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IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 49087

KIRSTIN BLAISE LOBATO

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

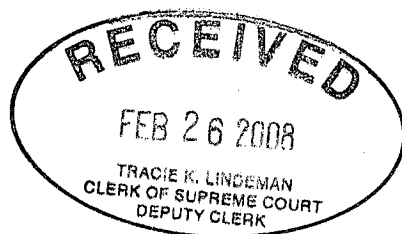
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Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Valorie Vega, District Judge

APPELLANT'S REPLY BRIEF



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1 **I. INTRODUCTION**

2 In her Opening Brief Appellant Lobato presented substantial reasons, which were
3 supported by both the facts and the law, as to why her judgment of conviction must be
4 reversed. The State's Answering Brief fails to establish that the trial proceedings conducted
5 against her were fair and unmarred by constitutional error. Accordingly, her judgment must
6 be reversed.

7 **II. REPLY TO THE STATE'S ARGUMENT**

8 **A. The State failed to present any physical evidence suggesting that Lobato**
9 **killed Bailey. It also failed to present any eyewitness identification of her**
10 **or her car, failed to establish that her numerous alibi witnesses were not**
11 **credible, and failed to establish that Bailey was the person that Lobato**
12 **admitted slashing. Given the incredible inconsistencies between details**
13 **provided by Lobato about the man who attacked her and the details**
14 **concerning Bailey's death and the complete lack of other evidence, there**
15 **is insufficient evidence to support Lobato's conviction.**

16 In her Opening Brief Lobato contended that there was insufficient evidence for the
17 jury to convict her on the charges of voluntary manslaughter with use of a deadly weapon and
18 sexual penetration of a dead human body. In response, the State argues sufficient
19 circumstantial evidence was presented at trial. Answering Brief at pages 6. Specifically, the
20 State argues that compelling evidence was presented concerning statements Lobato made to
21 her friends in Panaca and to Las Vegas police officers. These statements, however, do not
22 establish Lobato's guilt.

23 The State relies extensively upon the testimony of Dixie Tienken. State's Answering
24 Brief at pages 6-7. Tienken, however, testified that after Lobato slashed the man's penis that
25 she ran to her car and saw that the man was standing and groping himself, while the
26 undisputed testimony at trial was that Bailey was deceased prior to the time that his penis was
27 cut. 6 App. 1032, 1035. The State claims that Tienken testified that Lobato said that the
28 incident took place west of the I-15 freeway, but this statement does not appear in Tienken's
testimony. State's Answering Brief at page 6. Although Tienken testified that Lobato said
the incident took place on a west major hotel street, Tienken was unable to identify which
hotel or street. 6 App. 1033. She did testify, however, that police officers informed her that

1 it took place on west Tropicana. 6 App. 1046. Tienken also testified that Lobato said the
2 man she stabbed was "big," but Bailey did not fit this description. 6 App. 1033-34, 1043.
3 Lobato did not ever tell Tienken that she killed the man or that she stabbed the man in the
4 neck. 6 App. 1036, 1044. The State also notes that Lobato told Tienken that she was not
5 driving her car and did not want anyone to see it. State's Answering Brief at page 6. This
6 statement fails to establish Lobato's guilt, however, as she would have had the same concerns
7 about her car with regard to the man whose penis was slashed at the Budget Suites or with
8 regard to Bailey. In any event, the testimony was also well established, from a number of
9 witnesses, that Lobato parked her car in front of her house, in clear view, throughout the
10 relevant time period. 7 App. 1200; 8 App. 1512-13; 8 App. 1516; 9 App. 1623. In short,
11 Tienken's testimony failed to establish Lobato's guilt in any significant manner and actually
12 supported her defense in many respects.

13 The State next asserts that statements made to Michele Austria and Paul Brown
14 establish Lobato's guilt. State's Answering Brief at page 7. Neither of these witnesses,
15 however, testified that Lobato implicated herself in Bailey's death. Rather, Austria testified
16 that Lobato said she slashed at a man's penis. 6 App. 1099. This statement is entirely
17 consistent with Lobato's defense at trial that she cut a different man's penis, at a different
18 location and a different time. Also, Austria testified that Lobato said she did not know if the
19 man was dead or alive, but there was no dispute over the fact that Bailey was dead prior to
20 the removal of his penis. 6 App. 1101. Lobato also did not make any statements to Austria
21 that were consistent with the extensive injuries that Bailey received. 6 App. 1104.
22 Moreover, Austria testified that she believed the attack took place in June 2001, which was
23 prior to Bailey's attack on July 8, 2001, and she testified that she was with Lobato in Panaca
24 on July 8th. 6 App. 1104, 1105. Paul Brown did not have a direct conversation with Lobato,
25 but only overheard her talking with Austria and did not hear the entire conversation. 6 App.
26 1113. He did not hear any other statements that were consistent with the facts of Bailey's
27 death. 6 App. 1116.

1 The State next relies upon the testimony of Detective Thowsen concerning Lobato's
2 statements to officers on the day of her arrest. State's Answering Brief at page 7. The State
3 fails to address the fact that Lobato never confessed to killing Bailey, she made numerous
4 statements that were inconsistent with the incident involving Bailey, and despite ample
5 opportunity to do so, Detective Thowsen and the other officers failed to question Lobato
6 about these inconsistencies or details of the offense.

7 In her Opening Brief Lobato noted that there was absolutely no physical evidence
8 tying Lobato to either Bailey or the crime scene: no DNA, no fingerprints, no shoe prints, no
9 tire tracks that matched her car, no pieces of hair or clothing, none of Bailey's blood was
10 found on her clothing or in her car, and there was no evidence at the scene that was in any
11 way connected to Lobato. 7 App. 1169, 1170; 8 App. 1540. The State fails to address these
12 facts in its Answering Brief. The State also fails to address the physical evidence that was
13 found at the scene which may have belonged to the perpetrator, but which did not belong to
14 Lobato, including: bloody shoe prints were found leading from the dumpster area that did not
15 match Lobato's shoe size or the shoes of the first responders; fresh tire marks were made
16 over a planter median near the dumpster enclosure that did not match Lobato's car; a piece
17 of chewing gum was covered in blood which belonged to Bailey and also contained the DNA
18 of an unknown person who was not Lobato; a pubic hair that was found in Bailey's sexual
19 assault kit had a DNA mixture which included Bailey's DNA and the DNA of an unknown
20 person, but did not contain Lobato's DNA; two cigarette butts were collected from Bailey's
21 body, one contained DNA from an unknown male and the other contained a DNA mixture,
22 the major profile of which was consistent with Bailey and the minor profile of which was
23 from an unknown person who was not Lobato; and fingerprints were recovered from the door
24 of the dumpster enclosure, a box and a beer can, but they did not belong to Lobato; 6 App.
25 1022, 1023, 1062; 7 App. 1228, 1229, 1234, 1240, 1252, 1260, 1264, 1266, 1308, 1309,
26 1317, 1328; 8 App. 1521, 1541-44. Further, the State fails to address the fact that both the
27 State's medical examiner and the defense expert agreed that the Bailey's injuries were typical
28 of a male on male case and were inconsistent with the kind of injuries normally inflicted by

1 a female. 7 App. 1168; 8 App. 1540, 1549. Also unaddressed by the State is that no
2 eyewitness placed Lobato or her distinctive car in the bank parking lot where Bailey's body
3 was found; no one saw Lobato or her distinctive car in Las Vegas or on the road between Las
4 Vegas and Panaca on the day the offense was committed; and no one testified that Lobato's
5 car was moved from the front of her parent's home between July 2nd until July 20th, when
6 it was seized by the police. 7 App. 1172, 1200; 8 App. 1513, 1516.

7 The State failed to present sufficient evidence to support Lobato's conviction for the
8 two offenses against Bailey. Accordingly, her judgments must be vacated.

9 **B. Detective Thowsen was allowed to testify that there were no incidents of**
10 **any other penis stabbings based upon telephone calls allegedly made by**
11 **his secretary to unnamed persons at unnamed medical facilities. Lobato's**
12 **constitutional right of Confrontation and her statutory right against use**
13 **of hearsay testimony were violated as a result.**

14 Lobato contended in her Opening Brief that she is entitled to a new trial because
15 Detective Thowsen was allowed to testify as to the absence of records from medical facilities
16 concerning knife wounds to penises from May through July 2001. This testimony should not
17 have been admitted as it violated Lobato's state and federal constitutional rights of
18 confrontation and cross-examination and her right of due process, and because this hearsay
19 testimony was not admissible under the Nevada Rules of Evidence. In response, the State
20 argues this evidence was elicited by defense counsel, not the prosecutors, and therefore no
21 violation of Lobato's rights occurred. State's Answering Brief at pages 8 to 12. A complete
22 review of the record demonstrates that the State's argument is without merit. Attached hereto
23 as Exhibit A are each of the pages of transcript from Detective Thowsen's testimony
24 concerning this matter. They are also included in the appendix at 8 App. 1384-86, 1398-
25 1400, 1408, 1414-15. These transcripts make it clear that the State introduced this subject
26 by asking Thowsen whether he conducted any investigation to determine whether or not there
27 was any other individual who had been injured with his penis and cut off or slashed. 8 App.
28 1384. Thowsen responded "Yes, I did" and the State asked for and received judicial notice
of NRS 629.031 and NRS 629.041. 8 App. 1384. Defense counsel then asked to approach
and there was an off-the-record bench conference. 8 App. 1385. Upon returning from the

1 bench, the State asked Thowsen about his knowledge of NRS 629.031 and then asked "did
2 you determine whether or not there was any other report of an injury involving a knife wound
3 to a man's penis?" 8 App. 1385. Defense counsel initially objected and then withdrew the
4 objection. 8 App. 1385. Thowsen then testified that "I researched it through police records
5 to locate any sort of documentation on an injury such as that, which would be a stabbing or
6 a severing of a penis or groin area." 8 App. 1385. The State then asked questions about
7 other police agencies and jurisdictions and Thowsen responded that he did investigation with
8 regards to other police agencies within Clark County. 8 App. 1385. He then testified that
9 he found no records of a slashed or severed penis. 8 App. 1386. On cross-examination,
10 defense counsel asked Thowsen about his testimony on direct examination:

11 Q Now tell us what you did to determine that there were no reports
12 generated of a knife wound to as Mr. Kephart said the groin area or to
the penis during May, June and July of 2001?

13 A I had it researched through the various record sections –

14 Q Now when you say you had it researched, you had someone else do this
15 research?

16 A Yes.

17 Q Okay. It wasn't done by you?

18 A No, I can't do every single thing. Some things have to be delegated.

19 Q Okay. So someone else did the research and reported it to you?

20 A Correct.

21 Q Okay. Did they –

22 A I didn't go to each individual hospital and read all of the their records,
23 I didn't go to each records and ask if I could read through each of the
reports that had come in. It has to be at some point given to other
people to report back accordingly.

24 Q So someone else reported to you that there were no –

25 A Yes.

26 Q You didn't personally go out and do this yourself?

27 A I personally telephoned hospitals. I didn't personally look at every
28 single report but I made the determination through investigation that it
was not reported.

1 8 App. 1398. Thus, contrary to his testimony on direct examination, Thowsen revealed that
2 he did not personally conduct the investigation concerning hospital records but instead relied
3 upon telephone calls made by himself and his secretary to unknown persons at unidentified
4 hospitals. When asked if anyone other than his secretary was conducting these types of
5 inquiries, he volunteered that he spoke with several urologists and asked that they
6 communicate amongst themselves about this matter and learned that nobody had reported any
7 severed penises. 8 App. 1399. Thowsen was unable to identify the people who were
8 contacted regarding reports and did not have any idea as to how many instances there were
9 involving someone who went to a healthcare provider indicating that they had accidentally
10 cut themselves in that area. 8 App. 1400.

11 Following Thowsen's testimony and outside the presence of the jury, a record was
12 made concerning the bench conference that took place when Thowsen first addressed this
13 issue. Defense counsel noted that they "approached the bench and objected to Detective
14 Thowsen testifying concerning the reports of other people that have cuts in that area and then
15 were reporting. We object that it's hearsay and the Court allowed him to testify. We want
16 to renew that motion and make a motion to strike his testimony in that regard because, in our
17 opinion, clearly based completely on hearsay where he's talking to urologists and things like
18 that." 8 App. 1414. The district court then expressed her belief that Thowsen was initially
19 basing his testimony on calls that he made to hospitals, but the State told him at the bench
20 that that was not the case and his testimony was based upon reports from Metro. 8 App.
21 1414. The State and court then noted that the other facts were developed by defense counsel
22 on cross-examination. 8 App. 1414-15.

23 The district court denied the motion to strike after finding that the State limited its
24 examination to avoid hearsay and that the hearsay evidence was elicited by defense counsel.
25 8 App. 1415. This finding was clearly erroneous as the foundation for Thowsen's testimony
26 on direct examination was based purely upon inadmissible hearsay. As set forth above,
27 defense counsel timely objected to this testimony and a bench conference concerning this
28 objection was promptly held. The fact that defense counsel elicited testimony which

1 established that Thowsen's testimony on direct examination was based upon hearsay did not
2 justify the State's initial introduction of this hearsay testimony.

3 In her Opening Brief Lobato contended that Thowsen's testimony was inadmissible
4 under the business records exception to the hearsay rule. See Hamm v. Sheriff, Clark
5 County, 90 Nev. 252, 254, 523 P.2d 1301, 1302 (1974); United States v. Child, 5 F.3d 1328,
6 1334 (9th Cir. 1993); United States v. Riley, 236 F.3d 982, 984-85 (8th Cir. 2001); Tongil
7 Co. v. The Vessel "Hyundia Innovator", 968 F.2d 999, 1000 (9th Cir. 1992); United States
8 v. Pelullo, 964 F.2d 193, 200 (3rd Cir. 1992); Waddell v. Commissioner, 841 F.2d 264, 267
9 (9th Cir. 1988); Pierce v. Atchison T. & S.F. Ry., 110 F.3d 431, 444 (7th Cir. 1997); United
10 States v. Redd, 318 F.3d 778, 784 (8th Cir. 2003). The State fails to address this contention
11 or this authority in its Answering Brief.

12 Lobato also contended in her Opening Brief that Thowsen's testimony was
13 inadmissible under Crawford v. Washington, 544 U.S. 36 (2004), as Lobato was not able to
14 cross-examine and confront either Thowsen's secretary or the unnamed sources from the
15 unnamed healthcare facilities. The State fails to address this issue. Likewise, the State fails
16 to argue, let alone establish, that Lobato was not prejudiced by introduction of this testimony.
17 Accordingly, Lobato's conviction should be reversed.

18 **C. Detective Thowsen was allowed to give his opinion as to why Lobato's**
19 **statements to the police were inconsistent with the physical evidence and**
20 **was permitted to testify that Lobato was minimizing her involvement**
based upon her methamphetamine use. This testimony was improper and
usurped the jury's role.

21 Detective Thowsen was allowed to testify as to his beliefs that Lobato was
22 "minimizing" and "jumbling" when she gave her statement to the police and that this is why
23 her statement to the detective was inconsistent with the physical evidence concerning
24 Bailey's death. This testimony should not have been admitted as it violated Lobato's state
25 and federal constitutional rights of due process and a fair trial and because this testimony was
26 not admissible under the Nevada Rules of Evidence. In response, the State argues that this
27 issue was not properly preserved for appellate review because "a review of the record shows
28 that the grounds upon which defense counsel objected at trial are not in line with Appellant's

1 claims in the instant appeal.” State’s Answering Brief at page 13. Specifically, the State
2 argues that this Court should not consider this issue because trial counsel objected to this
3 testimony on the grounds of relevance, but not that it was an improper opinion, usurping the
4 jury’s role. State’s Answering Brief at page 13. The State also asserts that defense counsel
5 did not object to Thowsen’s testimony on minimization and that the objection to Thowsen’s
6 testimony concerning his belief that methamphetamine users jumble things together was
7 based upon his lack of expertise. State’s Answering Brief at pages 13-14. A review of the
8 record reveals that the State’s argument is without merit. Trial counsel adequately objected
9 to Thowsen’s testimony:

10 Q Okay. How many confessions have you taken?

11 Mr. Schieck: Objection, relevance, Your Honor.

12 The Court: Counsel approach.

13 (Off-record Bench Conference)

14 By Mr. Kephart:

15 Q Detective, how many statements have you taken from some – from
16 individuals that are suspects in homicides?

17 A Lots.

18 Q Okay, Give me an estimate?

19 A That were actually suspects in homicides would have to be in the
20 hundreds.

21 Q Okay. Do you find it uncommon for an individual to minimize their
22 statements when they’re giving you statements in reference to crimes
23 that they’ve committed?

24 A It’s very common for people to minimize their statements.

25 Q Give me an example of what you mean by “minimizing?” Those are
26 words I used.

27 A What a person will do if they determine they’re going to give a
28 statement and they are telling portions of that statement that show that
they have involvement in that particular crime many times they will tell
you things that you feel you already know and then they will try to
minimize by justifying their actions in why they had to do something
like that.

1 Q Sometimes they're not as detailed as maybe you have learned through
2 your other investigations?

3 A Correct

4 Q And in reference to your investigation of homicides do you know how
5 many statements you've taken from individuals that have claimed that
6 they were under the influence of methamphetamine when they're
7 committing their crime.

8 Mr. Schieck: Objection, relevance, Your Honor.

9 The Court: Overruled.

10 The Witness: Several.

11 By Mr. Kephart:

12 Q Okay. Did you find any – can you give me an idea of what you see
13 would effect their statement?

14 A Especially –

15 Mr. Schieck: Objection, Your Honor, again. This is outside his scope of
16 expertise.

17 Mr. Kephart: My question is based on his experience and the number that he
18 has taken with regards to statements.

19 The Court: Overruled.

20 The Witness: Could you restate your question for me again, please.

21 By Mr. Kephart:

22 Q. Okay. My question is is what do you see with statements from
23 individuals that claim that they're on methamphetamine at the time that
24 they're committing the crime when they're talking to you about
25 particulars in the crime? Any similarities?

26 A Yes.

27 Q And what is it?

28 A It's not uncommon that they'll jumble things together and take
something over it and put it together with something completely
unrelated and especially if it's a situation where an individual has been
or a binge for several days which is pretty common. That it's not that
uncommon for them not to be able to remember certain things and to
remember things strangely sometimes.

8 App. 1387-88. The objections made by trial counsel adequately preserved this issue for
appellate review. Moreover, an objection on relevance grounds to testimony concerning the

1 veracity of another witness is proper because such testimony is in fact irrelevant. See State
2 v. Hilton, 829 A.2d 890, 898 n.9 (Conn. 2003); Smith v. State, 674 So.2d 791, 794 (1996);
3 State v. Walden, 847 P.2d 956, 958-59 (Wash. App. 1993).

4 The State next asserts that the district court did not abuse its discretion in admitting
5 this evidence and argues that it was properly admitted as expert testimony pursuant to NRS
6 50.275. State's Answering Brief at pages 14-15. The State fails to cite any authority for the
7 notion that police officers are qualified to testify as experts on the issue of whether criminal
8 defendants are telling the truth, "minimizing," or "jumbling." To undersigned counsel's
9 knowledge, there is no such authority. To the contrary, this Court has consistently held that
10 such testimony is not admissible.

11 This Court has a long-standing rule that a prosecutor may not condemn the defendant
12 as a "liar." Rowland v. State, 118 Nev. 31, 39-40, 39 P.3d 114, 119 (2002); Ross v. State,
13 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990). Further, a witness may not give his
14 opinion as to the veracity of the statement of another. DeChant v. State, 116 Nev. 918, 924,
15 10 P.3d 108, 112 (2000). In DeChant v. State, the State questioned a police detective who
16 had reviewed the defendant's videotaped statement to police, which was shown at trial. Id.
17 at 922-23, 10 P.3d at 111. On the videotape, the defendant described the murder as a "mob
18 hit." Id. at 923, 10 P.3d at 111. This Court found that the detective properly highlighted
19 inconsistencies between the defendant's statement and his own experience with homicides
20 involving organized crime. Id. However, against the district court's instructions, the witness
21 "commented that [the defendant's] story was a 'fairy tale' and that he did not believe it for
22 one second." Id. The district court in DeChant ordered these statements on the defendant's
23 veracity stricken and gave the jury a limiting instruction. Id. at 923-24, 10 P.3d at 111.
24 However, during closing arguments, the prosecutor relied on the police detective's testimony
25 and described the defendant's statement as a "fairy tale." Id. at 924, 10 P.3d at 111. This
26 Court concluded that "this testimony and the prosecutor's comments during closing,
27 constituted an impermissible comment on the veracity of [the defendant's] statement." Id.
28 at 924, 10 P.3d at 112.

1 In this case, similar to the facts in DeChant, Detective Thowsen reviewed Lobato's
2 taped statement during trial. Also similar to the witness in DeChant, Thowsen was examined
3 about the inconsistencies in Lobato's statement and the facts concerning Bailey's death.
4 Unlike the facts in DeChant, the district court in this case did not sustain the defense
5 objection, it allowed Thowsen to testify about minimization and jumbling, and it did not
6 instruct the jury to disregard this testimony. Thowsen's testimony was the equivalent of
7 expressly calling Lobato a liar as to those facts that were not consistent with the State's
8 charges. This testimony was an improper comment on Lobato's veracity. The district court
9 erred when it overruled Lobato's objection and admitted this testimony.

10 In her Opening Brief Lobato cited to a number of cases which hold that a police
11 officer is not allowed to testify as to the defendant's veracity. See State v. Elnicki, 105 P.3d
12 1222 (Kan. 2005); United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987); United
13 States v. Moore, 936 F.2d 1508, 1522 (7th Cir. 1991); United States v. Windfelder, 790 F.2d
14 576, 582 (7th Cir. 1986); Cooper v. Sowders, 837 F.2d 284, 287-88 (6th Cir. 1988); Bowles
15 v. State, 381 So.2d 326, 328 (Fla. 5th DCA 1980). The State fails to address this authority
16 in its Answering Brief. Its failure to do so is especially lacking given its position that such
17 testimony is admissible.

18 Lobato also contended in her Opening Brief that Thowsen's testimony constituted
19 "profiling" evidence which was wholly inadmissible. See United States v. Hernandez-
20 Cuartas, 717 F.2d 552, 555 (11th Cir. 1983); United States v. Beltron-Rios, 878 F.2d 1208,
21 1210 (9th Cir. 1989); United States v. Lui, 941 F.2d 844, 848 (9th Cir. 1991); People v.
22 Castaneda, 55 Cal.App.4th 1067, 1072 (1977). The State fails to address this issue or
23 authority.

24 As set forth in the Opening Brief, Lobato was prejudiced by this testimony. The State
25 does not contend otherwise in its Answering Brief. Accordingly, Lobato's judgment must
26 be reversed.

1 **D. The district court refused to allow Lobato's witnesses to testify that**
2 **Lobato confided in them regarding her cutting of a man's penis prior to**
3 **the date of Bailey's death. In doing so, the district court prohibited**
4 **Lobato from presenting her defense and violated her constitutional rights.**

5 Lobato contended in her Opening Brief that the district court violated her right to
6 present a defense by prohibiting testimony from three witnesses about conversations they had
7 with Lobato prior to July 8th (the day Bailey was killed) in which Lobato confided that she
8 had been attacked and cut a man's penis. The State argues in response that the district court
9 did not abuse its discretion in prohibiting this testimony as it was not admissible under the
10 hearsay exception of NRS 51.065. State's Answering Brief at page 16. The State further
11 argues that Lobato's trial counsel sought to introduce this evidence to prove the truth of the
12 matter asserted, "that Appellant was attacked prior to July 8th and that her statements to
13 police referred to that attack, not the instant murder." State's Answering Brief at page 16.
14 This argument is without merit. The defense witnesses would not have testified that
15 Lobato's statement to the police referred to an attack which occurred prior to July 8th and not
16 Bailey's murder. The defense witnesses were not present for Lobato's statement to the police
17 and could not give any testimony concerning it. Rather, the defense witnesses were to testify
18 that Lobato made incriminating statements in which she stated that she had slashed a man's
19 penis and that those conversations took place prior to July 8th. The jury would then be
20 allowed to make the very reasonable inference that when Lobato made an admission to the
21 police that she was discussing a different incident. The proposed testimony was not being
22 introduced to establish the truth of the matter asserted, but rather was being introduced to
23 explain the timing of conversations and the fact that the admission occurred prior to Bailey's
24 death. As such, the testimony was admissible and should have been admitted. Wallach v.
25 State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

26 The State does not argue that this ruling was harmless error or that Lobato was not
27 prejudiced by the district court's ruling. Lobato's conviction must be reversed because of
28 the district court's erroneous and unconstitutional limitation on her right to present her
 defense.

1 **E. The district court allowed the State to introduce highly prejudicial**
2 **evidence that Lobato's car had the license plate, "4NIK8ER." The court**
3 **violated Lobato's rights admitting this inflammatory evidence.**

4 Lobato contended in her Opening Brief that the district court abused its discretion by
5 allowing the State introduced evidence that Lobato had a personalized license plate of
6 "4NIK8ER" or "FORNICATOR" even though that evidence was irrelevant and highly
7 prejudicial. The State argues in response that the district court did not abuse its discretion
8 in admitting this evidence because "the State offered evidence of the license plate, not
9 because a witness testified to seeing a car with a 4NIK8ER license plate at the scene, but
10 rather to corroborate Appellant's statements to law enforcement and other witnesses that she
11 hid her car because she was afraid that someone may have seen her unique car with its
12 distinctive plates at the crime scene." State's Answering Brief at pages 17-18. The State
13 also argues that defense counsel's offer to stipulate that Lobato's car had a distinctive license
14 plate was not sufficient because all personalized license plates are distinctive and it would
15 not have painted a complete picture for the jury as to why Lobato was concerned about her
16 car. State's Answering Brief at page 18. The State's arguments lack merit. First, the
17 probative value of this evidence was minimal. Under either the defense theory that Lobato
18 slashed the penis of a different man, after he attacked her, or the State's theory that Lobato
19 attacked Bailey, Lobato would have a motive to hide her car. Second, there was no evidence
20 that Lobato in fact hid her car. To the contrary, the record was clear that Lobato's car was
21 parked in front of her house, in clear view, and was in no way hidden. Third, there was no
22 testimony suggesting that any witness saw Lobato's car anywhere near the scene where
23 Bailey's body was found, so it was not necessary to introduce evidence of the license plate
24 for corroborating an identification. Accordingly, there was no probative value to this
25 evidence but the evidence was highly prejudicial. This evidence was admitted solely to
26 inflame the jury and was inadmissible under NRS 48.025 and NRS 48.035. See also Old
27 Chief v. United States, 519 U.S. 172, 180-81 (1997).
28

1 In her Opening Brief, Lobato also contended that this evidence constitutes evidence
2 of prior uncharged misconduct and bad character evidence. The State fails to address this
3 issue.

4 Lobato was not on trial for the offense of having a personalized license plate that
5 suggests or promotes fornication. Permitting the State to present this highly prejudicial and
6 inflammatory evidence amounted to nothing more than character assassination of Lobato,
7 which was wholly irrelevant and immaterial to the crimes charged. Her conviction must be
8 reversed as a result.

9 **F. The district court allowed the State to introduce evidence of positive**
10 **luminol tests on Lobato's car, even though there was no confirmatory**
11 **tests that established the presence of blood. The district court abused its**
12 **discretion in admitting this evidence.**

13 Lobato contended in her Opening Brief that the district court abused its discretion by
14 permitting the State to introduce evidence of positive luminol tests on Lobato's car, despite
15 the fact that confirmatory tests did not establish the presence of blood. The State first argues
16 in response that "this issue was considered previously by this Court and was found to be
17 without merit." State's Answering Brief at page 19 (citing Lobato v. State, 120 Nev. 512,
18 522, 96 P.3d 765, 772 (2004)). This argument is without merit. There is absolutely no
19 discussion of this issue in this Court's first opinion in this case. Indeed the word "luminol"
20 does not appear in this Court's opinion. This issue was not addressed in the prior appeal.

21 The State next argues that the district court did not abuse its discretion in finding that
22 the probative value of this evidence outweighed potential prejudice and that the issue was
23 fairly presented through the testimony at trial. State's Answering Brief at pages 19-20.
24 Lobato respectfully submits that the State's position is without merit and that this evidence
25 should have been excluded at trial.

26 In her Opening Brief, Lobato noted that there is a lack of consensus among state
27 courts regarding the proper standard to apply to the admission of expert testimony regarding
28 presumptive blood tests. See 82 A.L.R. 5th 67, "Admissibility of Results of Presumptive
Tests Indicating Presence of Blood on Object." She noted the reasons why several courts

1 have found evidence such as that presented here is not admissible. The State fails to address
2 this authority in its Answering Brief. The district court erred in admitting the presumptive
3 blood test evidence. The State failed to establish the existence of blood in Lobato's car
4 generally and failed to establish the existence of Bailey's blood in particular. Without
5 confirmatory tests, the luminol and phenolphthalin testing was misleading, confusing and
6 improperly set forth before the jury. Any probative value of the presumptive tests was
7 substantially outweighed by its prejudicial effect given the danger of unfair prejudice,
8 confusion of issues, and misleading the jury. NRS 48.035. The district court abused its
9 discretion in finding the preliminary tests admissible as the prejudicial effect of the evidence
10 substantially outweighed any probative value. The State also argues that introduction of this
11 evidence was harmless error. State's Answering Brief at page 21. This argument is also
12 without merit. Testimony concerning the luminol testing was a substantial portion of the
13 State's case. See 6 App. 1067-68; 7 App. 1238-40, 1245, 1284-85. The prosecution also
14 emphasized the presumptive tests in closing argument. 9 App. 1730. For the reasons stated
15 above and in the Opening Brief, the evidence in this case was far from overwhelming and
16 the jury was likely influenced by this testimony. Under these circumstances, Lobato's
17 conviction should be reversed.

18 **G. The State threw away important evidence and failed to make**
19 **reports about crucial matters. The district court abused its**
20 **discretion in denying Lobato's motion to dismiss charges based on**
 the State's bad faith and gross negligence in failing to preserve and
 collect potentially exculpatory evidence.

21 Lobato contended in her Opening Brief that the charges against her should have been
22 dismissed based upon the fact that the State threw away critical evidence and failed to gather
23 other important evidence. The State argues in response that officers acted reasonably in their
24 collection of evidence. State's Answering Brief at pages 21-24. The State fails to address
25 Lobato's primary argument, however, which is that officers violated her rights to confront
26 the evidence against her, to present a defense, and to a fair trial by failing to preserve
27 evidence that was collected. Specifically, white paper towels, that were partially stuffed into
28 the opening where Bailey's penis once was, were not preserved and were therefore

1 unavailable for fingerprint tests, DNA tests, and other examinations which likely would have
2 revealed information as to the identity of the person who killed Bailey. This evidence was
3 collected at the scene and was present at the Coroner's office, 6 App. 1021; 7 App. 1282,
4 1285, 1304; 8 App. 1487-89, 1490-91, but it was not preserved as evidence and was
5 discarded without justification. The State's failure to address this issue should be deemed
6 a confession that the issue is meritorious and that reversal of the judgment is warranted.
7 Bates v. Chronister, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating a Respondent's
8 failure to address an argument in its answering brief as a confession of error) (citing NRAP
9 31(c)); Nev. Employment Sec. Dep't v. Weber, 100 Nev. 121, 123-24, 676 P.2d 1318, 1319-
10 20 (1984); Jacobson v. Best Brands, 97 Nev. 390, 393 n.1, 632 P.2d 1150, 1152 n.1 (1981)
11 (citing NRAP 32(c)).

12 Next, the State argues in response to Lobato's contention that officers were grossly
13 negligent or acted in bad faith by throwing away a substantial amount of potential evidence
14 at the scene, without documenting in any fashion the evidence that they discarded, that the
15 officers made reasonable determinations as to what evidence should be collected. State's
16 Answering Brief at pages 22-23. This assertion is belied by the record. Crime scene analyst
17 Renhard acknowledged that items found inside the dumpster near Bailey's body were not
18 processed for fingerprints. 7 App. 1252. Crime scene analyst Ford testified that various
19 items from the scene were processed at the lab, but if they did not have fingerprints they were
20 tossed in the garbage for lack of evidentiary value. 7 App. 1262. No record was kept of
21 items that were collected from the scene, transported back to the lab and then discarded. 7
22 App. 1277. Items were not preserved for further testing if they tested negative for
23 fingerprints. 7 App. 1277. Other trash found near Bailey's body was not collected at all if
24 the officers decided that the items did not appear to be related to the incident at issue. 7 App.
25 1283. Maria Thomas testified that she and the detectives decided not to preserve a sample
26 of a silver substance that was found on Bailey's bare upper right buttock because they
27 believed the same substance was on Bailey's shirt, which had already been impounded. 7
28 App. 1302. Detective Thowsen also testified that officers did not collect every piece of

1 evidence at the scene. 8 App. 1390. He opined that it was possible that the officers missed
2 something that had Lobato's DNA on it, although it was also possible that no DNA was
3 present. 8 App. 1390. He further added that he has investigated many crimes and solved
4 them without anything that connected the defendant to the crime, and that many crimes were
5 solved by words that were spoken by the defendants themselves. 8 App. 1390. Under the
6 circumstances presented here, officers did not perform reasonably in collecting evidence of
7 apparent evidentiary value.

8 In her Opening Brief Lobato contended that additional and substantial evidence was
9 lost because of Detective Thowsen's failure to make reports of his investigation and failure
10 to record crucial information. For example, as noted above, Thowsen testified that he asked
11 other people to contact Las Vegas area hospital for a review of records concerning cut
12 penises in May, June and July of 2001. 8 App. 1398. He also testified that he telephoned
13 some hospitals and talked to some urologists, 8 App. 1398-99, but he did not prepare a report
14 on any of this investigation. 8 App. 1399. At the time of trial he did not know the names of
15 the people who gave him this information. 8 App. 1400. Without such documentation it was
16 impossible for Lobato and her counsel to contact any of these potential witnesses to verify
17 the information that was allegedly given to Thowsen and his secretary. Likewise, Thowsen
18 testified that he talked with the apartment manager of the complex where Diane Parker lived,
19 and asked about some Hispanic individuals who he had reason to believe might have known
20 about Bailey's attack on Parker, and that he ran their names to determine if they had a
21 criminal record, but he did not make a record of this investigation, did not talk with the
22 Hispanic men, and did not look at the men or their footwear. 8 App. 1404. Without a record
23 of this information it was impossible for Lobato's counsel to conduct a proper investigation
24 concerning these alternative suspects and impossible for her counsel to ask that their
25 fingerprints and DNA be tested to see if they were the sources of the unidentified fingerprints
26 and DNA that were found at the scene. The State fails to address this issue in its Answering
27 Brief.

1 Lobato also argued in her Opening Brief that the prosecutor committed misconduct
2 during closing argument by taking advantage of the fact that officers failed to collect and
3 preserve evidence. The State fails to address this issue in its Answering Brief.

4 Lobato was prejudiced by the State's handling of evidence that was thrown away,
5 evidence that was not documented through reports, and evidence that was collected and then
6 later discarded. This evidence was material and the failure to collect and preserve this
7 evidence and constituted bad faith, requiring dismissal of the charges, or at the minimum,
8 gross negligence, permitting the inference that the evidence would have been favorable to
9 Lobato. The district court's denial of Lobato's motion to dismiss, and her request for an
10 instruction permitting the inference that the evidence was favorable to her warrants reversal
11 of her judgment of conviction.

12 **H. This Court should reconsider its holdings as to issues raised in Lobato's**
13 **first appeal**

14 Lobato contended in her Opening Brief that this Court should reconsider several
15 holdings that it made on her first direct appeal. In response, the State argues that the doctrine
16 of law of the case should be applied and urges this Court not to revisit these issues.
17 Answering Brief at page 24. The State does not address the merits of any of the issues
18 discussed in this subsection.

19 "Under the law of the case doctrine, '[w]hen an appellate court states a principle or
20 rule of law necessary to a decision, the principle or rule becomes the law of the case and must
21 be followed throughout its subsequent progress, both in the lower court and upon subsequent
22 appeal.' Hsu v. County of Clark, 173 P.3d 724, __ & n.11 (2007) (quoting Wickliffe v.
23 Sunrise Hospital, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988)). "The law of the case
24 doctrine 'is designed to ensure judicial consistency and to prevent the reconsideration, during
25 the course of a single continuous lawsuit, of those decisions which are intended to put a
26 particular matter to rest.'" Id. at __ & n.12 (quoting U.S. v. Real Property Located at Incline
27 Village, 976 F.Supp. 1327, 1353 (D. Nev. 1997)). "The law of the case doctrine, therefore,
28 serves important policy considerations, including judicial consistency, finality, and protection

1 of the court's integrity.” *Id.* at ___ & n.13 (citing Poet v. Thompson, 144 P.3d 1067, 1072 (Or.
2 Ct. App. 2006)). “However, the law of the case doctrine is not a jurisdictional rule.” *Id.* at
3 ___ & n. 14 (citing Columbus-America Disc. Group. v. Atlantic Mut. Ins., 203 F.3d 291, 304
4 (4th Cir. 2000)). “Rather, as observed by the United States Supreme Court, it ‘merely
5 expresses the practice of courts generally to refuse to reopen what has been decided[:] [it is]
6 not a limit to their power.’” *Id.* at ___ & n.15 (quoting Messenger v. Anderson, 225 U.S. 436,
7 444 (1912)). “Accordingly, the United States Supreme Court has concluded that ‘[u]nder law
8 of the case doctrine, as now most commonly understood, it is not improper for a court to
9 depart from a prior holding if convinced that it is clearly erroneous and would work a
10 manifest injustice.’” *Id.* at ___ & n.16 (quoting Arizona v. California, 460 U.S. 605, 618 n.8
11 (1983)). “Based on statements such as these, federal courts have adopted three specific
12 exceptions to the law of the case doctrine, concluding that a court may revisit a prior ruling
13 when (1) subsequent proceedings produce substantially new or different evidence, (2) there
14 has been an intervening change in controlling law, or (3) the prior decision was clearly
15 erroneous and would result in manifest injustice if enforced.” *Id.* at ___ & n.17 (citing several
16 cases). “Nevertheless, as the United States Supreme Court has noted, absent those
17 ‘extraordinary circumstances,’ a court should be loathe’ to revisit its prior decisions.” *Id.* at
18 ___ & n.18 (quoting Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817
19 (1988)).

20 For the reasons set forth in the Opening Brief, Lobato respectfully submits that this
21 Court’s prior decision was clearly erroneous and would result in manifest injustice if
22 enforced.

23
24 **I. The sentence imposed by the district court violates Lobato’s double jeopardy rights under the state constitution**

25 Lobato contended in her Opening Brief that she is entitled to imposition of a new
26 sentence under Wilson v. State, 123 Nev. ___, 170 P.3d 975 (2007), because the district court
27 ran her sentences consecutively following this judgment, even though the court sentenced her
28 to current sentences in the first judgment. In response, the State argues that Wilson does not

1 apply because the change in sentencing structure occurred after a second trial rather than
2 merely a new sentencing hearing. Answering Brief at pages 25 to 26. The State also
3 contends that this Court should follow Holbrook v. State, 90 Nev. 95, 98, 518 P.2d 1243,
4 1244 (1974) rather than Wilson because of new evidence that was developed following the
5 first sentencing hearing. Answering Brief at page 26. Neither of the State's arguments is
6 meritorious.

7 As to the State's first contention, there is no indication in Wilson or Dolby v. State,
8 106 Nev. 63, 65, 787 P.2d 388, 389 (1990), that this Court's holding that "[w]hen a court is
9 forced to vacate an unlawful sentence on one count, the court may not increase a lawful
10 sentence on a separate count" is limited to cases in which the sentence, but not the underlying
11 conviction, is vacated. To the contrary, this Court is Wilson renewed its "commitment to
12 strong double jeopardy protections." Wilson, 170 P.3d at 977. There is nothing in Wilson
13 or Dolby which suggest that they are limited in the manner argued here by the State.

14 As to the State's second contention, it is Wilson that is controlling here rather than
15 Holbrook. In Holbrook, this Court found as follows:

16 The appellant contends that the sentence he presently is serving is
17 unconstitutional since it is harsher than the sentence originally imposed and
18 later set aside. The controlling authority on this subject is North Carolina v.
19 Pearce, 395 U.S. 711 (1969). The court noted that due process of law requires
20 that vindictiveness against a defendant must play no part in the sentence he
21 receives after a new trial, since the fear of such vindictiveness may
22 unconstitutionally deter a defendant's exercise of the right to appeal or
23 collaterally attack his first conviction. Accordingly, whenever a more severe
sentence is imposed after a new trial the reasons for doing so must
affirmatively appear. "Those reasons must be based upon objective
information concerning identifiable conduct on the part of the defendant
occurring after the time of the original sentencing proceeding. And the factual
data upon which the increased sentence is based must be made a part of the
record, so that the constitutional legitimacy of the increased sentence may be
fully reviewed on appeal." Id. at 726.

24 Holbrook, 90 Nev. at 98, 518 P.2d at 1244. In Wilson, however, this Court determined that
25 it was not going to follow federal precedent on double jeopardy protections and was instead
26 relying upon the state constitution for providing greater double jeopardy protections in
27 Nevada. Wilson, 170 P.3d at 977. Accordingly Wilson is controlling on this issue.

1 Even if this Court were to apply Holbrook, however, the increase in sentence structure
2 here is not justified by the record. In Holbrook, this Court found that the district court erred
3 in enhancing the defendant's sentence:

4 The record of the second sentencing does not satisfy that standard. It does not
5 show identifiable conduct by the defendant occurring after the original
6 sentence which would justify a more severe sentence. The only relevant
7 conduct of the defendant noted by the court was his desire to plea bargain to
avoid the expense to the county of trial and to obtain an advantage for himself.
This was the defendant's right. All other conduct referred to by the judge was
before the court when the first sentence was imposed.

8 Holbrook, 90 Nev. at 98, 518 P.2d at 1244. Likewise, in this case the district court did not
9 rely upon any conduct by Lobato occurring after the original sentence in justifying the more
10 severe sentencing structure that was imposed. The only relevant conduct by Lobato noted
11 by the district court was before the district court when the first sentence was imposed:

12 The Court: With this case there were many, many, many photographs
13 taken at the crime scene. And of the nearly 30 years that I've been working in
the criminal justice system this case and two other I think – that I recall vividly
were this bloody and violent. And all three cases involved methamphetamine.

14 If you take a snapshot of the crime scene and you take a snapshot of this
15 young wom[a]n's face and you put them side by side, it's difficult for a lot of
people to reconcile the two. How could this attractive young woman have this
16 reaction that's evidenced in the snapshot from the crime scene? I learned long
ago that you can't judge a book by its cover. And on the night that Duran
Bailey died, he was a man who had issues. And Ms. Lobato has issues. And
17 those issues collided head on.

18 Ms. Lobato, throughout your childhood the number of adults that you
relied on failed you. You are now an adult. When you're released from
custody you will be an adult. You will be self-reliant. And you alone will be
19 in charge of your future. You cannot change the past, but you can determine
what your future will be. Your personal history has left you with a multitude
20 of issues that you need to deal with and Dr. Paglini laid them out in the
diagnosis, in the middle of page 19 of his report and under the diagnostic
21 impression section on page 20 of his report. They are many, but they are not
insurmountable.

22 In the therapy that you have undertaken since the time of your initial
arrest you have made progress. But you have a lot more progress to make.
23 Your history may elicit sympathy but it does not excuse the taking of a life and
it does not excuse the mutilation and degrading of the corpse of Duran Bailey,
24 a fellow human being.

25 The Court has considered all of the goals that jurists try to achieve with
the sentencing and in reviewing the recommendation of the Division of Parole
& Probation it seems to be appropriate here.

26 9 App. 1761-62. As set forth above, the district court then imposed two consecutive terms
27 of 48 months to 120 months for voluntary manslaughter with use of a deadly weapon and a
28

1 consecutive term of 60 months to 180 months for use of a deadly weapon, even though the
2 sentences were ordered to run concurrently following the first trial. 9 App. 1762. As the
3 district court did not rely upon any conduct occurring after the first trial in making this
4 decision, its order of consecutive sentences violates Holbrook.

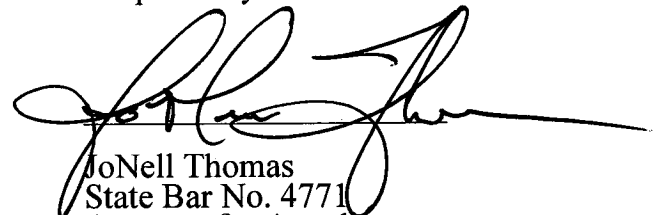
5 Lobato respectfully submits that pursuant to this Court's recent decision in Wilson,
6 as well as this Court's decision in Holbrook, the district court violated Lobato's state
7 constitutional right against double jeopardy by restructuring the sentences to require that she
8 serve her sentences consecutively, rather than concurrently, as originally ordered by the
9 district court. Accordingly, if this Court does not vacate the convictions entirely based upon
10 the fact that the State did not present sufficient evidence to support the convictions, or does
11 not reverse the convictions and remand for a new trial based upon the issues set forth above,
12 the case must nonetheless be remanded to the district court with instructions to enter a new
13 judgment of conviction which reflects concurrent sentences for the two offenses.

14 **III. CONCLUSION**

15 Lobato has been imprisoned based upon conviction for substantial offenses even
16 though the State fell far short of its burden of proving beyond a reasonable doubt that she
17 committed these offenses. Her convictions must be immediately vacated based upon this
18 injustice. In the alternative, she must be granted a new trial based upon the numerous errors
19 and constitutional violations that resulted in her conviction. Finally, her sentence must be
20 modified to provide for concurrent time between her two convictions.

21 DATED this 22nd day of February, 2008.

22
23 Respectfully submitted:

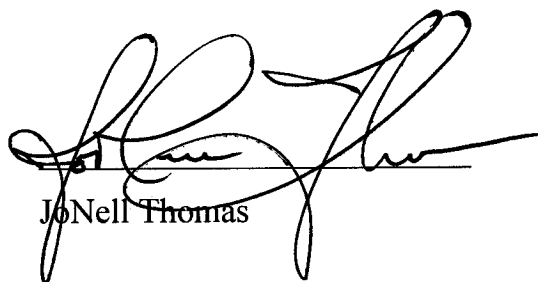
24
25 
26 Jo Nell Thomas
27 State Bar No. 4771
28 Attorney for Appellant

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3 **CERTIFICATE OF COMPLIANCE**

4 I hereby certify that I have read this appellate brief, and to the best of my knowledge,
5 information, and belief, it is not frivolous or interposed for any improper purpose. I further
6 certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in
7 particular, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in
8 the record to be supported by a reference to the page of the transcript or appendix where the
9 matter relied on is to be found. I understand that I may be subject to sanctions in the event
10 that the accompanying brief is not in conformity with the requirements of the Nevada Rules
11 of Appellate Procedure.

12 DATED this 22nd day of February, 2008.

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Jo Nell Thomas

EXHIBIT A

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

KIRSTIN BLAISE LOBATO,)	Case No. 49087
)	
Appellant,)	District Court No. C 177394
)	
vs.)	
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	
_____)	

APPELLANT'S APPENDIX

VOLUME 8

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE
IN THE EIGHTH JUDICIAL DISTRICT COURT

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ATTORNEYS FOR APPELLANT

ATTORNEYS FOR RESPONDENT

THOWSEN - DIRECT

1 A Yes.
2 Q And you had -- you had testified earlier that you had
3 learned her name through Laura Johnson, is that correct?
4 A That is correct.
5 Q Okay. Now the defendant in her statement to you
6 indicated that she had not told anybody else about the attack.
7 MR. SCHIECK: I'm going to objection, Your Honor,
8 that misstates the evidence. We heard the statement, she said
9 she didn't know, she couldn't remember.
10 THE COURT: Sustained.
11 BY MR. KEPHART:
12 Q Oh, in reference to that did she give you any
13 indication that she had told anybody else other than she didn't
14 remember or she couldn't remember?
15 A She did not and I believe in her statement she said
16 that she did not tell anybody else.
17 Q Okay. In addition to "I don't remember?"
18 A Yes.
19 Q And -- but you did learn some information from
20 Laura that she had apparently talked to Dixie?
21 A Yes.
22 Q Okay. And through your investigation did it lead you
23 to other people?
24 A Yes, several other people.

XIII-54

THOWSEN - DIRECT

1 interview with the defendant?
2 A With the defendant it didn't go long enough that I
3 had to turn the tape over. It went til we though we were at
4 the end, we stopped the tape, and then she mentioned
5 something afterwards that we wanted to go ahead and include
6 on the
7 tape --
8 Q Okay.
9 A -- so we turned it back on and documented that
10 information.
11 Q Okay. So wit Dixie you had to actually turn the tape
12 over?
13 A Yes.
14 Q Okay. Do you recall whether Dixie ever described to
15 you at any point in time during your discussion with her before
16 the tape about the defendant telling her that the attacker was
17 big?
18 A No.
19 Q Did you recall any time other than what was on the
20 tape, any time other than the -- that Dixie ever told you that
21 her and the defendant looked through newspapers dating back
22 to June 1st?
23 A No.
24 Q Now after talking to Dixie, Laura, Michelle, Rusty,

XIII-56

THOWSEN - DIRECT

1 Q And that would include Michelle Austria?
2 A Yes.
3 Q Paul Brown?
4 A Yes.
5 Q And during the period of time that you spoke to
6 those individuals did you -- you've already testified that you
7 did tape them and you have copies of their -- of their
8 transcribed tapes here and matter of fact you have copies of
9 their tapes and you told us the techniques that you use or the
10 standard that you usually follow when you're doing it. Did
11 anything change with regards to talking to other individuals?
12 A No.
13 Q Okay. While you were questioning Dixie did you
14 ever stop the tape multiple times during the portion of the
15 time that you were questioning her?
16 A I didn't stop the tape anytime until the -- towards
17 the end as with the Lanier recorder as you approach the end
18 of the tape there's some sort of sensor that knows you have
19 like a minute, minute and a half left and it'll start a beeping
20 noise to warn you. And you'll hear me stop the tape, turn it
21 over, and restart the tape indicating what the time is still at a
22 certain time meaning that it was less than a minute to just
23 take the tape, put it back over, turn it back on again.
24 Q As similar to what happened with regards to your

XIII-55

THOWSEN - DIRECT

1 the defendant and knowing what had occurred here and from
2 being at the crime scene, did you do any further investigation
3 with respect to determining whether or not there was any
4 other individual that had been injured in this way? With his
5 penis being cut off or penis being slashed?
6 A Yes, I did.
7 Q Detective --
8 MR. KEPHART: Well, Your Honor, I'm going to ask
9 the Court to take judicial notice of NRS 629.031 and 629.041.
10 May I approach the witness, Your Honor?
11 THE COURT: Just a second.
12 (Pause in the proceedings)
13 THE COURT: I have the four volumes on criminal
14 law in the -- in the courtroom here but I don't have the full
15 NRS. Those are in chambers. Do you have copies of them?
16 MR. KEPHART: I'll give you this one, Judge, and I'll
17 just -- based on these.
18 THE COURT: The Court takes judicial notice of NRS
19 629.031, a copy of which shall be marked as Court's Number
20 56; and NRS 269.041 which shall be marked as Court's 57.
21 MR. KEPHART: Judge, is that 269 or 629?
22 THE COURT: 629 --
23 MR. KEPHART: Thank you.
24 THE COURT: -- .031 and 629.041 if I misspoke.

XIII-57

001384

THOWSEN - DIRECT

1 MR. KEPHART: Can I -- can I use the Court's
2 exhibits as well, Your Honor?
3 THE COURT: Yes.
4 MR. SCHIECK: Could we approach, Your Honor?
5 THE COURT: Yes.
6 (Off-record Bench Conference)
7 BY MR. KEPHART:
8 Q Detective, you're familiar with NRS 629.041 which
9 was -- is -- which is called -- entitled, "Provider of Healthcare
10 Report, Persons Having Certain Injuries," are you not?
11 A Yes, I am.
12 Q As a matter of fact you've had discussions with the
13 State about this?
14 A Yes.
15 Q Matter of fact you've even testified specifically about
16 this statute on a previous occasion?
17 A That's correct.
18 Q And in that statute since it is -- The judge has made
19 it Exhibit 57 for the Court, it says:
20 "Every provider of healthcare to whom any person
21 comes or is brought for treatment of an injury which
22 appears to have been inflicted by means of a firearm or
23 knife, not under accidental circumstances, shall promptly
24 report the person's name if known, his location, and the

XIII-58

THOWSEN - DIRECT

1 do anything to determine whether or not there was any other
2 report of an injury involving a knife wound to a man's penis?
3 A Yes, I did.
4 Q And what did you do?
5 MR. SCHIECK: Objection, could we have -- I
6 withdraw the objection, Your Honor.
7 THE COURT: okay.
8 BY MR. KEPHART:
9 Q What did you do?
10 A I researched it through police records to locate any
11 sort of documentation on an injury such as that, which would
12 be a stabbing or a severing of a penis or groin area.
13 Q Okay. How far did you research that?
14 A It was a period of time, I don't remember the exact
15 date off the top of my head at this point.
16 Q Okay. Do you recall how far back you went before
17 July 8th?
18 A I don't recall.
19 Q Okay.
20 (Off-record colloquy)
21 Q In reference to -- we're going to look for that.
22 A Okay.
23 Q Do you recall testifying about that in --
24 A Yes. Yes, I do.

XIII-60

THOWSEN - DIRECT

1 character and extent of the injury to an appropriate law
2 enforcement agency."
3 Is that correct?
4 A That is correct.
5 Q And 629.031 defines provider of healthcare as:
6 "A physician licensed pursuant to this Chapter 630,
7 630A or 633 of NRS, dentist, licensed nurse, dispensing
8 optician, optometrist, practitioner of respiratory care,
9 registered physical therapist, pediatric physician, licensed
10 psychologist, licensed marriage and family therapist,
11 chiropractor, athletic trainer, doctor of Oriental medicine
12 in any form, medical laboratory director or technician,
13 pharmacist or licensed hospital as the employer of any
14 such person."
15 With regards to that, these two, is this basically
16 what they call a mandatory reporting statute that requires the
17 healthcare -- any healthcare provider to report injuries
18 involving, in this case, a knife or firearm or knife? Is that
19 correct?
20 A That is correct.
21 Q Okay. And in respect to that, you had indicated that
22 you had done other investigations with regards to speaking to
23 Dixie and Michelle and Laura; other individuals in this case; the
24 defendant; who gave you her confession, and you -- did you

XIII-59

THOWSEN - DIRECT

1 Q Okay. And in reference to the area where this
2 occurred up off of Flamingo is -- there's other police agencies
3 in the Valley, is that correct?
4 A Yes, there are.
5 Q Okay. This area here up in -- on West Flamingo
6 would have been in Metro's jurisdiction?
7 A Yes.
8 Q Okay. And the area in which the defendant gives
9 you statement about Budget Suites?
10 A Yes.
11 Q You were talking to her and she talks about Boulder
12 Highway and that?
13 A Yes.
14 Q Is that also in Metro's jurisdiction?
15 A Yes, it is.
16 Q And would that have been police records that you
17 had looked at too to determine whether or not any type of
18 injury like this occurred --
19 A Yes.
20 Q -- in any of those records? Do you recall whether or
21 not you did any investigation with regards to other police
22 agencies?
23 A It would be anywhere in -- within Clark County.
24 Q Clark County? Okay. Anywhere?

XIII-61

001385

THOWSEN - DIRECT

1 A Anywhere which would include North Las Vegas,
2 Henderson, Boulder City.
3 Q Do you recall if you were able to -- were you
4 successful? Did you find any other injury caused by a knife to
5 an individual's penis?
6 A I found no slashed or severed penis.
7 MR. KEPHART: Your Honor, may I approach the
8 witness with regards to his previous testimony?
9 THE COURT: You may. Would you just identify the
10 EM, the date, the page, and the line number?
11 MR. KEPHART: Okay. It's Volume 3, page 82, Your
12 Honor. And I'm talking about question 5 through -- be on line
13 5 through line 14. If I may approach, Your Honor?
14 THE COURT: You may.
15 BY MR. KEPHART:
16 Q I'm showing you what appears to be from previous
17 testimony Volume 3, page 82. Would you take a look right
18 here at page -- I mean question number 5 and read through
19 that and tell me whether or not that refreshes your memory as
20 to what you had done before?
21 A Yes, it does.
22 Q Okay. Does that refresh your memory as to how far
23 you looked back for purposes to determine whether or not
24 anybody had received an injury, recorded it in the Valley here

XIII-62

THOWSEN - DIRECT

1 THE COURT: Yes.
2 BY MR. KEPHART:
3 Q I'm showing you -- how you describe it, what
4 appears to be a silver chrome type of object. It's in this plastic
5 bag. Now you didn't bring it in a plastic bag, did you?
6 A No, I did not.
7 Q Okay. That's something that the court placed it in?
8 A Yes.
9 Q Could you take this out and tell me if this the object
10 that you brought to court today?
11 THE COURT: The clerk did it because it was a
12 difficult item to mark.
13 MR. KEPHART: Okay. Judge, I'm not making it for -
14 - and admitting it, we're using it for demonstrative purposes
15 only and I'm going to be asking the Court to allow the officer
16 to take it with him when he leaves.
17 THE COURT: Okay.
18 MR. SCHIECK: I'm going to ask if it's going to be
19 demonstrated to the jury it be marked and admitted, Your
20 Honor.
21 BY MR. KEPHART:
22 Q Do you care about that, officer?
23 A No, I don't.
24 MR. KEPHART: Okay. That's fine then. I don't see

XIII-64

THOWSEN - DIRECT

1 or in Clark County?
2 A Yes.
3 Q When did you look?
4 A May, June, and July.
5 Q Okay. So you looked the three months?
6 A Yes.
7 Q Now the defendant had indicated in her statement
8 that she used a butterfly knife?
9 A Yes.
10 Q And she talked to you about her father giving it to
11 her for a Christmas present, that type of thing?
12 A That's correct.
13 Q Okay. And are you familiar with butterfly knives?
14 A Yes.
15 Q Would -- did you -- were you asked by the State to
16 bring one with you today for purposes of demonstration?
17 A Yes, I was.
18 Q Okay. And before you came in today, was that
19 deposited with the Court?
20 A Yes, it was.
21 MR. KEPHART: Your Honor.
22 THE COURT: You may approach the clerk.
23 (Off-record colloquy)
24 MR. KEPHART: Court's indulgence, Your Honor?

XIII-63

THOWSEN - DIRECT

1 any need to have it marked, it's not -- it's not evidence but it is
2 for purposes of demonstration. I guess maybe they might
3 want to deal with it themselves back in the jury room so that's
4 fine. We'll mark it then as next in order for the State.
5 THE CLERK: 262.
6 MR. KEPHART: Okay. I move to admit 262.
7 MR. SCHIECK: No objection, Your Honor.
8 THE COURT: 262 is admitted.
9 (State's Exhibit No. 262 admitted)
10 MR. KEPHART: All right.
11 BY MR. KEPHART:
12 Q Now 262 that you have with you now that is what
13 you understand to be a butterfly knife?
14 A Yes, it is.
15 Q And it is a -- in this particular case a one-sided
16 bladed butterfly knife?
17 A Yes.
18 Q And she said that that's what she had when she did
19 this?
20 A Yes.
21 Q And for -- now you haven't -- have you used this
22 type of knife before or did -- worked with it before?
23 A Only for about a day.
24 Q Okay. Can you -- can you show the jury how it is

XIII-65

THOWSEN - CROSS

- 1 Q And while we're talking about individuals that have
- 2 had injuries to their penis, you were shown a statute that's a
- 3 mandatory reporting statute, is that correct?
- 4 A That is correct.
- 5 Q Okay. So -- and let's just use the general term,
- 6 "healthcare provider." We don't need to go through all the
- 7 different mandatory reporters, let's just say "healthcare
- 8 providers," okay? Someone comes in and has a gunshot
- 9 wound, they have to report that?
- 10 A Yes.
- 11 Q Mandatory?
- 12 A Mandatory.
- 13 Q What if it's an accidental gunshot wound?
- 14 A They have to report it.
- 15 Q What if there's a knife wound, a cut?
- 16 A If they have a knife wound it's reported.
- 17 Q Even if it's accidental?
- 18 A I guess it's to be determined whether it's accidental
- 19 or not.
- 20 Q Okay. And so someone at the healthcare provider
- 21 makes that determination whether it's accidental or not?
- 22 A Well, no, generally they would report it and it would
- 23 be determined whether it was accidental or not.
- 24 Q Well --

XIII-110

THOWSEN - CROSS

- 1 A I cannot tell you what another person is going to
- 2 think or do. What I am told, according to the statute, is that if
- 3 a knife wound appears to be non-accidental that it would be
- 4 reported to the police?
- 5 (Off-record colloquy)
- 6 Q It's 629.041. Indicates that if you have -- and I'll
- 7 paraphrase the first part and I'll show this you to be fair, an
- 8 injury which appears to have been inflicted by means of a
- 9 firearm or knife, not under accidental circumstances, shall
- 10 promptly report the person's name, if known; his location; and
- 11 the character and extent of the injury. So if it's under
- 12 accidental circumstances according to the statute there's no
- 13 requirement to report?
- 14 A Correct.
- 15 Q Okay. And so someone at the healthcare provider
- 16 must make that determination whether or not it's accidental
- 17 circumstances?
- 18 A Okay.
- 19 Q Okay. So is that a fair statement?
- 20 A That's fair.
- 21 Q Now tell us what you did to determine that there
- 22 were no reports generated of a knife wound to as Mr. Kephart
- 23 said the groin area or to the penis during May, June, and July
- 24 of 2001?

XIII-112

THOWSEN - CROSS

- 1 A Is my understanding.
- 2 Q -- we're talking about generally.
- 3 A Okay.
- 4 Q Somebody has to make that determination whether
- 5 or not it was accidental or not?
- 6 A My understanding is if someone comes in with a
- 7 knife wound it would be reported.
- 8 Q Every single knife wound?
- 9 A That's my understanding.
- 10 Q I have to confess that when I cook I tend to quite
- 11 often cut myself and have even done so to the point that I've
- 12 needed stitches.
- 13 MR. KEPHART: Your Honor, is Mr. Schieck
- 14 testifying? If he is then we should probably have him sworn
- 15 in. This is -- I'm objecting to the form of that question if
- 16 that's a question.
- 17 THE COURT: Sustained.
- 18 BY MR. SCHIECK:
- 19 Q Hypothetically, if a -- if a person is at home cooking
- 20 and slicing tomatoes and induces themselves to slice a -- not
- 21 only the tomato but a large piece of their finger that requires
- 22 stitches and goes to a healthcare provider and says I was
- 23 cutting tomatoes when I cut my finger, is it your testimony
- 24 that that is going to be reported to Metro?

XIII-111

THOWSEN - CROSS

- 1 A I had it researched through the various record
- 2 sections --
- 3 Q Now when you say you had it researched, you had
- 4 someone else do this research?
- 5 A Yes.
- 6 Q Okay. It wasn't done by you?
- 7 A No, I can't do every single thing. Some things have
- 8 to be delegated.
- 9 Q Okay. So someone else did the research and
- 10 reported it to you?
- 11 A Correct.
- 12 Q Okay. Did they --
- 13 A I didn't go to each individual hospital and read all of
- 14 their records, I didn't go to each records and ask if I could
- 15 read through each of the reports that had come in. It has to
- 16 be at some point given to other people to report back
- 17 accordingly.
- 18 Q So someone else reported to you that there were
- 19 no --
- 20 A Yes.
- 21 Q You didn't personally go out and do this yourself?
- 22 A I personally telephoned hospitals. I didn't personally
- 23 look at every single report but I made the determination
- 24 through investigation that it was not reported.

XIII-113

THOWSEN - CROSS

1 Q Okay. You indicated just a minute ago that you had
2 someone else do this and report back to you?
3 A Yes, some things I would do myself; some things I
4 may have the secretary do.
5 Q And she would tell you what her results were?
6 A Yes.
7 Q Okay. And did you prepare a report on the results
8 of this investigation?
9 A I did not. Because it was negative I reported to the
10 District Attorney's office and there was nothing found.
11 Q So you generated no report whatsoever on this
12 additional investigative work you did on this case?
13 A I did not.
14 Q Okay. And besides perhaps your secretary going out
15 and talking to whoever she talked to and reporting back to
16 you, who else was out there doing this?
17 A Well, I also spoke with urologists in the Valley since
18 a urologist would be involved in having to repair and/or
19 replace an individual's penis had they actually survived, and
20 determined that nobody had reported any severed penises that
21 they had reconstructed.
22 Q You talked to every urologist in Las Vegas?
23 A I talked to several of them and asked that they
24 would communicate amongst themselves at their various

XIII-114

THOWSEN - CROSS

1 Q How often does it happen?
2 A It doesn't. That's why it's a big deal.
3 Q Okay. It's never happened before?
4 A It does not happen often is what I'm saying.
5 Q Okay. Well, you're familiar with how often it has
6 happened?
7 A No.
8 Q Okay. Are you aware of Dr. Simms' testimony that
9 every case he's seen has been male on male amputation?
10 A I was not present for Dr. Simms' testimony.
11 Q Okay. You were never informed of that? No one
12 ever informed you of that?
13 A The ones that he has seen?
14 Q Or read about?
15 A I have not been informed of that, no.
16 Q You haven't done any reading on this type of
17 amputation, you're just basing it on what you've heard and the
18 Bobbitt case?
19 A I base this on my experience as a police officer
20 investigating murders like this that don't involve severed
21 penises and realizing that it doesn't occur but very rarely.
22 Q And as a -- as a veteran homicide officer you know
23 the importance of preparing reports of your investigation,
24 correct?

XIII-116

THOWSEN - CROSS

1 conferences and that, yes.
2 Q So your testimony is based on you asking others to
3 go out and ask others whether or not they had seen a severed
4 penis or fixed a severed penis or cut penis?
5 A As far as the urologists go, a town of this size
6 doesn't have all that many urologists.
7 Q How many does it have?
8 A I can't give you an exact number.
9 Q But how do you know that there's not that many?
10 A Because I've probably been to dinner with most of
11 them at the same time.
12 Q Okay. All right. Leaving out your dinner
13 conversations your investigation in this case was to talk to
14 some urologists and ask them to talk to other urologists?
15 A Yes.
16 Q Okay. And --
17 A Because that's something that is -- would be talked
18 about. If somebody's penis was severed and had to be
19 reinstalled it's sort of like Lorena Bobbitt. I think pretty much
20 everybody is familiar with her name because it's an unusual
21 occurrence. It doesn't not happen very often and it's a big
22 deal. If something like that happened and somebody did the
23 surgery, everybody in that business would be knowing about it
24 and talking about it.

XIII-115

THOWSEN - CROSS

1 A I know that it's important to be able to testify to
2 what has been done. In some cases it's done in a report so
3 you can have it outlined. In some cases if it's something that
4 stands out and you've discussed it with the District Attorney's
5 office and it did not come up with any result that indicated
6 there was an actual individual that was a victim with that
7 injury, then no.
8 Q So you do all this investigation and don't document
9 it anywhere?
10 A Well, I think it has been documented in prior
11 testimony.
12 Q Other than coming to court --
13 A Forgive me, Your Honor, I thought this was
14 completely off. (Turns off cellphone) I'm sorry, go ahead.
15 Q Other than coming to court and testifying at a prior
16 proceeding, have you ever documented any of this
17 investigation you did in this case?
18 A Yes, I've documented a lot of this investigation I've
19 done.
20 Q No, on the -- on the penis amputation or severance
21 or lack of any reports being filed?
22 A It's not in a specific document, no.
23 Q Now let's say someone is -- suffers a stab wound,
24 it's not directly to the penis but perhaps it's to the groin area

XIII-117

THOWSEN - CROSS

- 1 without impacting the penis, how many of those happened
- 2 during that three-month period?
- 3 A I don't know. Didn't see any.
- 4 Q Okay. Well, which ones did you look at?
- 5 A I asked for anything that would be reportedly attack
- 6 of the groin.
- 7 Q Okay. Who did you ask for that information?
- 8 A The records bureaus of the various locations here in
- 9 Clark County.
- 10 Q Okay. And they didn't report back to you in writing?
- 11 They just called you up and said --
- 12 A Yes.
- 13 Q Okay. So it's based on what they told you during
- 14 what, a phone call?
- 15 A A phone call or someone looking up on a computer
- 16 terminal.
- 17 Q Well, they -- you mean sending you an e-mail saying
- 18 I didn't get any results?
- 19 A No, I did not have any e-mails.
- 20 Q Okay. Well, how did you get the information back
- 21 that there were no reports filed if it wasn't by phone call?
- 22 A That's what I'm telling you is that it would have
- 23 been a conversation in person or on a telephone. There was
- 24 not an e-mail.

XIII-118

THOWSEN - CROSS

- 1 Q Okay. And there's no documentation to tell us who
- 2 these persons were that gave you this information?
- 3 A No.
- 4 Q How many instances were there where someone
- 5 went to a healthcare provider during that time and indicated
- 6 that they had accidentally cut themselves in that area?
- 7 A I have no idea.
- 8 Q Because the healthcare provider wouldn't have to
- 9 report that?
- 10 A I think a severed penis would not be considered a
- 11 potentially accidental cutting.
- 12 Q I was indicating the entire -- the area including cuts
- 13 to the groin or the upper stomach, things of those nature
- 14 where you go into the doctor and you say, you know, I was
- 15 using my saber saw and it slipped and I cut myself, and the
- 16 doctor believed that it was an accidental injury and didn't
- 17 report it. How many of those happened during that period?
- 18 A None that I'm aware of.
- 19 Q But if it was determined to be accidental it wouldn't
- 20 have been reported so there's no way you'd be aware of it,
- 21 correct?
- 22 A No.
- 23 Q Unless you went to every single doctor in town and
- 24 asked, you know, that somebody come in with that?

XIII-119

THOWSEN - CROSS

- 1 A Correct.
- 2 Q And you were asking questions concerning paper
- 3 towels at the scene by Mr. Kephart, some white paper towels
- 4 stuffed in the open wound in the penis area?
- 5 A Yes.
- 6 Q And it's recollection that you didn't see any of those?
- 7 A Not stuffed in any wounds, no.
- 8 Q Okay. And Sergeant Manning was there at the
- 9 scene?
- 10 A Yes, he was.
- 11 Q Okay. And he would have various responsibilities at
- 12 the scene?
- 13 A His responsibility is to oversee the detectives and/or
- 14 deal with the media if the media's there, and if we need
- 15 additional equipment or something like that he'd be the one
- 16 that would arrange that sort of thing.
- 17 Q Would he also deal with the coroner's investigator
- 18 office?
- 19 A He may at times, yes.
- 20 Q And you had talked about the fact that when you do
- 21 a media release on a homicide case that often times you will
- 22 withhold certain information to verify if someone comes
- 23 forward that they're telling you something that is true or
- 24 they're just trying to volunteer so to speak?

XIII-120

THOWSEN - CROSS

- 1 A That's correct.
- 2 Q And would you also give directions to the coroner
- 3 medical investigator not to release information to the next of
- 4 kin concerning those type of things?
- 5 A Yes, that would be consistent as well.
- 6 Q If the next of kin was contacted and told that there
- 7 was a severed penis, that information could get out to the
- 8 public and you'd want to control that?
- 9 A That's true.
- 10 Q And so would Sergeant Manning, part of his
- 11 responsibilities to be to tell the coroner's investigator what not
- 12 to release to the next of kin or whoever they deal with?
- 13 A Yes, if in a case like this if we wanted to tell them
- 14 not to release that the penis was severed he would do that.
- 15 Or, in a case of somebody that had been shot and not release
- 16 what caliber it was, things like that so we'd know if somebody
- 17 was talking about a specific caliber we'd know that we had
- 18 somebody who knew what they were talking about.
- 19 Q And that's not uncommon in most homicides,
- 20 correct? To withhold some information?
- 21 A That's correct.
- 22 Q And that certainly would be within Sergeant
- 23 Manning's duty to make the determination what not to be
- 24 released?

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001400

THOWSEN - REDIRECT

1 somebody would miss him or someone miss him.
 2 Q Okay. And that's past tense?
 3 A Yes.
 4 Q And you questioned a lot about whether or not --
 5 what you did to determine whether or not this had been
 6 reported anywhere else throughout Clark County. Do you
 7 remember that --
 8 A Yes.
 9 Q -- cross-examination? How big's the department?
 10 A Around 4,000 employees, around 2,000 police
 11 officers.
 12 Q Okay. You also testified that this was a big -- it was
 13 big information that you received from -- up in Panaca before
 14 you left to cause you --
 15 MR. SCHIECK: Objection, leading, Your Honor.
 16 THE COURT: Sustained.
 17 BY MR. KEPHART:
 18 Q Okay. Do you remember telling -- testifying about
 19 how this was a big situation before you left?
 20 MR. SCHIECK: Objection, asked and answered,
 21 Your Honor.
 22 THE COURT: Overruled.
 23 BY MR. KEPHART:
 24 Q Do you remember that?

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THOWSEN - REDIRECT

1 A Yes.
 2 Q Okay. Why was it so big?
 3 A Because we had not put any information out, we'd
 4 gone to lengths to make sure that nobody had known that we
 5 had a victim that had his penis severed.
 6 Q Did you think that a department investigated this
 7 type of crime about a penis injury that would get around
 8 through the department?
 9 MR. SCHIECK: Objection, speculation, Your Honor.
 10 THE COURT: Sustained.
 11 BY MR. KEPHART:
 12 Q How long have you been a police officer now?
 13 A Twenty-nine years.
 14 Q Is this a big enough incident that that would be
 15 something that would be discussed if it was something
 16 investigated by the police department?
 17 MR. SCHIECK: Question's vague as to who's
 18 discussing it, Your Honor. Is it between homicide detectives or
 19 the secretary at the --
 20 MR. KEPHART: Judge, I said the police department.
 21 THE COURT: Sustained.
 22 MR. KEPHART: Okay.
 23 BY MR. KEPHART:
 24 Q Homicide. Would you necessarily discuss an injury

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THOWSEN - REDIRECT

1 to someone's penis unless it was a dead body?
 2 A I'm not sure I understand your question there.
 3 Q Okay.
 4 A Sorry.
 5 Q Would the homicide department discuss -- if you
 6 learned about information about an individual that got his
 7 penis severed would that be a topic of discussion --
 8 A Yes, it would.
 9 Q -- at the homicide?
 10 A Yes, it would.
 11 Q Even if he wasn't dead?
 12 A Absolutely.
 13 Q Within the police department?
 14 A Yes.
 15 Q So that's a big thing, big deal?
 16 A Yes.
 17 Q Unique?
 18 A Very unique.
 19 Q Defendant had indicated to you that she was on a
 20 meth binge, at the end of a meth binge and I guess her words
 21 were three-day meth binge. Do you remember that testimony?
 22 A Yes, I do.
 23 Q She indicated -- not testimony, I mean her
 24 statement, she indicated multiple times that she --

XIII-152

THOWSEN - REDIRECT

1 MR. SCHIECK: Objection, leading, Your Honor.
 2 THE COURT: Sustained.
 3 BY MR. KEPHART:
 4 Q She ever tell you that she was -- in her statement,
 5 do you recall in her statement that there was -- she did a lot
 6 for drugs?
 7 A Yes.
 8 Q Okay. Do you recall whether or not she told you
 9 that she knew that she -- where to get them in Las Vegas?
 10 A I don't recall that specifically.
 11 Q Could you look to page 15? Do you see the top of it
 12 you're talking about the topic of drugs?
 13 A Yes.
 14 Q And you see about the -- one, two, three, the third
 15 answer down? Read that to yourself.
 16 A Yes.
 17 Q What's she telling you there?
 18 A That she basically had to go back to her house in
 19 Panaca because when she was in Las Vegas she knew where
 20 to get drugs.
 21 Q Okay. She needed to go to Panaca to get clean?
 22 A Yes.
 23 Q Also at -- you knew from her statement she was
 24 talking about two different places with respect to the Budget

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001408

THE COURT: -- you can't object to what you solicit yourself.

MR. SCHIECK: I solicited his information that he testified to as if it was his own knowledge, was in fact based totally on hearsay.

MS. DIGIACOMO: We didn't ask him about contacting the hospitals.

(Pause in the proceedings)

THE COURT: His testimony on direct was that he looked for reports through May, June, and July anywhere in Clark County and found none. Found no other report.

(Pause in the proceedings)

THE COURT: That was where the State left it. It was on -- it wasn't on cross-examination that he indicated that he had delegated some of the research to the secretary who reported back to him. That he had called hospitals and he had called urologists. That was information that was solicited by the defense so.

MR. SCHIECK: On cross-examination of his statement that he had examined reports and that's what he was basing his testimony. His testimony on cross was he didn't examine any reports, he talked to people. He talked -- he had his secretary talk to people and didn't document any of it, of course, but.

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THE COURT: The motion to strike is denied. The State limited either examination to avoid the hearsay. The hearsay that was brought out was solicited by the defense so the motion to strike is not appropriate.

MR. SCHIECK: Your Honor, for the record I would note that when we did approach the bench I indicated that the contents of reports would also be hearsay, that those reports in fact are based on hearsay. That's hearsay information that's related in the reports, so it's much broader than just who he talked to --

MR. KEPHART: The testimony --

THE COURT: But the --

MR. SCHIECK: And I'm comfortable with the record as it stands.

MR. KEPHART: Well, I'm not.

THE COURT: The State's position --

MR. KEPHART: The --

THE COURT: -- was that it was a negative. That there were no reports --

MR. KEPHART: Right.

THE COURT: -- that that is not hearsay. So --

MR. KEPHART: That's our position.

THE COURT: Okay. We'll see everybody at 1 o'clock tomorrow.

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THE COURT: No, he didn't say he didn't refer to any reports. He said he did refer to the reports and he did additional things as well which --

MS. DIGIACOMO: The question was posed generally.

MR. KEPHART: As I recall specifically in that area because I knew what Mr. Schieck was objecting to. His testimony on direct was the searched for reports and that and found -- and within the department and nothing had been reported and it was left at that. Mr. Schieck went into, well, what did you do? Did you make phone calls yourself? Did you talk to hospital personnel? Did -- and then he got to the point where they talking about -- to urologists and how many urologists did you talk to? Do you know all the urologists? That's all cross-examination. That's Mr. Schieck's questions as to what he did in talking to people, but he testified on direct that he found no reports. And my specific direct was aimed as to the statute as to whether or not there was any reports made resulting in information about a person being stabbed or cut with a knife and we talked here specifically about in the groin area slashed with a knife or whatever and he said nothing was reported like that. And now Mr. Schieck said, well, what, did you talk to -- you know, he went on beyond reports based on cross-examination.

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MS. ZALKIN: Thanks, Your Honor.

THE COURT: Everyone have a good evening.
(Court adjourned at 5:08 p.m. until the following day,
September 28, 2006 at 1:00 p.m.)

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JUROR ARIENO: Yes.
 THE COURT: Any questions by the State?
 MR. KEPHART: No, Your Honor.
 THE COURT: Any by the defense?
 MR. SCHIECK: No, Your Honor.
 THE COURT: Counsel, approach.
 (Off-record Bench Conference)
 THE COURT: Mr. Arieno, as you're aware we're not going to be in session tomorrow morning nor Friday morning. And we'll be starting at 1 o'clock both of those days. The Court's going to ask that tomorrow morning you see if you cannot rearrange your appointments that you have for Monday, Tuesday, and Wednesday next week and see if you can push them -- push them further out and reset them. And then we'll come back to you to talk to you about that tomorrow, okay?
 JUROR ARIENO: All right.
 THE COURT: You'll remain under the evening admonishment from the Court. You have a good evening, we'll see you tomorrow at 1:00.
 JUROR ARIENO: Thank you.
 THE COURT: You're welcome.
 (Juror Arieno recessed)
 THE COURT: Ms. Moir.

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MS. ZALKIN: If the Court has a moment I would welcome the opportunity to respond. If the Court needs to go then we can go.
 THE COURT: Okay. I do need to go, so.
 MS. ZALKIN: Okay.
 THE COURT: It appears he's not going to get called tomorrow so we have a little bit of time to come back to the issue.
 MS. ZALKIN: Sure.
 THE COURT: Okay. Thank you.
 MR. SCHIECK: Just so the Court knows, Your Honor, and I know the Court's got to go and we can do this tomorrow also, but we approached the bench and objected to Detective Thowsen testifying concerning the reports of other people that have had cuts in that area and then were reporting. We'd object that it's hearsay and the Court allowed him to testify. We want to renew that motion and make a motion to strike his testimony in that regard because, in our opinion, clearly based completely on hearsay where he's talking to urologists and things like that. We can address that tomorrow. I just wanted to make you totally aware I needed to make a record.
 MS. DiGIACOMO: We might be need to address that because if that's the case we do have custodians from every

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(Pause in the proceedings)
 THE COURT: Ms. Moir, you're encountering difficulties for next week?
 JUROR MOIR: Actually I just need another letter.
 THE COURT: We can do that.
 JUROR MOIR: That's all I need, just another letter stating that, you know, you didn't anticipate it to go this long and as long as I have documentation.
 THE COURT: Okay. Very good, we can provide that to you.
 JUROR MOIR: Okay.
 THE COURT: You'll remain under the admonishment from the Court for the evening recess and we will see you at 1:00 o'clock tomorrow.
 JUROR MOIR: Okay. Thank you.
 THE COURT: Thank you.
 (Juror Moir recessed)
 (Pause in the proceedings)
 THE COURT: I just sent my JEA an e-mail. She leaves at 5:00 so she's probably headed out the door for her to do that letter tomorrow.
 (Pause in the proceedings)
 THE COURT: It doesn't appear that we're going to be getting to Brent Turvey tomorrow.

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hospital that were contacted and they had no incidence of a penis being cut. We'll need to call all those witnesses then, which probably would be another 10 witnesses. Because we did go to each hospital emergency room in the Valley, do our own investigation and ask regarding any injury to any penis and there wasn't one, so. I mean we could leave it with Detective Thowsen or we can, you know, go that route. We just need to know.
 MR. SCHIECK: Well, there's a lot more --
 THE COURT: The --
 MR. SCHIECK: -- healthcare providers than 10.
 THE COURT: -- objection at sidebar was as to hearsay and we had discussion at sidebar that -- cause my initial impression was that Detective Thowsen himself had called the hospitals and was going to rely what the hospital personnel had told him and Mr. Kephart said, no, that that was not the case. That he had internally reviewed reports from Metro that were negative. And that is what Detective Thowsen initially testified to so I want to go back to my notes.
 MS. DiGIACOMO: It was on cross-examination, the rest you know.
 THE COURT: And that was solicited by the defense rather than --
 MS. DiGIACOMO: That's correct.

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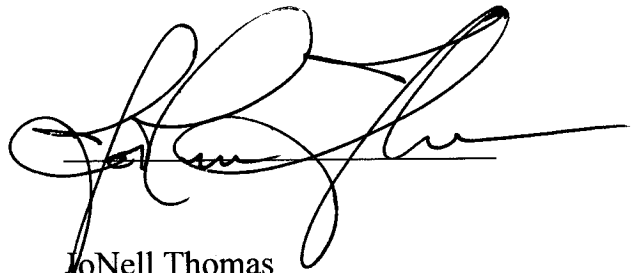
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2008 I caused to be mailed a true and correct copy of the foregoing Appellant's Reply Brief

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A handwritten signature in black ink, appearing to read 'JoNell Thomas', written over a horizontal line.

JoNell Thomas
State Bar #4771