IN THE SUPREME COURT OF THE STATE OF NEVADA

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TOYER EDWARDS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 82639

RESPONDENT'S ANSWERING BRIEF

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

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RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT

Pursuant to NRAP 17(b), the Supreme Court may assign this case to the Court of Appeals.

STATEMENT OF THE ISSUES

1. The State presented sufficient evidence at trial to sustain Appellant's convictions for Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm.
2. The jury was properly instructed.
3. Appellant has not demonstrated cumulative error.

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STATEMENT OF THE CASE

On July 6, 2017, Appellant was charged by way of Information with two (2) counts of Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony - NRS 200.481). 1 Appellant's Appendix ("AA") 1–2. On July 7, 2017, Appellant appeared for arraignment, pleaded not guilty, and waived his right to a speedy trial. 1 Respondent's Appendix ("RA") 1. On August 2, 2017, the State filed its Notice of Intent to Seek Punishment as a Habitual Criminal. 1 AA 4.

On February 26, 2018, Appellant proceeded to jury trial. 1 AA 29. On March 2, 2018, after five (5) days of trial, the jury returned its verdict as follows: Count 1 – Guilty of Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm, Count 2 – Guilty of Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm. 4 AA 701.

On May 10, 2018, Appellant appeared for sentencing. 5 AA 795–796. The court adjudicated Appellant guilty, consistent with the jury's verdict, and thereafter sentenced Appellant under the large habitual criminal statute to the Nevada Department of Corrections as follows: Count 1 – ten (10) to twenty-five (25) years, and Count 2 – ten (10) to twenty-five (25) years, concurrent with Count 1, with three hundred and fifteen (315) days for credit for time served. 5 AA 795–796.

Appellant's Judgment of Conviction was filed on May 22, 2018. 5 AA 795. On October 29, 2018, Appellant filed a pro se Notice of Appeal from his Judgment of Conviction. 5 AA 797. On December 14, 2018, the Nevada Supreme Court filed an Order Dismissing Appeal due to untimeliness. 5 AA 803. Remittitur issued on December 31, 2018. 5 AA 810.

On April 25, 2019, Appellant filed a Petition for Writ of Habeas Corpus alleging that counsel denied him of the right to file an appeal. 5 AA 812. On October 2, 2019, the State filed its Response. 5 AA 824. On December 3, 2021, the court held an evidentiary hearing on Appellant's Petition for Writ of Habeas Corpus and took the matter under advisement. 1 RA 2. On December 11, 2019, the court filed its Order Granting Petitioner's Writ of Habeas Corpus. 5 AA 829. On March 12, 2021, the court filed an Amended Order Granting Petitioner's Writ of Habeas Corpus finding that Appellant was deprived of his right to a direct appeal and ordering the district court clerk to prepare and file a Notice of Appeal within seven (7) days of the entry of the order. 5 AA 836. A Notice of Appeal was filed on March 17, 2021, in accordance with the court's order. 5 AA 840. On December 10, 2021, Appellant filed the instant Opening Brief.

STATEMENT OF THE FACTS

On June 18, 2017, William Allison and Chase Lovato were working as security officers at the Hawaiian Market Place located at 3743 Las Vegas Boulevard,

in Clark County, Nevada. 3 AA 336, 339, 426. The Hawaiian Marketplace is private property. 3 AA 339. As part of their job duties, security officers were required to carry a radio, handcuffs, and mace, which they were required to purchase themselves. 3 AA 336, 439.

When security officers encountered a trespasser on the property, it was their procedure to read them the Nevada Trespass Code (NRS 200.207). 3 AA 338. If the trespasser refused to leave and became aggressive after they had been trespassed, if it was required for officer safety, the officers would detain them. 3 AA 338.

At approximately 6:56 a.m. Allison and Lovato were patrolling the property. 3 AA 336. As they were patrolling, they came into contact with Appellant. 3 AA 340–42, 369. Lovato had already seen Appellant at around 6:00-6:15 a.m., at a chair sitting down in front of DJ's tacos. 3 AA 426.

At this time, Appellant was sleeping in a chair in front of the restaurant with his shoes off. 3 AA 343–346, 3 AA 426. His belongings were seated next to him. 3 AA 343–346.

Allison and Lovato approached Appellant and attempted to wake him up. 3 AA 347. Lovato whistled at Appellant, and Allison uttered verbal commands to wake him up. 3 AA 347. When Appellant woke up, he told the officers to leave him alone and go get security. 3 AA 428. The officers advised him that they were security and that he was not permitted to sleep on private property. Id.

Once it was clear Appellant was not going to leave the property, Allison told Appellant he was going to trespass him from the property. 3 AA 429. In response, Appellant told Allison, "You ain't going to do shit . . . I'm going to fuck you up," and called him a racial slur. 3 AA 429.

At this point, Lovato continued to let them speak because he noticed Appellant's hand go into his pocket and reach for what looked like the silver sheen of the butt of a blade. 3 AA 430. With his hand in his pocket, Appellant told Allison, "I've got mines [sic], don't worry." 3 AA 352.

Lovato told Appellant to remove his hand from his pocket or he would be maced. 3 AA 432. Appellant did not remove his hand from his pocket, but continued to verbally threaten Allison as he was being trespassed and told him that he was going to "stich [him] up." 1 AA 433.

The security officers told Appellant that because he refused to leave the property after being trespassed, they were going to enact a citizen's arrest. 3 AA 434. Appellant stood up, was in a stance to fight, and looked as if he was going to attack Allison. 3 AA 434–436. At that point, Lovato realized that there was no way to deescalate the situation and he attempted to mace Appellant. 3 AA 435. After the first try, Lovato realized he was not holding the mace gun properly. 3 AA 435. He readjusted his grip and maced Appellant. 3 AA 435.

Because Appellant was wearing sunglasses, some of the mace bounced off his sunglasses and hit Allison in the face. 3 AA 436. Appellant pulled out his knife and stabbed Allison on his left side below his ribcage. 3 AA 354, 436. Lovato moved behind Allison in order to try to neutralize him, and Appellant stabbed him in the back of his right thigh in the process. 3 AA 438.

Allison suffered another stab wound to his shoulder before getting the knife away from Appellant and throwing it as far off as he could. 3 AA 355, 359. As Allison was trying to place Appellant in handcuffs, Appellant had the broken can of mace pointed in his face, but Allison got it away from him. 3 AA 356.

Allison and Lovato brought Appellant to the security office. 3 AA 356. Appellant continued to boast about what he had done to the security officers and stated that if Lovato had not been there, he would have killed Allison. Id.

Metropolitan Police Officers arrived, and body camera video revealed Appellant was belligerent and obnoxious. Appellant was screaming and taunting the injured security officers, yelling "you can't fuck with me on your best day and my worst day," and "I tore his ass up." 4 AA 634. Defendant continued to brag shouting derogatory terms and odd phrases. 4 AA 514, 518–519, 634.

Lovato and Allison were transported to the hospital. 4 AA 520. Allison was treated for two (2) stab wounds. 3 AA 358. Allison's stab wounds bled consistently

for multiple weeks after the incident. 3 AA 359. Allison testified that, "[e]ach night going to bed, I would wake up with the gauze pads with blood." 3 AA 359.

Allison's pain from his shoulder wound limited his mobility because "lifting it up, front, any pressure on it was very uncomfortable." 3 AA 359. The pain in Allison's shoulder lasted approximately one and a half months. 3 AA 360.

Allison also suffered pain to his rib area from the second stab wound. He stated, "any rotational movements of my trunk caused me a lot of discomfort. Bending, anything like that was very discomfort [sic]. I think, again, same thing, any pressure to the area was painful." 3 AA 361. Allison stated that the pain to his torso lasted almost three (3) months. 3 AA 361. Allison suffered scars from both wounds. Id.

Lovato testified that after he got stabbed, he felt pain. He stated "[a]t first it was just hard to stretch the leg. It felt uncomfortable. Felt like a really nasty bruise." 3 AA 444. Lovato testified that he could not put a lot of weight on his leg after being stabbed, and that this lasted for approximately one (1) month. 3 AA 444. The State showed the jury a photo of a scar Lovato sustained on his leg as a result of the stab wound. 4 AA 444.

SUMMARY OF THE ARGUMENT

This Court should affirm Appellant's judgment of conviction. First, the State presented sufficient evidence to sustain Appellant's convictions for battery with use

of a deadly weapon resulting in substantial bodily harm. As to the willfulness and unlawful elements of the offense, the State presented evidence that Appellant stabbed security officers William Allison and Chase Lovato with a knife after they asked him to leave the Hawaiian Marketplace. The jury heard testimony from both victims, and also viewed videos of Appellant committing the batteries and continuing to taunt the officers after the incident. Moreover, the state presented evidence that Appellant was the initial aggressor and was therefore not able to claim self-defense. As to the substantial bodily harm element, both officers suffered pain from their stab wounds for weeks if not months following the incident and both experienced scarring. Thus, Appellant has cannot show that no rational trier of fact could have found the essential elements of battery with use of a deadly weapon resulting in substantial bodily harm beyond a reasonable doubt and his sufficiency of the evidence claim should be denied.

Second, Jury Instruction Number 5, regarding reasonable doubt, and Jury Instruction Number 35, regarding equal and exact justice, were proper as both challenged instructions have been repeatedly upheld by this Court.

Finally, Appellant fails to demonstrate cumulative error. As all of Appellant's claims lack merit, there are no errors to cumulate.

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ARGUMENT

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS FOR BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing 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." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

It is the jury's role "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the

prosecution." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). When reviewing a sufficiency of the evidence claim, the relevant inquiry is *not* whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the defendant guilty, the limited inquiry is "whether, 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." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (internal quotation and citation omitted) (emphasis in original).

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976).

A. The Jury Properly Found that Appellant Did Not Act in Self-Defense

NRS 200.481 provides:

> 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.

Here, Appellant argues that the State failed to prove the elements of both willfulness and unlawfulness of the use of force because Appellant was acting in self-defense. AOB at 9–12. Appellant argues that the evidence, particularly the video, showed the security officers to be the initial aggressors, and that Appellant held a reasonable belief that the security officers would cause him great bodily harm. Id. at 13.

First, the fact that Lovato deployed his pepper spray prior to Appellant pulling the knife out of his pocket does not axiomatically mean that he was the initial aggressor. As the State explained to the jury in detail, Lovato was justified in using the pepper spray on Appellant first due to the apparent danger he posed to himself and Allison. 4 AA 602, 635.

NRS 193.240 states:

> Resistance by party about to be injured. Resistance sufficient to prevent the offense may be made by the party about to be injured:
> 1. To prevent an offense against his or her person, family or some member of his or her family.
> 2. To prevent an illegal attempt, by force, to take or injure property in his or her lawful possession.

Further, any other person, in aid or defense of a person about to be injured, may make resistance sufficient to prevent the offense. NRS 193.250.

Here, the evidence showed that Appellant became aggressive after Lovato and Allison woke him up and asked him to leave the property. 3 AA 370. After Allison told him he would be trespassed, Appellant told Allison he would "fuck [him] up." 3 AA 429. Lovato saw Appellant reach for what looked like the butt of a blade in his pocket. 3 AA 430. The video showed that Lovato was staring at Appellant's pocket throughout the encounter. 3 AA 449. As Appellant was shaking his hand in his pocket, he was telling Allison "I've got mines [sic], don't worry," and that he was going to "stitch [him] up." 1 AA 433. Throughout the encounter, Appellant was saying things like "I'm going to kill you all." 3 AA 450. Thus, when Appellant jumped up in a position as if he were about to attack Allison, Lovato was absolutely justified in deploying his mace. Lovato was not required to wait for Allison to be attacked before engaging in self-defense. NRS 193.240. The jury heard the testimony of Allison and Lovato and was able to observe Appellant's body language and stance in the video for themselves. It was the jury's duty to assess the credibility of Allison and Lovato and weigh it against the video evidence. Jackson, 443 U.S. at 319, 99 S. Ct. at 2789. Although Lovato deployed his mace first, there was sufficient evidence that (1) he reasonably believed that Allison was about to be attacked, and (2) Appellant's use of force was willful and unlawful.

In addition, there was evidence presented that Allison and Lovato's use of force was reasonable. Lovato merely used mace against Appellant who was threatening his partner's life with a knife. 3 AA 448. At most, the mace would have temporarily disoriented Appellant. This was in stark contrast to Appellant, who intentionally escalated the situation by grabbing his knife, threatening the officers, and stabbing them. 3 AA 430–439.

Appellant largely repeats the same arguments that he made at trial which the jury rejected. The jury heard the same arguments, reviewed the video, heard all of the testimony, and was properly instructed regarding self-defense, yet the jury concluded that Appellant did not act in self-defense. It was up to the jury to determine whether Appellant's self-defense claim was credible in light of the evidence. The jury's finding that Lovato and Allison's use of force was lawful and justified, whereas Appellant's was not, was supported by sufficient evidence and should not be disturbed.

B. The State Presented Sufficient Evidence of Unlawfulness and Willfulness

As explained above, there was ample evidence that Appellant was the initial aggressor and therefore could not claim self-defense. Thus, the element of unlawfulness was met. As to intent, the State also presented sufficient evidence to support this element.

Intent to commit a crime need not be proved by direct evidence but may be inferred from the defendant's conduct and other facts and circumstances disclosed by evidence. Larsen v. State, 86 Nev. 451, 453, 470 P.2d 417, 418 (1970).

The facts of this case are similar to Byars, which Appellant cites.[1] In Byars, the Court held that the State provided sufficient evidence of intent to commit battery where a driver suspected of driving under the influence struck two (2) officers during a warrantless blood draw. Byars v. State, 130 Nev. 848, 852, 336 P.3d 939, 942 (2014). The State introduced evidence that prior to the blood draw, the defendant made it clear that he would resist and stated, "[w]atch. Watch. I know what I can do. Watch." Id. at 863, 336 P.3d 949. The Court held that the State had "provided sufficient evidence to support the jury's verdict beyond a reasonable doubt that Byars intentionally used force upon another, however slight." Id.

In this case, the evidence of intent was far stronger than that presented in Byars. Appellant affirmatively told Allison that he was going to "stitch [him] up," prior to stabbing him and was making comments about killing people. 3 AA 450. In

[1] The State notes that Appellant's argument is largely based on unpublished cases which he cites in violation of NRAP 36(c)(3), which allows only unpublished Nevada Supreme Court cases issued on or after January 1, 2016, to be cited as persuasive authority. Appellant also failed to include the electronic database and docket number, as required under the same rule. The following cases are cited in violation of NRAP 36(c)(3), and the State therefore requests that the Court strike these portions of the brief: Hernandez v. State, 129 Nev. 1121 (2013); Green v. State, 125 Nev. 1040 (2009); Franklin v. State, 129 Nev. 1115 (2013).

addition, the jury was presented with video surveillance which showed Appellant stabbing both officers and continuing to try to resist and spray one of the officers in the face with a broken can of pepper spray even after they had wrestled the knife away from him. 3 AA 374. The jury also saw video footage of Appellant's behavior after the incident which showed him bragging about having committed the batteries. 3 AA 358, 4 AA 518, 596, 634. Accordingly, Appellant has not demonstrated that no rational trier of fact could have found the essential elements of willfulness and unlawfulness beyond a reasonable doubt. See Milton v. State, 111 Nev. at 1491, 908 P.2d at 686–87.

C. The State Presented Sufficient Evidence of Substantial Bodily Harm

NRS 0.060 defines substantial bodily harm as follows:

> NRS 0.060 "Substantial bodily harm" defined. 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.

This court has defined "prolonged physical pain" as "some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." Collins v. State, 125 Nev. 60, 65, 203 P.3d 90, 93 (2009).

Here, both Allison and Lovato experienced physical pain which lasted for a substantial period of time after they were stabbed. Allison testified that his stab

wounds bled consistently for weeks, and that he would wake up with his gauze pads covered in blood. 3 AA 359. His shoulder pain limited his mobility and lasted for over a month, whereas the pain from where he was stabbed in his rib area lasted for over three (3) months. 3 AA 359–60. This clearly qualifies as "prolonged physical pain," pursuant to NRS 0.060. As to Lovato, Lovato struggled to put weight on his leg and experienced pain for approximately one (1) month. 3 AA 444. That Appellant would argue that experiencing pain from a stab wound for approximately one (1) month is puzzling.

In addition, both Allison and Lovato suffered scars as a result of the attack, which qualifies as "permanent disfigurement" pursuant to NRS 0.060. 3 AA 361, 4 AA 444. Both Allison and Lovato were violently stabbed and experienced pain for a month or longer as a result of their injuries. This clearly qualifies as "some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." Collins v. State, 125 Nev. 60, 65, 203 P.3d 90, 93 (2009). Accordingly, Appellant has failed to show that no rational trier of fact could have found the essential elements of battery with use of a deadly weapon resulting in substantial bodily harm beyond a reasonable doubt. His challenge to the sufficiency of the evidence should therefore be denied.

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II. THE JURY WAS PROPERLY INSTRUCTED

Appellant argues that the District Court committed plain error in giving the jury Instruction Number 5 on reasonable doubt, and Instruction Number 35 about equal and exact justice. AOB at 17, 19. Both challenged instructions have been repeatedly upheld by this Court. As an initial matter, Appellant did not object to these instructions and has therefore waived his opportunity for appellate review. Guy, 108 Nev. at 780, 839 P .2d at 584. As such, the issue may only be reviewed for plain error. Maestas, 128 Nev. at 146, 275 P.3d at 89. "Reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." Martinorellan, 131 Nev. at 49, 343 P.3d at 594.

Generally, district courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000. However, this Court reviews de novo "whether a particular instruction . . . comprises a correct statement of the law." Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). District courts have "broad discretion" to settle jury instructions. Id. at 1019, 195 P.3d at 319. A district court may refuse to give a jury instruction substantially covered by another. Davis v. State,

130 Nev. 136, 145, 321 P.3d 867, 874 (2014). Importantly, a trial court may refuse to give an instruction if it is less accurate than other instructions or will confuse the jury. Sanchez-Dominguez v. State, 130 Nev. 85, 90, 318 P.3d 1068, 1072 (2014).

A. Jury instruction #5 was proper

Appellant argues that the reasonable doubt instruction given "minimized the State's burden," "inflates the constitutional standard of doubt necessary from acquittal," and "created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires." AOB30. At trial, the Court gave the following instruction as to reasonable doubt:

> The Defendant is presumed innocent until 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 offense.
>
> 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 and 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 reasonable doubt as to the guilty of the Defendant, he is entitled to a verdict of not guilty.

4 AA 670. The Court did not err in issuing this instruction as NRS 175.211 explicitly requires courts to issue this instruction and none other:

> Definition of reasonable doubt; no other definition to be given to juries.
> 1. 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.
>
> 2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this State.

Specifically, this Court has found this instruction to be constitutional time and time again. Jeremias v. State, 134 Nev. 46, 412 P.3d 43 (2018); Garcia v. State, 121 Nev. 327, 331, 113 P.3d 826, 838 (2005)(finding that "the reasonable doubt instruction required by NRS 175.211 is not unconstitutional); Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003)("This court has repeatedly reaffirmed the constitutionality of Nevada's reasonable doubt instruction); Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999). This is particularly true where, as here, the jury was also instructed on the presumption of innocence and the State's burden of proof. Leonard v. State, 114 Nev. 1196, 1209 969 P.2d 288, 298 (1998). The Ninth Circuit has also deemed this instruction constitutional. Ramirez v. Hatcher, 136 F.3d 1209, 1211 (9th Cir. 1998). Even Appellant acknowledges that this Court has found

the instruction proper and makes no argument for why it should not continue doing so. AOB at 19. As this instruction comported with the law, there was no abuse of discretion, let alone plain error.

B. Jury instruction #35 was proper

Appellant next complains that the instruction on "Equal and Exact Justice" was incorrect because it "created a reasonable likelihood that the jury would not apply the presumption of innocence in favor of [Appellant] and would thereby convict and sentence based on a lesser standard of proof than the constitution requires." AOB31-32.

Here, the Court provided the following jury instruction:

> 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.

4 AA 700. This Court has repeatedly rejected Appellant's argument. This Court in Leonard explained that the instruction to the jury to do "equal and exact justice" does not implicate or lessen a defendant's presumption of innocence because it is not concerned with that presumption or the State's burden of proof. 114 Nev. at 1209

969 P.2d at 298; See Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004); Daniel v. State, 119 Nev. 498, 52278 P.3d 890, 906 (2003). Again, Appellant has not provided any authority for why this Court should now reject decades worth of legal precedent.

III. THERE IS NO CUMULATIVE ERROR

Appellant alleges that the cumulative effect of the alleged errors deprived him of his right to a fair trial. AOB at 20. This Court considers the following factors in addressing a claim of cumulative error: (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, 854–55 (2000). Appellant must present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)).

Appellant has failed to show cumulative error. First, the issue of guilt was not close. The State presented first-hand testimony from the victims as well as video footage of the attack and Appellant's behavior immediately after the attack. Next, there are no errors to cumulate as Appellant has failed to assert any meritorious claims of error. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Finally,

Appellant was not convicted of grave crimes. See Valdez v. State, 124 Nev. 1172, 1198, 196 P.3d 465, 482 (2008) (stating crimes of first-degree murder and attempt murder are very grave crimes). Appellant was convicted of much lesser offenses, and, therefore, the third factor does not weigh in his favor.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 8th day of March, 2022.

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 5,174 words and 22 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 8th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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