'5" in height, and approximately one hundred twenty-five (125) pounds in weight. (A. A. Vol. 4, pg. 529, 534).

While in a deep sleep, two security officers approached Mr. Edwards. (A. A. Vol. 4, pg. 483). Security officers William Allison and Chase Lovato were employed for Global Security Concepts, which provided security for the Hawaiian Marketplace. (A. A. Vol. 3, pg. 336, 423). Mr. Allison and Mr. Lovato had both been provided with handcuffs and had been instructed to possess mace as part of their duties. (A. A. Vol. 3, pg. 337; Vol. 4 pg. 465). Mr. Allison and Mr. Lovato did not possess firearms. (A. A. Vol. 3, pg. 379; Vol. 4 pg. 636).

Importantly, neither Mr. Allison nor Mr. Lovato had received any training in how to handle volatile situations or training in any form of de-escalation. (A. A. Vol. 3, pg. 388-389). In fact, Mr. Lovato admitted that he had neglected to attend mace training that was available. (A. A. Vol. 3, pg. 451).

At the time, Mr. Allison was approximately 6'1" in height, weighed 230 pounds, and was 22 years old. (A. A. Vol. 3, pg. 397). Mr. Lovato was 6 feet tall, weighed 210 pounds, and was 21 years old. (A. A. Vol. 4, pg. 483).

Mr. Lovato believed that he was required to wait approximately thirty minutes before asking an individual to leave the property for loitering. (A. A. Vol. 4, pg. 477-478). Mr. Lovato acknowledged that Mr. Edwards appeared to arrive at

6:39 a.m., and was approached by security at 6:55 a.m. This time period, obviously, did not exceed thirty minutes. (A. A. Vol. 4, pg. 480).

Apparently, there are homeless individuals who sleep at the Hawaiian Marketplace. (A. A. Vol. 4, pg. 481). Both security officers wore shirts with the words "security" on the shirt. (A. A. Vol. 3, pg. 341, 424). Mr. Lovato began whistling loudly to wake the sleeping Mr. Edwards. (A. A. Vol. 4, pg. 483). When Mr. Edwards awoke, a verbal altercation ensued. According to Mr. Allison and Mr. Lovato, Mr. Edwards became verbally aggressive when he awoke from his deep sleep. (A. A. Vol. 3, pg. 348). Mr. Allison requested that Mr. Edwards leave, and Mr. Allison began to read a trespass code to him. (A. A. Vol. 3, pg. 338,350). Allegedly, Mr. Edwards responded that he was going "to stitch" them up and that he was going to kill them. (A. A. Vol. 3, pg. 433).

Mr. Lovato began jangling his handcuffs and decided he would make a citizen's arrest. (A. A. Vol. 4, pg. 486, 495; Vol. 3, pg. 434). Prior to Mr. Edwards producing a weapon, Mr. Lovato unsuccessfully attempted to mace Mr. Edwards, and then in a second attempt, maced him in the face, causing some mace to reach Mr. Allison's face as well. (A. A. Vol. 3, pg. 436). Security believed that Mr. Edwards had a weapon in his pocket because he placed his hand in his pocket and said, "I've got mine." (A. A. Vol. 3, pg. 352, 431).

Mr. Lovato admitted that Mr. Edwards' first response upon being awoken was to request that they go get security. (A. A. Vol. 3, pg. 428-429). Mr. Lovato also admitted that once he had decided that they were going to make a citizen's arrest, they were not going to let Mr. Edwards leave. (A. A. Vol. 4, pg. 490).

After being maced, Mr. Edwards began fighting back with the officers and ultimately cut both officers with a knife. (A. A. Vol. 3, pg. 354-361, 438). Mr. Allison sustained a cut below his rib cage and one on his shoulder. (A. A. Vol. 3, pg. 354-360). Mr. Allison went to the hospital where he received an adhesive bandage and received instructions to wear the bandage for two to three days. (A. A. Vol. 3, pg. 358, 381). He claimed he suffered approximately a month of discomfort from the shoulder and approximately three months of pain from the cut on the rib cage. (A. A. Vol. 3, pg. 360-361). He spent approximately five hours in the hospital. (A. A. Vol. 3, pg. 422). His scars were only noticeable as a being a "pinker color" than his skin. (A. A. Vol. 3, pg. 361).

Mr. Lovato was cut on his right thigh and taken to UMC Medical Center. (A. A. Vol. 3, pg. 438). An adhesive bandage was used to treat Mr. Lovato, and he remained in the hospital for approximately four or five hours. (A. A. Vol. 3, pg. 438, 442; Vol. 4 pg. 502-503). Mr. Lovato received no future treatment for the injury. (A. A. Vol. 4, pg. 503). In fact, the first responding officer Joshua Simms, followed both Allison and Lovato to the hospital. (A. A. Vol. 4, pg. 533).

Thereafter, Officer Simms drafted a report describing the injuries as "minor." (A. A. Vol. 4, pg. 533).

On the other hand, Officer Simms noted that Mr. Edwards bled profusely from his head, and he had an appearance consistent with being maced. Mr. Edwards was in handcuffs and was requesting a tissue. (A. A. Vol. 3, pg. 453; Vol. 4 pg. 524-527).

Interestingly, after the incident, Mr. Allison received training on de-escalation policy, and Mr. Lovato was told that in the future, they should call Metro for security reasons. (A. A. Vol. 3, pg. 403; Vol. 4 pg. 493).

IX. SUMMARY OF THE ARGUMENT

Mr. Edwards should not have been convicted on Counts 1 and 2 of the Information because the State presented insufficient evidence at trial to convict Mr. Edwards. Mr. Edwards now seeks an order reversing his convictions and remanding the case for a new trial.

X. ARGUMENT

A. This Court should reverse Mr. Edwards' convictions on Counts 1 and 2 of the Information because the State presented insufficient evidence at trial to convict Mr. Edwards.

Standard of Review

The law has been long established that when facing a challenge to the sufficiency of the evidence presented at trial, this Court must use the following

standard: "After viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010); see also *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Edwards v. State*, 90 Nev. 255, 258–59, 524 P.2d 328, 331 (1974).

The Due Process Clause of the Fifth Amendment prohibits a criminal conviction unless the prosecution has proved every element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007); *Brass v. State*, 128 Nev. 748, 754, 291 P.3d 145 (2012). While a conviction will not be overturned if there is substantial evidence in the record to support the verdict, it follows that a conviction must be reversed if the evidence is so weak as to render it as no evidence at all. *Sanders v. State*, 90 Nev. 433, 529 P.2d 206 (1974). A conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. *Thompson v. Louisville*, 362 U.S. 199, 204, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). Additionally, "Where there is substantial evidence to support the jury's verdict, the verdict will

not be upset on appeal." *LaPierre v. State*, 108 Nev. 528, 836 P.2d 56 (1992), citing *Bolden v. State,* 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Furthermore, the Due Process clause of the United States Constitution protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime alleged by the State. See, *Origel-Candido v. State*, 114 Nev. 378, 956 P.2d 1378 (1998).

1. The State failed to present sufficient evidence to convict Mr. Edwards on Counts 1 and 2 because he acted in self-defense.

NRS 200.481 provides in pertinent part:

> 1. As used in this section:
>
> (a) "Battery" means any willful and unlawful use of force or violence upon the person of another.
>
> ...
>
> 2. Except as otherwise provided in NRS 200.485, a person convicted of a battery, other than a battery committed by an adult upon a child which constitutes child abuse, shall be punished:
>
> (e) If the battery is committed with the use of a deadly weapon, and:
>
> (2) Substantial bodily harm to the victim results or the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $10,000.

Nevada's battery statute derives from California's statute. *Byars v. State*, 130 Nev. 848, 863, 336 P.3d 939 (2014), citing, *Hobbs v. State*, 127 Nev. 234,

237-238, 251 P.3d 177, 179-80 (2011). In order to prove the crime of battery, "the prosecutor need only prove that "the defendant actually intend[ed] to commit a willful and unlawful use of force or violence upon the person of another." *Byars*, 130 Nev. at 863, citing *People v. Lara*, 44 Cal.App.4th 102, 51 Cal.Rptr.2d 402, 405 (1996). The *Byars* Court focused upon the defendant's intent "to use force upon another" in determining that the State met the burden to prove the crime of battery. *Byars*, 130 Nev. at 864. In reviewing the *Byars* decision, this Court has held "the term "willful" to be synonymous with "intentional."" *Cox v. State*, 132 Nev. 959 (2016) (unpublished disposition), citing *Byars*, 130 Nev. at 863.

In conjunction with the statutory definition of battery, it is imperative to assess the value of the deadly weapon and substantial bodily harm elements. In *Rodriguez v. State*, 134 Nev. 780, 782, 431 P.3d 45 (2018), this Court held that the "use of a deadly weapon" and "substantial bodily harm" elements constituted elements of the offense, rather than sentencing enhancements. See also, *Hernandez v. State*, 129 Nev. 1121 (2013) (unpublished disposition).

In *Green v. State*, this Court handled a sufficiency of the evidence claim in a case involving the charge of battery with use of a deadly weapon resulting in substantial bodily harm against a security officer. 125 Nev. 1040 (2009) (unpublished disposition). The facts of the *Green* case contrast against the facts of instant case to shed light upon why the instant case should be reversed.

The facts in *Green* show that Mr. Green urinated on a car behind a stage, and a security officer approached Mr. Green. *Id*. The security officer told Mr. Green to leave the property. *Id*. The security guard tapped Mr. Green on the shoulder and asked him to take a walk. *Id*. Mr. Green then swung with a box cutter at the security officer's neck. *Id*. According to the Court's rendition, "The jury was also shown a surveillance video recording of the incident, which depicted Green swinging at the victim before the security officers attempted to restrain him." *Id*.

Here, in contrast, the State did not prove either count of battery with use of a deadly weapon resulting in substantial bodily harm because Mr. Edwards acted only after the security officers attacked and became aggressive with him.

First, the State did not prove either the willfulness or unlawfulness of the use of force or violence. To prove this element, the State would have needed to show that Mr. Edwards intended to act unlawfully by using force upon the security officers. The evidence presented at trial demonstrated the exact opposite.

Under NRS 193.230 and 193.240, an individual may resist an offense when he is about to be injured. Additionally, NRS 200.275 provides:

> In addition to any other circumstances recognized as justification at common law, the infliction or threat of bodily injury is justifiable, and does not constitute mayhem, battery or assault, if done under circumstances which would justify homicide.

Self-defense constitutes an applicable defense to a battery charge in Nevada. *Davis v. State*, 130 Nev. 136, 141, 321 P.3d 867 (2014), citing *Rosas v. State*, 122 Nev. 1258, 1262, 147 P.3d 1101 (2006). In other words, self-defense applies to charges other than homicide. *Id*. at 142. Nevada law permits an individual to act in self-defense when he reasonably believed the force to be "necessary under the circumstances to avoid death or great bodily injury to himself." *Id*.

At trial, the State showed a video of the incident between the security officers and Mr. Edwards. See, Video, Exh. 3.[1] The video shows the security officers standing with Mr. Edwards after awakening him from his slumber. Moreover, the officers brandished their handcuffs. The video further shows one of the security officers deliberately preparing and using mace to attack Mr. Edwards, while Mr. Edwards merely stood in his place. In fact, the video shows Mr. Edwards not even swinging his arms until after he had been maced and after the security officers began trying to detain him. At that point, the altercation became physical. Responding LVMPD Officer Joshua Simms characterized the security officers' injuries as "minor," but Officer Simms noted Mr. Edwards bled profusely from his head. In what turned out to be a two-against-one fight, Mr. Edwards clearly lost.

[1] Along with the instant Opening Brief, Appellant is simultaneously filing the Appellant's Motion to Direct the District Court to Transmit Original Exhibits to the Supreme Court, which will provide the referenced video for the Court's review.

Had there been no video of the incident, maybe the State could have proven the case by circumstantial evidence. Here, however, direct evidence completely undermined the State's theory of the crimes. The evidence showed the security officers to be the initial aggressors. Mr. Edwards absolutely held the reasonable belief that the security officers would cause him great bodily harm. The jury should have found that Mr. Edwards acted in self-defense.

After reviewing the evidence in the light most favorable to the State, the evidence clearly showed that no reasonable jury could have found Mr. Edwards guilty of both counts of battery with use of a deadly weapon resulting in substantial bodily harm. Therefore, Mr. Edwards respectfully requests that this Court reverse his conviction and remand the case for a new trial.

2. The State presented insufficient evidence to convict Mr. Edwards because the injuries to the security officers did not constitute substantial bodily harm.

Nevada law defines "substantial bodily harm" in NRS 0.060 as follows:

> Unless the context otherwise requires, "substantial bodily harm" means:
>
> 1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
>
> 2. Prolonged physical pain.

See, NRS 0.060.

In *Hardaway v. State*, this Court addressed the use of the word "serious" and found that it only applied to the permanent disfigurement portion of NRS 0.060. *Hardaway v. State*, 112 Nev. 1208, 1212, 926 P.3d 288 (1996).

In *Franklin v. State*, this Court found that the State met the burden of proving substantial bodily harm where the defendant broke the victim's arm, which then necessitated "surgery and a titanium plate to repair the injury. *Franklin v. State*, 129 Nev. 1115 (2013) (unpublished disposition). Moreover, the victim experienced continuing numbness and weakness in her arm. *Id*.

This Court has explained that "prolonged physical pain" is subjective but must "encompass some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." *McNamara v. State*, 377 P.3d 106, 111, 132 Nev. Adv. Op. 60 (2016). In *Collins v. State*, this Court held that the defendant in a battery case would not be liable for "prolonged physical pain" for the touching itself, but he would be liable for the physical pain that "lasts longer than the pain immediately resulting from the wrongful act." 125 Nev. 60, 64, 203 P.3d 90, 92-93 (2009); see also *United States v. Fitzgerald*, 935 F.3d 814, 818 (9th Cir. 2019). In *LaChance v. State*, the victim suffered prolonged physical pain because even after she received treatment for her initial injuries, the injuries resulted in permanent shin splints, an inability to sit for long periods, and hearing loss. 130 Nev. 263, 271-72, 321 P.3d 919, 925 (2014). The *LaChance* Court also

reiterated the *Collins* standard that the suffering must last longer than the pain immediately resulting from the wrongful act. *LaChance*, 321 P.3d at 925, *see also, Collins*, 125 Nev. at 64.

Here, the facts adduced at trial revealed that neither officer received injuries that arose to the level of substantial bodily harm. The injuries that occurred created no risk of death. Neither Mr. Allison nor Mr. Lovato ever testified that they had been injured to the point where their lives were in danger. In other words, neither security officer endured life-threatening injuries. Additionally, no evidence presented at trial indicated that either security guard suffered injuries that caused serious, permanent disfigurement or protracted loss or impairment of any bodily function. In fact, both officers suffered cuts that required no treatment beyond receiving adhesive bandages. The record shows that Mr. Allison received adhesive bandages with the doctor's suggestion to wear the bandages for two to three days. (A. A. Vol. 3, pg. 359). Mr. Allison further testified that he felt discomfort in his shoulder for about a month and a half. (A. A. Vol. 3, pg. 360). When describing the scarring at trial, he only indicated that the scars were "more of a pinker color." (A. A. Vol. 3, pg. 361). Additionally, as for Mr. Lovato, he also received an adhesive bandage for his injury and received no additional treatment. (A. A. Vol. 4, pg. 45-46). The responding officer, Officer Simms, reported both security officers' injuries to be "minor." (A. A. Vol. 4, pg. 533).

The record is clear. The security officers suffered only minor injuries that did not amount to substantial bodily harm as defined in NRS 0.060, or as compared to Nevada's reported cases detailing instances of substantial bodily harm. To extend the definition of substantial bodily harm to the injuries in this case would inevitably open the door for the statute to encompass non-serious and non-life threatening injuries.

Therefore, Mr. Edwards respectfully requests that after viewing the evidence in the light most favorable to the State, this Court find that no rational trier of fact could have found beyond a reasonable doubt the elements essential to hold that the injuries in this case amounted to substantial bodily harm. Mr. Edwards further requests that this Court reverse the convictions and remand the case for a new trial.

B. <u>The District Court Erred by Giving Improper Jury Instructions.</u>

Standards of Review

District Courts have broad discretion to decide jury instructions, and this Court reviews those decision for an abuse of discretion. *Mathews v. State*, 134 Nev. 512, 517, 424 P.3d 634 (2018). Moreover, this Court reviews "appellate claims concerning jury instructions using a harmless error standard of review." *Mathews*, 134 Nev. at 517, citing *Barnier v. State*, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003).

When a defendant fails to object to a jury instruction on the record, this Court must review the error under the plain-error standard. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93 (2003). To conduct plain-error review, this Court "must examine whether there was "error," whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights." *Id.* The appellant has the burden to show "actual prejudice or a miscarriage of justice." *Id.*

Jury Instruction Errors

The District Court committed errors pertaining to jury instructions that Mr. Edwards will outline in the following sections.

1. **The District Court improperly gave Jury Instruction No. 5- The Reasonable Doubt Instruction.**[2]

Although Defense Counsel objected to the instruction by requesting that additional language be added to the instruction, Counsel did not object to the statutory language. Therefore, this Court must review the error associated with Instruction No. 5 under the plain-error standard.

The District Court's reasonable doubt instruction given improperly minimized the State's burden of proof. The District Court provided the following instruction regarding reasonable doubt:

[2] The undersigned has raised this issue to this Court numerous times and acknowledges that the Court has always denied the issue. The issue is presented because the Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

Jury Instruction No. 5

> The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the crime.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

(A. A. Vol. 4, pg. 670).

The instruction given to the jury minimized the State's burden of proof by including terms "It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life" and "Doubt to be reasonable must be actual, not mere possibility or speculation." This instruction inflated the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the Constitution requires. See *Victor v. Nebraska*, 511 U.S. 1, 24, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (Ginsburg, J., concurring in part); *Cage v. Louisiana*, 498 U.S. 39, 41, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475,

116 L.Ed.2d 385 (1991). Mr. Edwards recognizes that this Court has found this instruction to be permissible. See e.g. *Elvik v. State*, 114 Nev. 883, 985 P.2d 784 (1998); *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998). Mr. Edwards respectfully requests that this Court find plain-error and reverse his convictions because this instruction lessened the standard of proof required for a conviction and caused prejudice because the State convicted Mr. Edwards based on a lower standard of proof than the Constitution requires.

a. District Court improperly gave Jury Instruction No. 35- The Equal and Exact Instruction.[3]

Defense Counsel did not object to this instruction, and therefore, this Court must review the error associated with Instruction No. 35 under the plain-error standard.

The District Court's "equal and exact justice" instruction improperly minimized the State's burden of proof. The District Court provided the following instruction to the jury:

/ / /

/ / /

/ / /

[3] The undersigned has raised this issue to this Court numerous times and acknowledges that the Court has always denied the issue. The issue is presented because the Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

Jury Instruction No. 35

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

(A. A. Vol. 4, pg. 700).

By informing the jury that it must provide equal and exact justice between the defendant and the State, this instruction created a reasonable likelihood that the jury would not apply the presumption of innocence in favor of Mr. Edwards and would thereby convict and sentence based on an lesser standard of proof than the Constitution requires. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

Because Instruction No. 35 reduced the constitutionally-required standard, Mr. Edwards respectfully requests that the Court find plain error and reverse his convictions.

C. <u>Cumulative Error in the Trial Proceedings</u>

Mr. Edwards' convictions should be reversed because of cumulative error, even if each error standing alone is not enough for reversal. In *DeChant v. State*, 116 Nev. 918, 10 P.3d 108 (2000), this Court reversed a murder conviction because of the cumulative effect of the errors at trial. The *DeChant* Court

provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction." *Id*. at 113, citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

Likewise, in *United States v. Necoechea*, the Ninth Circuit Court of Appeals found that although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal." *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993). Additionally, "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Montana v. Egelhoff*, 518 U.S. 37, 53, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)).[4]

Additionally, the "cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."

[4] "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) citing *Chambers*, 410 U.S. at 290 n.3.

Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 420 (2007).[5] "Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *Alcala v. Woodford*, 334 F.3d 862, 883 (9th Cir. 2003). A court should consider (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.*

Here, the question of guilt as to both Counts 1 and 2 of the Information was extremely close. The evidence presented at trial showed that the security officers confronted Mr. Edwards, maced Mr. Edwards, and began trying to capture him before he acted in self-defense. Likewise, the State presented insufficient evidence regarding the element of substantial bodily harm. Therefore, the issue of guilt is extremely close.

Second, the quantity and character of the errors leans in favor of Mr. Edwards. Mr. Edwards should not have been convicted on either count of the Information based upon the evidence presented at trial.

Third, the jury convicted Mr. Edwards on both counts, and the District Court sentenced him on both counts under the large habitual criminal statute. He

[5] 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 (2002).

is serving many years in prison, and it is essential that this Court find that the errors denied Mr. Edwards his right to a fair trial and reverse the convictions.

XI. CONCLUSION

Based on the foregoing, the Appellant respectfully requests that this Court vacate his convictions and order a new trial.

Respectfully submitted this 10th day of December, 2021.

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XII. CERTIFICATE OF COMPLIANCE

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 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 of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14 point Times New Roman.*

*Certificate of Compliance containing word count continued to page 25.

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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 6,382 words. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of December, 2021.

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XIII. CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 10, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Employee of Christopher R. Oram