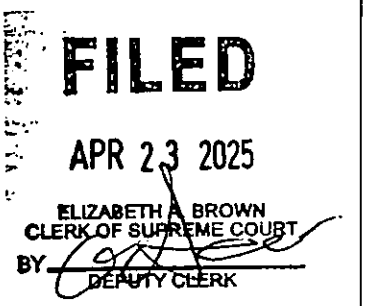
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAKOTA WENFORD HOWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87631-COA



ORDER OF AFFIRMANCE

Dakota Wenford Howell appeals from a judgment of conviction, entered pursuant to a jury verdict, of battery by a prisoner, probationer or parolee with the intent to promote or assist a criminal gang. First Judicial District Court, Carson City; James Todd Russell, Judge.

First, Howell argues the district court plainly erred by permitting the State to admit evidence during the guilt phase of his trial to prove his affiliation with the white supremacist prison gang Outlaw Nazi Skins (ONS) without first conducting a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985). Howell contends the district court should have limited testimony about Howell's tattoos to those validating his membership in ONS and excluded testimony regarding their "deplorable and offensive" racist nature because such evidence was not relevant and was highly prejudicial. Howell also contends the district court should have excluded testimony about Howell's alleged drug use and his status as a felon on similar grounds.

Prior to trial, the parties stipulated to bifurcate the trial between the guilt phase for the battery and the enhancement phase for the intent to promote or assist a criminal gang. The State filed a motion in

limine to admit evidence of Howell's affiliation with ONS during the guilt phase of trial to establish his motive or intent to batter the victim, who was a member of a rival gang. Howell filed a non-opposition to the State's motion and did not object to the introduction of any of the evidence he now challenges on appeal. In light of Howell's seemingly intentional decision to not oppose this evidence, we are not convinced this issue should be reviewed on appeal. *See Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 50 (2018) (declining to "correct[ ] the error under these circumstances" because appellant's decision not to object appeared intentional and doing so "would encourage defendants who are aware their rights are being violated to do nothing to prevent it, knowing that they can obtain a new trial as a matter of law in the event they are convicted"); *see also Turner v. State*, 136 Nev. 545, 550-51, 473 P.3d 438, 445 (2020) (discussing the doctrines of invited error, waiver, and forfeiture and warning against correcting errors on appeal for the reasons discussed in *Jeremias*).

Even were we to review Howell's claim for plain error, *see Chadwick v. State*, 140 Nev., Adv. Op. 10, 546 P.3d 215, 225 (Ct. App. 2024), he is not entitled to relief. To demonstrate plain error, an appellant must show there was an error, the error was plain or clear under current law from a casual inspection of the record, and the error affected appellant's substantial rights. *Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

Bifurcation of the gang enhancement portion of a criminal trial is mandatory "where a failure to bifurcate compromises a defendant's right to a fair trial." *Gonzalez v. State*, 131 Nev. 991, 1002, 366 P.3d 680, 687 (2015). While evidence regarding the criminal activities of a defendant's gang "would generally not be admissible during a guilt phase of a trial" to prove the gang enhancement, evidence of gang affiliation may be

"admissible for other purposes, such as to show motive." *Id.* In order for this other act evidence to be admissible, the district court must determine that (1) the evidence is relevant and is offered for a non-propensity purpose, (2) the other act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *holding modified by Bigpond v. State*, 128 Nev. 108, 110, 270 P.3d 1244, 1245-46 (2012); *see also Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78 (2004) (applying the *Tinch* factors and stating "[t]his court has repeatedly held that gang-affiliation evidence may be relevant and probative when it is admitted to prove motive"). Where no hearing is held for the admissibility of other act evidence, we will not reverse where "the record is sufficient to establish that the evidence is admissible under [*Tinch*] or the trial result would have been the same had the trial court excluded the evidence." *Chadwick*, 140 Nev., Adv. Op. 10, 546 P.3d at 225 (quoting *Diomampo v. State*, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008)). Nevertheless, "if the defendant fails to object to the absence of a *Petrocelli* hearing, an appellate court may review only for plain error affecting the defendant's substantial rights." *Id.*

In its motion in limine, the State argued the victim informed jail officials he was a member of the Aryan Warriors (AW) gang and believed Howell battered him because Howell was a member of a rival prison gang, ONS. The State argued evidence of Howell's gang affiliation was relevant to establish Howell's motive or intent for battering the victim. In its motion, the State sought to admit the following evidence through the testimony of Investigator Ortiz and Detective Torres: (1) Howell is a "validated" member of ONS; (2) the victim is a validated member of AW; (3) the gangs are rivals;

(4) credibility or standing in either gang can be enhanced through an attack on a rival gang member; (5) Howell had a "questionable" or "unfavorable" status in ONS at the time the offense was committed; (6) shortly before the offense, Howell had been sentenced to prison where ONS is very active; and (7) Howell, knowing his return to prison was imminent, attacked the victim to remedy his standing with ONS. As mentioned above, Howell filed a non-opposition to this motion.

During the guilt phase of Howell's trial, the State called Detective Torres and Investigator Ortiz to establish Howell's gang affiliation and explain that such affiliation would provide Howell with a motive or intent to commit the battery against the victim. Torres and Ortiz testified that ONS and AW are rival white supremacist prison gangs whose members often had racist or neo-Nazi tattoos. Ortiz testified that he "validates" or identifies prison gang members from, among other things, their tattoos. Ortiz explained that inmates are assessed different levels of gang affiliation based on a point system and are reevaluated periodically. Ortiz further explained that, while some of Howell's tattoos are "identifiers" of his association with ONS, Howell's other tattoos espousing general white supremacist or neo-Nazi ideologies are also used for validating Howell as an ONS member. Torres testified that, while some of Howell's tattoos are directly related to ONS membership, other tattoos, such as a neo-Nazi shield, could either explain general neo-Nazi beliefs or could be used to define Howell's rank within ONS. Further, Torres explained that other non-gang specific tattoos are consistent with the ideology followed by white supremacist, neo-Nazi gang members, including ONS. Finally, Torres testified that one of Howell's tattoos indicated he was among ONS members who had done drugs. Torres explained that there was a split within ONS

where members who had a white version of this tattoo were believed to not use drugs while members who had a version that was "black faded in" used drugs. Torres inferred that members who did not use drugs were held in higher esteem because the objective was "to make the white race better so you don't do any of those things [drugs] because you want to make your race better."

Here, the challenged evidence was relevant and highly probative of the State's assertion that Howell battered the victim to elevate his standing with ONS prior to going back to prison. Both Torres and Ortiz testified that Howell's status within the gang had diminished prior to the offense and that it was in his best interest to elevate his status in the gang prior to his imminent return to prison. While the victim, Torres, and Ortiz all identified Howell as an ONS gang member, testimony regarding Howell's tattoos, including tattoos not specific to his ONS membership and the one indicating drug use, was relevant in establishing Howell's connection to ONS and Howell's motive to attack a rival gang member based on Howell's status in the gang. Just as the analysis of Howell's tattoos was relevant to the validation process, so too was it relevant in establishing Howell's standing with ONS at the time he battered the victim and his motive to do so. Where evidence of Howell's tattoos and gang affiliation were relevant and highly probative, and where the jury also learned that the victim was a member of a rival white supremacist gang, Howell cannot show that his substantial rights were violated by the admission of the challenged evidence. We conclude Howell fails to demonstrate the district court plainly erred by admitting evidence of Howell's gang affiliation during

the guilt phase of trial.[1] Therefore, we conclude Howell is not entitled to relief based on this claim.

Second, Howell argues he was denied his right to confront the victim about his prior inconsistent statements because the State failed to use the proper procedure to admit those statements as non-hearsay. Howell appears to contend the State was required to confront the victim with a recorded version of the prior statement as opposed to just asking the victim whether he remembered making a particular statement. Howell did not object to the admission of the statements he challenges on appeal. Therefore, we review for plain error.[2]

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. Under Nevada law, "when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure

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[1]The State's motion in limine sought to introduce evidence that Howell was a validated member of a prison gang who attacked the victim to remedy his status with the gang before returning to prison, where the gang is active. Thus, the motion necessarily informed Howell that the State sought to admit evidence of his status as a felon. Because Howell intentionally filed a non-opposition to the State's motion clearly seeking to admit this evidence, we do not consider his claim regarding evidence of his status as a felon on appeal. *See Jeremias*, 134 Nev. at 52, 412 P.3d at 49; *Turner*, 136 Nev. at 550-51, 473 P.3d at 445.

[2]Howell objected only once to the admission of the victim's prior inconsistent statements but does not raise that specific statement on appeal. Further, Howell did not object on confrontation clause grounds. *See Flowers v. State*, 136 Nev. 1, 11, 456 P.3d 1037, 1047 (2020) (providing "a defendant must object on the grounds that admission of the out-of-court statement will violate the defendant's right to confront witnesses; it is not sufficient to object to the statements as inadmissible hearsay" (internal quotation marks omitted)).

of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement pursuant to NRS 51.035(2)(a)." *Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004). "The previous statement is not hearsay and may be admitted both substantively and for impeachment." *Id.* Generally, NRS 50.135(2) precludes the admission of "[e]xtrinsic evidence of a prior contradictory statement by a witness" unless "[t]he statement fulfills all the conditions required by subsection 3 of NRS 51.035; or . . . [t]he witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate him thereon."

During its direct examination of the victim, the State asked the victim about prior statements he made to Torres and Deputy Pacheco regarding the circumstances of the attack, including whether he previously stated Howell struck him, whether his injuries were caused by Howell, and whether the attack was gang related. The State did not confront the victim with a recorded version of his prior statements but rather asked whether he remembered making a particular statement. The victim responded to each question by either denying he made the particular statement or answering he could not remember. Thereafter, the State elicited testimony from Pacheco that the victim said he was attacked by Howell in his cell and the attack was possibly gang related.[3]

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[3]Howell does not challenge any specific prior inconsistent statements admitted through Torres' testimony. Howell alleges body camera video footage depicting Torres' interview with the victim was played for the jury but because "[t]he record does not capture which statements [the victim] made on the video[,] [ ] it is impossible to determine whether they were prior inconsistent statements." Howell stipulated to the admission of the body camera video at trial. However, Howell did not include the body camera

The victim's answers to the State's questions regarding his prior statements constituted a denial of those statements making them prior inconsistent statements under NRS 51.035(2)(a). Moreover, the use of extrinsic evidence from Pacheco and Torres was proper because the victim denied making the prior statements and opposing counsel was afforded an opportunity to cross-examine the victim about them. *See* NRS 50.135(2)(b). Howell offers no legal authority for the proposition that a witness must be confronted with recorded versions of their prior inconsistent statements in order to admit such statements as a prior inconsistent statement or to ensure a defendant's ability to confront the witness about the prior statements. In light of these circumstances, we conclude Howell fails to demonstrate error plain from the record regarding the admission of the victim's prior inconsistent statements at trial. Therefore, we conclude Howell is not entitled to relief based on this claim.

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video in the record on appeal. *See* NRAP 10(a) (stating that "[t]he trial court record consists of the papers and exhibits filed in the district court"); NRAP 10(b)(1) (providing that the parties shall include in an appendix "the portions of the trial court record to be used on appeal"); *see also* NRAP 10(b)(2) (stating that "[i]f exhibits cannot be copied to be included in the appendix the parties may request transmittal of the original exhibits"). And because it is the appellant's burden to ensure that a proper appellate record is prepared, *see Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980), we necessarily presume that the missing body camera video supports the district court's decision to admit the victim's prior inconsistent statements through Torres' testimony and the body camera video footage. *Cf. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). To the extent Howell contends the district court failed to make the statements a part of the trial record, Howell had available to him the procedure outlined in NRAP 10(c) for correcting the record but failed to utilize it.

Third, Howell argues insufficient evidence supports his conviction. When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). And circumstantial evidence is enough to support a conviction. *Washington v. State*, 132 Nev. 655, 662, 376 P.3d 802, 807 (2016).

Howell contends insufficient evidence supports his conviction of battery by a prisoner because the only direct evidence to prove his guilt was inadmissible hearsay. As is discussed above, the victim's prior inconsistent statements regarding the offense were properly admitted through the extrinsic evidence the State presented during trial, from which the jury heard that Howell struck the victim multiple times in the face while both were in custody at the Carson City Jail. Further, the jury saw surveillance video footage depicting Howell entering the victim's cell just prior to the victim leaving his cell, showering to clean himself up following the incident, and informing authorities. The jury could have reasonably inferred from the evidence presented that Howell committed battery by a prisoner. *See* NRS 200.481(1) (defining battery); NRS 200.481(2)(f) (defining the elements and penalty for battery by prisoner without the use of a deadly weapon). Therefore, we conclude Howell is not entitled to relief based on this claim.

Howell also contends insufficient evidence supports the gang enhancement because the State failed to prove the ONS gang commits

felonies as one of its common activities. "Nevada's criminal gang enhancement statute provides for an additional prison sentence, to run consecutively to the sentence for the underlying offense, for any person convicted of a felony 'committed knowingly for the benefit of, at the direction of, or in affiliation with, a criminal gang, with the specific intent to promote, further or assist the activities of the criminal gang.'" *State v. Devries*, 140 Nev., Adv. Op. 82, 561 P.3d 42, 46 (2024) (quoting NRS 193.168(1)). "To establish a group is a criminal gang, the State must show that one of the group's 'common activities' is 'engaging in criminal activity punishable as a felony,' apart from the conduct alleged in the charged offense." *Id.* (quoting NRS 193.168(8)(c)). "That individual members commit crimes to benefit the group is not enough to prove common criminal activity; rather, the State must show that 'felonious action is a common denominator of the gang.'" *Id.* (quoting *Origel-Candido v. State,* 114 Nev. 378, 383, 956 P.2d 1378, 1381 (1998)). The elements of the gang enhancement statute must be proven beyond a reasonable doubt. *Origel-Candido*, 114 Nev. at 382, 956 P.2d at 1380-81; NRS 193.168(4)(b).

Torres testified about the violent, felonious conduct in which ONS members engage. He explained that an ONS member encountering a rival gang member while in custody would be expected to "take action" (fight or engage in violence) on behalf of the gang. Torres also explained that "putting in work" (fighting or stabbing someone) was done by ONS members to benefit the gang. Ortiz further testified that a member of ONS could enhance their status within the gang by committing violent attacks on rival gang members. The jury could have reasonably inferred from the evidence presented that ONS' common activities included engaging in criminal conduct constituting felonies. *See* NRS 200.481(1) (defining battery); NRS

200.481(2)(f), (g) (providing that battery by prisoner is a felony). Therefore, we conclude Howell is not entitled to relief based on this claim.

Finally, Howell argues that the doctrine of cumulative error mandates reversal. Although "[t]he 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), Howell has not demonstrated any errors to cumulate. Therefore, he is not entitled to relief on this claim. *See Chaparro v. State*, 137 Nev. 665, 673-74, 497 P.3d 1187, 1195 (2021) (holding a claim of cumulative error lacked merit where there were no errors to cumulate); *see also United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Therefore, Howell is not entitled to relief based on this claim. For these reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: First Judicial District Court, Department One
Carson City Public Defender
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk