IN THE SUPREME COURT OF THE STATE OF NEVADA

DAIMON MONROE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 52788

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUE(S)

1. Whether the district court erred when it denied Defendant's motion to suppress evidence seized pursuant to the search warrants as fruit of the poisonous tree.

2. Whether the district court erred when it concluded the search warrants were supported by probable cause.

3. Whether the search warrants lacked particularity and unlawfully authorized "general searches.[1]

4. Whether there was sufficient evidence presented to support all of Defendant's convictions.

5. Whether there was sufficient evidence presented to support the element of value for all counts charging possession of stolen property.

6. Whether the district court erred when it permitted the State to amend count one of the Indictment and whether this resulted in the improper admission of prior bad acts evidence.

7. Whether Defendant was properly sentenced as a large habitual criminal.

[1] In his section titled "Issues Presented for Appeal Defendant lists 7 issues, letters A through G; however, in the body of his brief Defendant included an additional section (note that there are two section "C s (AOB 14, 20)) which challenges the sufficiency of the particularity requirement of the search warrants. See Appellant's Opening Brief (AOB) 20. In the interest of clarity and uniformity, the State has addressed the issue of the particularity requirement in its Argument 3 wherein it addresses the issue of general searches.

STATEMENT OF THE CASE

On December 13, 2006, an Indictment was filed charging Daimon Monroe (aka Daimon Hoyt), hereinafter "Defendant, with one count (count 1) of Conspiracy to Possess Stolen Property and/or to Commit Burglary (Gross Misdemeanor – NRS 205.275, 199.480), and 26 counts (counts 2-27) of Possession of Stolen Property (Felony – NRS 205.275.[2] RA 249-60. On April 30, 2008, the State filed a Notice of Habitual Criminality. RA 545-48.

On April 29, 2008, the State filed a Motion to Amend Indictment. RA 538-44. The district court entertained argument on the issue on May 1, 2008, granted the State's motion, and then filed an Order Amending Indictment. RA 549-50. The Amended Indictment was also filed on May 1, 2008. RA 551-62.

On May 3, 2008, Defendant filed a Notice of Motion to Suppress Evidence Obtained Pursuant to Search Warrants. RA 563-70. The State filed its Opposition on May 9, 2008. RA 625-32. On May 7, 2008, Defendant (1) filed a Joinder of Motions, (2) filed his own Motion to Suppress Evidence (as fruit of the poisonous tree) on May 7, 2008, and then (3) joined in Fergason's Motion to Suppress Evidence (as fruit of the poisonous tree) also filed on May 7, 2008.[3] RA 611-624, 571-94, 595-97. The State's Opposition was filed on May 9, 2008.[4] RA 638-46. On May 12, 2008, the court denied both of Defendant's motions.[5] RA 779-83.

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[2] It appears Defendant transposed the cover sheets of his appendices in Nos. 52788 and 52916. Consequently the record for # 52788 was filed in # 52916 and vice versa. To avoid confusion, the State is submitting Appellant's Appendix in No. 52916, which is actually the record in the instant appeal, as part of Respondent's Appendix in No. 52788 (the instant appeal). The State has also included in its Respondent's Appendix separate documents which are necessary to properly address Defendant's claims on the merits.

[3] The State would note that Defendant's suppression motions in the instant case were identical in substance to his suppression motions filed in C227874 (No. 52234) and C228581 (No. 52916). See RA 508-22, 703-717, 718-25.

[4] On May 7, 2008, Defendant filed a Joinder to motions filed by his co-defendants in the instant case including those filed by Bryan Fergason. RA 595-97, 783. The State's Opposition filed on May 9, 2008, was in response to Fergason's Motion to Suppress which was filed on May 6, 2008. Defendant's motion to suppress evidence obtained as a result of his detainment and arrest on September 24, 2006 raised precisely the same issues raised by Fergason in his motion to suppress. As such, the State did not file a separate opposition to Defendant's motion to suppress and relied, instead, on its opposition already filed in response to Fergason's motion to suppress. See RA 783, 638-646.

On May 13, 2008, the State filed a Second Amended Indictment charging Defendant with one count (count 1) of Conspiracy to Possess Stolen Property and/or to Commit Burglary (Gross Misdemeanor – NRS 205.275, 199.480), and 26 counts (counts 2-27) of Possession of Stolen Property (Felony – NRS 205.275). RA 647-58.

Defendant's jury trial commenced on May 13, 2008. RA 827. On May 20, 2008, Defendant was convicted of all counts as charged in the Second Amended Indictment. RA 696-702. On October 1, 2008, Defendant was sentenced under the large habitual offender statute as follows: as to count 1 – twelve (12) months in CCDC; counts 2 through 14 - LIFE without the possibility of parole, with Defendant's sentence in each count ordered to run CONCURRENT with each other; counts 15 through 27 LIFE without the possibility of parole, with Defendant's sentence counts 15 through 27 ordered to run CONCURRENT with each other but CONSECUTIVE to his sentence in counts 2 through 14. RA 754-61. Further, Defendant's sentence in the instant case was also ordered to run CONSECUTIVE to his sentence in C227874[6] with zero (0) days credit for time served. Id. A Judgment of Conviction was filed on November 4, 2008. RA 754-61. The State's Answering Brief follows.

STATEMENT OF THE FACTS

The instant case arises from stolen property recovered pursuant to several search warrants. Part of the probable cause for the warrants developed as a result of a *Terry* stop and arrest which occurred on September 24, 2006. Six premises were searched: 3250 N. Buffalo, 1504 Cutler (Defendant's residence), 5900 Smoke Ranch #174, 8265 West Sahara, Unit B-106, 8100 W. Charleston #A138 and 7400 Pirates Cove #220. RA 1-41, 42-91, 92-133, 134-172, 173-217, 218-248. Hundreds of items of stolen property were recovered. Defendant's Opening Brief (DOB) 6-8. Charges arising out of the September 24, 2006

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[5] In his Appellant's Opening Brief (AOB) Defendant incorrectly refers to C228581 as corresponding with Supreme Court No. 52234. In fact, C228581 corresponds with No. 52916, and No. 52234 corresponds with C227874 (which was the "initial incident), not C228581. See AOB 5, 6.

[6] No. 52234.

incident resulted in convictions under District Court case number C22787 (SC # 52234). In addition, there were other cases involving a co-defendant, Bryan Fergason as well as other charges against Defendant. The instant case involves allegations of conspiracy to commit possession of stolen property (the items recovered pursuant to the warrants) and/or burglary of the two business involved in the *Terry* stop, Just for Kids Dentistry and Anku Crystal Palace (Count 1) as well as twenty-six counts of possession of stolen property relating to items recovered through execution of the warrants (Counts 2-27). RA 647-58. In each case, identical motions challenging the propriety of the *Terry* stop and requesting suppression of all evidence that arose from that stop and any derivative evidence obtained through the search warrants were filed. The State's Opposition was also identical in each of the cases. Consequently, the facts relating to the September 24, 2006 are relevant to this appeal.

I. C227874, No. 52234

In the early morning hours of September 24, 2006, security systems monitored by ADT Security ("ADT) were activated at two businesses located near the intersection of Tropicana Avenue and Grand Canyon Road in Las Vegas.[7]

In the first incident, the burglar alarm at the front door of Anku Crystal Palace ("Anku) was activated at 1:14 a.m.[8] RA 265-66, 268. Motion detectors subsequently detected activity inside the business at 1:16 a.m., and then registered the opening of the rear door at 1:17 a.m. RA 269. ADT unsuccessfully tried to call Mr. Hung, a representative of the business, but reached his brother, George, instead. George subsequently reached Mr.

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[7] The following Statement of Facts is extracted from the transcript of the preliminary hearing which occurred on November 7-8, 2006, in C227874. See RA 261-477. Said facts relate to Defendant's Arguments I through III, infra. Notably, the preliminary hearing transcripts for C227874, and the Incident Recall Reports (CAD) for Anku and Dentistry, were relied upon and cited extensively by Defendant and Fergason in their motions to suppress (in all cases) as well as by the State in its oppositions, however, for some reason neither party attached a copy of the preliminary hearing transcript as an exhibit to any of their pleadings in the instant case. The record reflects the district court in this case was aware of the pleadings and therefore the facts as cited in the transcript.

[8] The times contained in ADT's event history reports for the locations in question were generated and entered into the mainframe computer at the time they occurred. PHT I 10. The event history reports for each location were entered into evidence as State's Exhibits 1 and 2. RA 268, 272.

Hung who then called ADT directly. RA 299-300. ADT then sent an alarm response officer to Anku at 1:21 a.m. RA 271, 285, 287. .

Mr. Hung arrived at Anku at approximately 1:50 a.m. and waited for ADT's alarm response officer who arrived approximately 5 minutes later. RA 287-88. As he walked through his store he noticed a few pieces missing including a wood carving, a dragon carving, and some crystal jewelry with semi-precious stones. He also noticed a laptop computer and Game Cube game with several cartridges were missing. RA 289. Finally, he noticed that a rudalated crystal and mineral hairpiece which retailed for $1500, as well as some petty cash in the amount of $300 (including several $5 bills) were also missing. RA 289-90. After looking through the entire store the ADT security officer called the police. RA 291. It took the police approximately 15-20 minutes to respond.

After the police arrived Mr. Hung walked them through the store and gave them a description of everything that was missing. Approximately 10-15 minutes later he received a phone call from ADT informing him there might be a suspect in custody. RA 292. An officer then spoke with ADT and took Mr. Hung to the suspects' location which was about 5 minutes away. Once at the scene, a police officer took Mr. Hung to a white minivan; the minivan's back passenger sliding door was already open. RA 293, 304-05. While standing outside of the van with the officer's flashlight he observed a crystal jewelry bracelet and a crystal mineral piece on the floor of the van as items stolen from his store. RA 293, 304. When the police subsequently opened the back of the van Mr. Hung recognized two wood carvings stolen from Anku. RA 295-96.

Meanwhile, also on September 24, 2006, between 1:30 and 2:00 a.m., Brent Engle was on his cell phone arguing with his girlfriend outside Timbers, a bar/restaurant located on Tropicana and Grand Canyon,[9] when he observed a white Dodge Caravan minivan pull into the parking lot, circle the lot once, and then drive around and stop in the middle of the parking lot for "a good thirty seconds. RA 315-17, 318. He testified that at that hour ,

[9] Timbers was one of five or six businesses including the Just for Kids Dentistry located within in that strip mall. RA 315-16, 339.

"[t]here's nothing at that parking lot except the Timbers and I found that a little bit strange and I was standing between an SUV and truck and I guess the car couldn't see me. RA 317. He continued to observe the minivan as he continued talking on the phone because "I found it very strange at 2:00 o'clock you're going be [sic] there in an empty parking lot like that. RA 318. After the van's thirty-second stop, he observed it pull up towards the Dentistry. Mr. Engle immediately ended his phone call and then observed two individuals exit the minivan with hoods on; while he could not describe their faces, he noted that one individual had blond hair "coming out of the hood. RA 319. These individuals walked straight to the Dentistry's front door and "went right through the door like faster than me or you could put a key in the door and open it and they went through the door so fast. Realizing this was a problem he walked into Timbers and told the bartender that someone was breaking into the dentist office and to call Metro. RA 319-20.

Upon walking back outside Mr. Engle observed that the van was still parked in front of the Dentistry, and the individuals were coming from the back of the building. RA 320. A cook for Timbers, who went back outside with him, approached the individuals as a ruse to ask them for a cigarette. RA 321, 336. They ignored him, got back into their van and drove off. Approximately 30 seconds to a minute later the "eye in the sky police helicopter was flying down on the parking lot. RA 322. Subsequently, the police took Mr. Engle to an area where a white minivan had been stopped by the Las Vegas Metropolitan Police Department. RA 322, 331, 337. While he could identify the minivan as the one he'd seen, because he did not get a clear look at the earlier mens' faces, he could not identify the men present at the scene as the ones he observed earlier. RA 322.

Sam Harris-Inman, the office manager of the Dentistry, received a call from ADT in the early morning hours of September 24, 2006, advising him that the front door alarm and motion sensor alarms inside the store had been activated. RA 338-39. ADT asked that he respond to the scene; the police were already at the Dentistry when he arrived. RA 339. Upon his walk through the business it appeared to him that nothing had been taken. RA 339-40.

LVMPD officers Kenny Salisbury ("Salisbury) and Jerry MacDonald ("MacDonald) were initially dispatched to the Anku burglary at about 2:15 a.m. RA 341-42, 344. However, just a few minutes after being dispatched (and before they arrived at Anku) they were diverted to a possible burglary in progress nearby at the Just For Kids Dentistry office ("Dentistry) located at 9837 West Tropicana Avenue. RA 342, 344. Other officers then responded to Anku.[10] RA 586. The two businesses are approximately 1.5 miles apart. Salisbury described the Dentistry location as a strip mall.

When he arrived at the location he observed "only one vehicle in that entire parking lot in front of the dentistry . . . a white minivan[,] and it was parked directly in front of the dentist's office. RA 343-44. Given the rural setting of the area, generally, and the location of the van, specifically, Salisbury concluded the van warranted checking out. RA 344. As he described it, "I see [the van] on the approach. And as I see it on the approach and we are pulling up to that stop sign at Tropicana and Grand Canyon I see this vehicle start moving. RA 345. He was clear he initially observed the van at rest before he observed it start to move. It backed out and headed eastbound on Tropicana when MacDonald, who was now in front of Salisbury, pulled it over. RA 346. They then performed a felony car stop: "At that time to our knowledge we have a felony crime that's been committed. We do a felony car stop, which is where we're immediately going to have the occupants exit the vehicle and we are going to make sure we've got any and all occupants out of the vehicle and do any sort of Terry stop investigation in front of our patrol car . . . RA 346-47, 414.

Upon ordering the men to exit the van, Salisbury ordered the passenger, co-defendant Bryan Fergason,[11] to leave the passenger front door open so that he could conduct a protective sweep for additional occupants. RA 349, 416. He explained that the windows were tinted "and there's a whole lot of vehicle behind it. He leaned inside the vehicle

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[10] On the Incident Recall Reports (or CADs) Officer MacDonald's call number was 1R2 (1 Robert 2). RA 344.

[11] Bryan Fergason, with whom Defendant was arrested on September 24, 2006, was subsequently prosecuted and tried with Defendant in C227874.

through the passenger front seat, looked to the back with his flashlight, and confirmed there were no other occupants inside.

During his protective sweep Salisbury immediately noticed a unique-looking "glass crystalline object on the floorboard of the van which "immediately struck me as odd . . . It was just out of place. RA 350, 354. As he looked back he also observed a hanging picture, tools, a Nintendo and other property in plain view on the seats and floorboard of the van.[12] RA 350. In addition, Salisbury saw tools he recognized as burglary tools. RA 355, 357, 432. Upon this discovery he asked both suspects what they did for a living to which they both responded "pressure washing. RA 355. Salisbury still believed the items were burglary tools because the some of the tools had been modified and "a real long bent screwdriver and bolt cutters did not seem consistent with pressure washing concrete.

After the protective sweep, MacDonald solicited personal information and conducted a records criminal history check of Defendant and Fergason while Salisbury watched over them. RA 351. Meanwhile, other officers were dispatched to investigate the Dentistry premises. RA 589. These officers initially reported to Salisbury they had checked the front door of the Dentistry and it was locked. The back door was being investigated. RA 590.

Approximately ten to fifteen minutes after learning their criminal histories, and after Salisbury received the communication about the Dentistry front door, Salisbury heard radio communication dispatching two units to the Anku burglary and made the connection of Anku and the crystal piece he observed inside Defendant's van. RA 351. He described his thought process as follows: "and I'm like that's a crystal shop that just got robbed a mile away and there's a crystal fixture or object in [sic] the bottom of this van, so let's have those officers go and see if this came from that store. Given this connection, Salisbury communicated over the phone with the officer at the Anku scene who described to him the items Mr. Hung told him were missing. RA 352. Based on what was described to him

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[12] Salisbury defined plain view as seeing the objects inside the van (on the seats and floor) through the window with a flashlight without having to actually enter or move beyond the front passenger door. RA 354, 404.

Salisbury recognized those objects as being the same objects he observed inside the van. RA 352-53. At that point Salisbury arrested Defendant and Fergason for the Anku burglary. RA 353.

After Salisbury connected the Anku burglary with the crystal object seen in the protective sweep, he learned that neither door of the Dentistry showed signs of a forced entry and nothing was missing. However, at that point he was already investigating the van and its occupants for the Anku burglary, so he continued to detain the van. RA 432. Once he received the information that items missing from Anku matched items viewed in the protective sweep, he arrested Defendant for the Anku burglary. He based his probable cause on the short time frame within which that burglary had occurred, the prior arrest histories of the two defendants, the altered burglary tools and the unusual crystal object (as well as other unusual items) he observed in plain view inside the van. RA 403-04; see RA 430-33.

Salisbury's search of Fergason incident to his arrest resulted in the recovery of unique-looking bracelets; by the time of their recovery Salisbury was already aware these bracelets were among the items taken from Anku (they still had price tags on them). RA 65, 357-58. He also recovered gloves and cash from Fergason's wallet in the amounts and denominations "congruent to that which was taken from Anku. RA 357, 359-400.

Subsequent to Defendant's arrest Det. Bradley Nickell ("Nickell) was assigned to investigate the case. He described the alteration done to one of the burglary tools initially observed by Salisbury inside Defendant's van during his protective sweep as a 16 to 18 inch screwdriver that had been torched and bent at a 90 degree angle with its shaft "ground down very thin. RA 435, 444. "[W]hen I saw the tool I saw there had been a significant amount of effort had [sic] been put into altering the tool and that told me from my experience that that's important to somebody and had a specific purpose. [13]

At some point during his investigation Nickell checked the tool out of evidence and took it to both crime scenes to see whether he could use it to enter both businesses. RA 436-

[13] A photograph of the altered screwdriver was identified by Det. Nickell and then entered into evidence at the preliminary hearing as State's Exhibit 14. RA 436.

37. At Anku Nickell successfully opened the front door by touching the end of the tool to the thumb locking devise inside the door thereby deactivating the lock without the use of a key. RA 438. He was able to unlock Anku's front doors in under a minute without leaving any significant or obvious damage on the door. RA 438-39. At the Dentistry, Nickell was similarly able to maneuver the tool and deactivate the thumb lock of the front door in less than two minutes. RA 439-40, 443. Nickell returned to both scenes on another day with another officer so that he could be photographed unlocking the doors with this tool.[14] RA 440. Based on this additional information, Defendant was subsequently charged with the Dentistry burglary as well.

II. C228752 – No. 52788: Defendant's instant appeal

The information obtained through the *Terry* stop and arrest on September 24, 2006 led to search warrants being executed on Defendant's residence and other locations. Evidence obtained in the initial searches then led to additional warrants. As a result, large amounts of stolen property were recovered that relate to the Counts at issue in this case. Facts relating to the warrants are discussed Arguments I through III. Testimony relating to the stolen property's value is discussed below.[15]

Count 2.[16] Travis Graves, an owner of Desert Rock Sports located at 8221 W. Charleston, recalled that his business was burglarized in August 2006. RA 1036. He described his merchandise as "high-end. RA 1038. Specialty sleeping bags, socks, camping-related items such as purification items, backpacking lanterns, headlamps, sandals, and clothes were among the items taken. Mr. Graves identified sleeping bags and Teko socks depicted in State's Exhibits 4 through 8 has property stolen from his store. RA 1039, 1045. When the items were returned to him they looked just as they did on the day they

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[14] Some of these photographs were entered into evidence as State's Exhibits 15, 16, and 17. RA 440-42.

[15] Defendant is only challenging the sufficiency of the evidence presented by the State regarding the value of the stolen items as represented by counts 2 through 27. See Argument 5, infra. Given the vast trial record in this case and Defendant's limited challenge, the State will only summarize those portions of the record necessary to address Defendant's specific arguments on the merits.

[16] All counts refer to the Second Amended Indictment filed on May 13, 2008. RA 647-58.

were stolen except that the socks were not in their packaging. RA 1040. Only four sleeping bags were returned; each of which retailed for between $250 and $350. RA 1042, 1046. Graves indicated the items seen in State Exhibit 5 were worth several hundred dollars. RA 1043. The socks sell for $8 to $10 a pair and he recalled that between 30 and 50 pairs were returned to him. RA 1044.

Count 3. Mike Lantsberger owned The Touch of Vegas. RA 1025-26. It was burglarized on August 2, 2006. RA 1026. A lot of Rock and Roll memorabilia including a photograph of Woodstock were among the 24 to 26 pictures taken. RA 1027, 1035. Some time later he was contacted about the Woodstock photograph which he later confirmed was his when he viewed it at the evidence vault. He also viewed other photographs and found more of his stolen property.[17] He recalled paying about between $60 and $80 for the signed Ed Sullivan photograph, and the Rolling Stones photograph. RA 1032. He paid "around 1000 for the Woodstock photograph, and around $2000 for the INXS photograph depicted in State Exhibit 15. RA 1032-33. He paid around $60 to $80 for each of the Bob Dylan and Led Zeppelin photographs. RA 1033. He did not give anyone permission to possess his memorabilia photographs.

Count 4. Andre Hines, a graphic designer and artist, works for Annie Lee's Art Gallery and remembered he got a call in July 2006 advising him that the gallery had been burglarized. RA 1772-74. Two original canvas pieces of his were missing as well as a lot of original works by Annie Lee, and some pieces belonging to artist Lonnie Gordon. RA 1774. He identified Annie Lee's original pieces in State Exhibit 32, 33, and 35 and testified that her original pieces start at a minimum of $10,000 each. RA 1774-76. One exhibit depicted a price tag for $16,000. RA 1776. In Exhibit 37 the "Steepin' 'N Sleepin and "Graffiti Bridge pieces also starts at $10,000 each. RA 1778. Another piece called "Market Place

[17] State's Exhibits 9-18, 19, 21, 23, 25, 27, 29, and 31 depicted the property and pictures taken from his business. RA 1028-30. Exhibit 10 depicted Ed Sullivan and the Beetles. RA 1031-32.

is valued at "a little bit over 10,000. No one had permission to possess these pieces. RA 1779.

Count 5. Estrella De La Cruz was an office manager for Spa Depot located at 9350 W. Tropicana – a retailer that sells accessories, spas, and barbecues. RA 1062. On June 26, 2006, the store was burglarized. Numerous spa chemicals and supplies were stolen. RA 1062-63. She identified merchandize shown in State Exhibits 41 to 47 as the stolen items due to the custom labels (Elite Spas).[18] RA 627. No one else carries Elite Spas chemicals in Las Vegas. RA 1066, 1069, 1070. She approximated the value of the spa chemicals that were returned to be $2600. RA 1069.

Count 6. Kay Friedrichs, who manages the See's Candies store on 10300 W. Charleston, noticed the store had been burglarized on June 15, 2006. RA 1047-48. They had taken inventory a day before the burglary so she knew what was on the shelves and in the back room. RA 1049. Five-pound, three-pound, and one-pound boxes of assorted candies were taken as well as a case of lollipops with 250 boxes to a case, and bulk candy. RA 1049-50. No one had permission to take the candy. RA 1050. In State Exhibit 49 she identified 5- and 3- pound boxes of candy that she had personally wrapped in either dark or light blue paper for Father's Day. RA 1050, 1052. In State Exhibit 48 she identified their candy because the boxes are patented trademark in the blue wrap their candy comes in. RA 1050-51. The gold seals also have See's trademark on them. RA 1051. Each box of two-pound of assorted candies in white boxes is $28 per box. The three gold boxes are $67 a box, and each of the three two-pound gold boxes are $37. The value of the five-pound box: $14.50 per pound multiplied by 5 (for the number of pounds). The same for the three-pound box ($14.50 multiplied by 3). RA 1053. The lollipops were $13 per box, and the box of assorted lollipops was $14 a pound and there were 24 one-pounders. RA 1053-54. The only candy that is ever marked down are the novelty items such as Easter bunnies. RA 1054-55.

[18] She identified their chemicals depicted in State Exhibits 41 to 47. RA 1066-67, 1068-69.

Christine Carter, an assistant manager of See's Candies, identified the candy she brought back to the store from the Cutler address as depicted in State Exhibits 48 through 52. RA 1057-58.

Count 7. Brittany Petersen worked for her father's company, Mountain Springs Wellness, at the time it was burglarized on June 8, 2006. RA 1071-72, 1766. A hyperbaric chamber and the components that go with it, an oxygen compressor, a massage chair, 3D flat screens and two laptops were stolen. RA 1072. She identified the stolen chamber and its components as depicted in State's Exhibits 57 and 62-67. RA 1074-77. They never replaced it after its theft and they were still able to use it after its return. RA 1075. She was with her father when he identified the brown leather massage chair. RA 1077-78. No one had permission to possess any of these items. RA 1079. The approximate value of the chamber is $20,000 and the massage chair is about $2500. Todd Waldren identified the stolen massage chair depicted in State Exhibits 53, 53, and 57-61 which had a wholesale value of $995 and a retail value of $1500 as well as the hyperbaric chamber which he testified retailed for $20,000 and for which he paid $17,715 (according to the receipt he brought with him to court). RA 1768-71.

Count 8. On May 8, 2006, Mark Chernine, a manager at Land Baron ("Land Baron) Investments at 5275 South Durango, noticed his office had been burglarized. RA 1147-48. Flat screen TVs, a computer monitor, compute tower, some artwork, and various sports memorabilia had been taken. RA 1148. Chernine and some other employees owned the memorabilia and art. RA 1149. Specifically, Russ Jacobi owned a Disney piece of art, a Bugs Bunny item and some type of Rock 'n Roll memorabilia. Chernine's son owned a display of 50-year old baseball cards and a display of old casino chips. He identified the Cutler residence where some of his merchandise had been found as depicted in State Exhibit 68 and 69. He went there with his son Mike, J.W. Bellar and Chad North to recover the property.[19] RA 1150. Chernine collected both the baseball cards and the casino dollar chips

[19] He also identified the baseball card and casino chip collection in exhibits 70 to 73, 74, 76, and 78. RA 1150-52. He recovered some of them items from Metro's evidence vault.

himself over the years and had them mounted and framed for his son. RA 1153. It cost him $150 to frame the chips as well as the baseball cards. He valued the baseball cards at between $3000 and $4000. Also taken was a Mater's golf flag that had been signed by various former Master champions. RA 1155. It was a gift from his son but on the internet such a flag was valued at $3000. He valued the computer tower at $3000 (he did not know the value of the monitor). RA 1156. He never gave anyone permission to possess the items that were stolen. RA 1157.

James Beller, a real estate broker for Land Baron, received a call that a computer screen and tower, baseball cards, Austin Powers signed picture, some Bugs Bunny lithographs and some Tiger Woods photos had been recovered at the Cutler address. RA 1795. He identified the stolen computer screen and tower and approximated the cost for them at about $2500. RA 1796-97.

Count 9. James Vincent is Vice President and Chief Operating Officer (COO) of Econ Appliance, a builder distributor that sells appliances. RA 1129. As COO he had access to both the retail and wholesale value of cost of the appliances. RA 1130. On April 10, 2006, he was advised the Henderson store had been burglarized. RA 1131. Upon conducting an inventory they discovered that various icemakers, refrigeration, and laundry equipment had been taken. They provided the police with model and serial numbers of the stolen items. RA 1132. Metro notified him some time later that they believed they found his merchandise and, after confirmation via serial numbers, he received some of the items back.[20] RA 1133. Among the items taken was a Scotman 15-inch icemaker, a 48-inch refrigerator/freezer (wholesale value of $5000, retail value of $6800), and a Sub-Zero 36-inch freezer (wholesale value of $3500 and retail value of $4800). RA 1135-36. A Whirlpool ensemble washer and dryer with a wholesale value of $880 and retail value of $1100 each were also stolen and recovered. RA 1137.

[20] Mr. Vincent identified the merchandise as depicted in State Exhibits 79-90. RA 1134.

Absocold Corporation is the parent company of Econ Appliance which is in a different business than Econ. RA 1138. As a distributer Econ works with builders including Grand Canyon Construction. RA 1139. Once Econ installs the appliances for the builder at the builder's site, the items become the property of the builder. At the time Econ recovered their merchandise they also found a Viking refrigerator and cook top taken from a Grand Canyon construction site that still belonged to Econ because it had not yet been installed. RA 1140. See count 17, infra. Those two items had a wholesale value of $8000 and a retail value of $12,000 to $13,000 combined. RA 1142. Because those two items were still the responsibility of Econ, the company had to replace them for an additional cost of $8000 wholesale ($12,000 to $13,000 retail). RA 1143, 1203. He identified those items as depicted in State Exhibits 315 to 319. RA 1144-45. They recovered the refrigerator but the cooktop is still in Metro's custody. RA 1146.

Count 10. Marcus Giannella, an interior designer, worked for Milton Homer Refined Home Furnishings ("Milton) which sold high-end furnishings, wall paper, carpeting, flooring, and drapery treatments. RA 938-39, 940. It had been burglarized in February 2006. RA 940-41. As an interior designer for the last 17 years Giannella sells home furnishings, interior design services, paint finishing's, wall finishes, flooring and drapery treatments. RA 939. As a seller of such items and services he is very familiar with their cost. In State Exhibits 91-165 he identified a tree and urn valued at between $750 and $900; two chairs and floor torchiere as well as two pieces of artwork, a table and armchair collectively valued at between $10,000 and $12,000; another armchair valued between $2500 and $3000; a tree and mirror valued at approximately $2000; two pieces of artwork, a dining room table and chairs, and a floral arrangement collectively valued at between $8000 and $10,000; a chest of drawers for $800; a table and lamp for $6000; as well as several more pieces of artwork, mirrors, lamps, end tables, sofas and cocktail tables, occasional chairs, a chest and hanging florals. RA 947-49, 950-51, 952, 953-54, 955-64. Mr. Giannella noted that the cost value (as opposed to the retail value) of the items he described and values he gave would be roughly one-third of the retail figures he quoted. RA 952-53. Giannella

found Milton Homer merchandise within the entire residence except for one room which had been converted into a recording studio. RA 956-57. He also visited a storage unit on W. Charleston. RA 962. There he found two bronzed sculptures one of which was called Bella Donna and which he valued at $3000. RA 965-66. He valued a bronze urn with two cupids at $2500. RA 966.

Franklin Thompson, the owner of Milton, took part in the inventory after the burglary. RA 1415-16. His insurance company did an audit on everything he declared to be stolen and then paid him. RA 1417. On November 6, 2006, he got a phone call from police and went to the Cutler residence where he recovered his property. RA 1418. The approximate total value of the stolen property which was eventually recovered and returned to him was $50,000. RA 1419. All of the property returned to him was "nicked and dinged and shop worn ; the insurance company collected it and sold it at auction. RA 1420.

Count 11. Scott Michels worked for Cal Spas located at 7770 South Industrial Road for three years. RA 1011. As Operations Manager he was responsible for overseeing the day-to-day operations of the business and was therefore privy to the cost of its stock. RA 1010. On July 4, 2005, he noticed the store had been burglarized. RA 1010-11. An inventory search revealed a triangular-sized hot tub measuring 78 inches by 68 inches had been stolen. He called the police and gave them its serial number of the missing hot tub. RA 1012. Sometime later a detective called and verified they found the hot tub. State's Exhibits 169 through 171 depicted the hot tub. RA 1013-14. No one had permission to take the hot tub. RA 1016. At the time it was taken from the store the hot tub was valued at $2,310. RA 1024-25.

Count 12. Roger Moss, a branch manager for Hoshizaki Western Distribution (an ice machine manufacturing company) originally located at 5160 South Valley View, testified that on June 13, 2005, his business was burglarized. RA 1170-71. Among the items taken were some ice machines. RA 1171-72. No one had permission to enter the building. RA 1172. He was subsequently contacted by the police who asked him to confirm the serial numbers of the merchandise they found with the serial numbers of the merchandise that was

taken. RA 1172-73. He then identified State Exhibits 172 through 177 as photographs depicting an AM 50, 50-pound ice machine stolen from him. RA 1173. He recognized it by the company name plate on the side of the item. He valued the icemaker at about $1500. RA 1175.

Count 13. Kevin Peltier is co-owner of HP Media Group and in April of 2005 his business was burglarized. RA 1176-77. HP Media designs home theaters and home automation systems and all of their TVs and audiovisual equipment had been taken as well as some computer equipment. RA 1178-79. Plasma TVs, amplifiers, speakers, audio, and subwoofers were among the items taken. AA 740. At some point the police called and asked him to identify the equipment. RA 1180. At the time of the theft he had given the police a large list of all of the items that were taken. RA 1181-82. For the items he did not have serial numbers for he was able to "match the fact that we had written the name of the client on the box. RA 1182. He identified a JBL S4A speaker, Marantz DVD player and receiver, two Sonance power amplifiers, and JBL subwoofer.[21] RA 1183-84. The serial numbers are 02309, 02414, and 02415 with HA0091 in front of each. RA 1188. Their retail value together was $8000; wholesale cost was about $3800. The Marantz DVD player, serial number MZ00050902592, retailed for $650. RA 1190-91. The two Marantz surround receivers, serial numbers MZ000506001583 and MZ000507004989, retailed for $1600 and $1000, respectively. RA 1191-92, 1193. The Sonance amplifier retailed for $2100. RA 1193. HP was the only authorized dealer of the JBL subwoofer.

Count 14. Kurt Saliger, a certified public accountant doing business as KDS, DPA, with an office located at 1601 Rainbow, was burglarized on March 12, 2005, and again on August 22, 2005. RA 1273. During the first burglary sports memorabilia including framed autographed jerseys from Joe Namath, Roger Staubach, Joe Montana, Nolan Ryan, Mickey Mantle, Jack Nicklaus, and Ted Williams were taken. RA 1274. Super Bowl tickets and autographed photos of famous athletes were also taken. During the second burglary casino

[21] As depicted in State Exhibits 178-79, 180 to 209. RA 1184-85.

chip-type items, historical casino chips and Norman Rockwell items were taken. He identified State Exhibits 210, 215 to 217, 218, 220, 221, 223, 225 to 229, 231 to 233, and 235 as photographs depicting his stolen property. RA 1275-77. He paid $1031 (as shown by receipt) for the silver Norman Rockwell proof set, however, with the doubling of the cost of silver it is now worth $4000. RA 1281-82. The matchbook covers are antique from the 1920's to the 1940's worth $10 to $50 each. RA 1282. He paid $500 for the frame. The Joe Namath jersey is worth $1000, and he paid $500 for the Norman Rockwell stamp. His collection of unused Superbowl tickets were from the first ever played, and then from the second, fifth and eighth Superbowls ever played. RA 1283. His Ted Williams autographed jersey with a super medallion coin in the middle, as represented by State Exhibit 233, is worth $5000 since he is deceased. RA 1284. He did not give anyone permission to take his property.

Count 15. On February 1, 2005, Robert Colton, owner of See America discovered his business had been burglarized. RA 971. About 20 pictures hanging throughout the 3500 square foot business had been taken including 13 to 15 cells (drawings of cartoon characters signed on the back by the artist who designed it).[22] RA 973-74. These included Flintstone characters. RA 974. State's Exhibit 236 included Mr. Colton's picture of a clown which he purchased in the 1980's for about $500 to $600. RA 985. Over 20 years ago he paid between $8000 and $10,000 for all of the cartoon cells that were stolen. RA 986. He paid "just under $1000 20 years ago for a Cronin photograph of an eagle which is an "artist proof . RA 987. In total three Cronin paintings were stolen. RA 987, 988. He paid $700 to $800 for the picture represented in Exhibit 242. RA 988. The picture represented by Exhibit 245 was purchased by him at an auction for about $400 to $600. He confirmed the total sum of all of the pictures that were taken was over $2500. RA 993

[22] Mr. Colton identified his pictures depicted in State Exhibits numbered 236 through 241, 242 and 243, 245 through 247, 248 (which was a photograph of three of the cells that were taken), 249, 251, 253, 257, 259, 261, 263, 265, 266, 268, 270, 272, 274, 276, 278, 280, 282, 284, 286, 287, 289, 291, 293, 295, and 297. RA 975-77, 977-84.

Count 16. Michael McNeilly, an artist, had a warehouse in Las Vegas where he stored his artwork.[23] RA 928. In January 2005 he received a call that his warehouse had been broken into. A large number of art pieces, sketches, framed sketches, oil paintings and sculptures were stolen.[24] RA 929, 930. He identified 3 3D sculptures which he valued at about $20,000 each. RA 931-32, 933. "Half-a-dozen or more sketches were taken which he valued at "between $1000 and $1500 each , and he valued two oil paintings that were also recovered at between 10 and $20,000 each. RA 932, 933-35. He noted that a lot of the pieces had his signature including his pencil sketches, 3D sculptures and oil paintings. RA 930, 932, 934. Mr. McNeilly confirmed he sells his art work which is how he values his pieces. AA 933. He never gave anyone permission to possess any of this artwork. RA 930A.

Count 17. Janet Kennedy owned Grand Canyon Construction. RA 1197. On August 26, 2004, eight custom homes they were building were burglarized. A Viking refrigerator and cook top from Lot 3 which she had purchased from Econ were taken. RA 1199, 1202. She never gave anyone permission to take those items. RA 1204. See Count 9, supra.

Count 18. On May 30, 2004, Richard Groom, an obstetrician/gynecologist with offices at 1950 Pinto Lane, discovered his office had been burglarized. RA 1232. His computer and a limited edition lithograph print by artist Jane Wooster Scott called "Doc's Race with the Stork were missing as well as a cash box, safe, medication, tools and other supplies. RA 1232-33, 1234. No one had his permission to enter his office and take any of these items. RA 1233. He reframed the lithograph himself and identified it in State Exhibits 320 and 321.[25] RA 1233-34. He originally purchased the lithograph for $400 but as a

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[23] Given the number of counts charging possession of stolen property the district court decided it would assist the jurors by providing them with a copy of the Second Amended Indictment to follow along with as the State presented its case. RA 831, 835.

[24] Photographs of all of Mr. McNeilly's artwork that was stolen (and subsequently recovered) in this case were identified by him and then admitted into evidence as State's Exhibits 298-312, and 312A through 312D. RA 930-35.

[25] Exhibits 322 to 326 also depicted the same lithograph that was taken. RA 1235-36.

limited edition it is now worth "about twice that.' RA 1237. The frame cost him between $150 and $200.

Count 19. David McQueen, owner of Plaza Caf on Warm Springs, was burglarized on March 28, 2004. RA 771. A meat slicer and food was taken. RA 1211. He identified State Exhibits 327 and 328 which depicted him and the meat slicer. RA 1213. They verified the slicer was his via the serial number. He paid $1200 for the slicer in October of 2004 and it was broken down and cleaned every day until it was stolen in March of 2004. RA 1215. No one had his permission to take the slicer from his caf . RA 1215-16.

Count 20. Dr. Stephen Gordon, a plastic surgeon, has an office at 7710 W. Sahara that was burglarized in June of 2003. RA 1264. All of the computers, a TV-VCR unit, and all of the flat-screen computers were taken as well as medication, two large tapestries and other artwork, skin care products, and cash. RA 1265. He identified two tapestries that he bought in Thailand in 1991 from State Exhibits 329 through 333. They were framed in special Plexiglas boxes by a company called Art Encounter. RA 1267. One tapestry was appraised by his insurance company for $2300, and the other was appraised for $2700. RA 1270. No one had his permission to take his tapestries. He had the tapestries carefully restored, framed, and then framed a second time in the Plexiglas. RA 1271. Each Plexiglas frame cost almost $1000.

Count 21. Anthony Holly owned DVD Unlimited, a production studio, and on May 19, 2003, his business was burglarized. RA 1343. Video cameras, video tape recorders, speakers, music production equipment and other electronic music equipment was stolen. RA 904. He identified his stolen property in State Exhibits 340 to 344, 345 to 346, 348 to 351, and 353 to 356, including an MPC 2000 valued at about $1400 and two studio monitor/speakers (identified by serial number 29SPB1129-1) valued at $500 to $600 (he conceded he could have paid about $450 for the two). RA 1344-51. His equipment was only about 90 days old at the time of the theft. AA 912. No one had his permission to possess these items. RA 1350.

Count 22. Mr. Phillip Holec worked for Family Music Centers in music retail sales at the time it was burglarized on November 29, 2002. RA 994-95. As a sales representative he would know the value of the items being sold in the store. RA 995. Large quantities of musical items were stolen including guitars (primarily), keyboards, and other audio equipment. State's Exhibits 357 through 361 depicted an acoustic guitar, electric guitars and basses that were stolen. RA 996-97, 998, 999. He valued each item as "ranging from wholesale cost of 500 to up to 2000. Retail value would be up to three times that, and that was the value of it at the time, in 2002. RA 999. The blade-style electric guitar (identified by its serial number) as depicted in Exhibit 362 was valued at $1200. RA 1002-03. Exhibit 366 and 367 depicted a G&L strat style guitar or blade strat style guitar (also identified by serial number) valued at $1200 to $1500 today. RA 1003-04. He also identified a G&L or blade strat style guitar also valued at $1200 to $1500. Eight of the guitars he viewed have still not been returned. RA 1005. All of the guitars taken from the Family Music Center were new and both the wholesale and retail cumulative value of the guitars recovered from the Cutler address were over $2500. RA 1007-09.

Count 23. John Engelke worked at Brady Industries at the time it was burglarized on November 11, 2002. RA 1671. Floor and carpet cleaning equipment was stolen and he filed a report with the police at that time. RA 1671-72. He identified State Exhibits 393 to 396 as depicting the stolen equipment which he personally worked with and sold, both new and used. RA 1672. He valued the Tennant floor machine at about $1200 wholesale and $2000 retail. RA 1673. Brady's private label floor machine was valued at about $900 wholesale and about $1700 retail. RA 1674. The Tennant commercial vacuum wholesaled for about $700 and retailed for about $1100. The Windsor Cadel self-contained carpet extractor's wholesale value was $900 and retail value $1600. RA 1674-75. No one had permission to possess these items. RA 1675. At the time of the theft he gave the police serial numbers for the items; other equipment had the Brady label on them.

David Drummond, a Brady employee, received a call from police on November 6, 2006, and then left for a storage facility on Smoke Ranch. RA 1678-79. He identified State

Exhibits 393 to 396 as the stolen items which he identified via their serial numbers and which he recovered from the Smoke Ranch location. RA 1680-81, 1685.

Count 24. Robert Cayne owned Global Entertainment Group, Inc., with his wife. RA 1326. In March of 2005 art work and a large amount of gold records, mementos belonging to him and his wife from past jobs when he was a tour accountant for different bands, were stolen. RA 1327. Items stolen from his studio were identified by him in State Exhibits 397 to 399, and 400 to 412, as well as multiple other exhibits (RA 892). RA 1328-32. Several of the items had his and/or his wife's names engraved on them. RA 1331. The items included gold records from the Stone Temple Pilots (6 records), Chicago, the Scorpions, Paula Abdul, Great White, Bon Jovi, and a map of the world. RA 1333-35. He paid $950 for the map of the world. RA 1334. The gold records were gifts from the bands themselves and could retail from "a few hundred dollars to between $500 to $700 each. To him they are priceless because they were gifts. RA 1336-37, 1340. No one had permission to possess these items. RA 1339. His wife, Phyllis Cayne, testified that the watercolor print shown in exhibit 458 cost her about $200 but then she stated she couldn't be sure. RA 1341.

Count 25. Phyllis Paulson's store, Furniture Markdowns, was burglarized in April of 2002. RA 1218-19. A couple of pictures, a chest of drawers and a couple of nightstands were taken. RA 1219. She identified the two pictures in State Exhibits 459 and 460 has property that was stolen. RA 1220. The retail price of both paintings was $220; they were damaged when she got them back so she gave them away. RA 1221-23. She also identified the chest of drawers and nightstand in Exhibits 461 and 462 and some other merchandise she had on the walls in 465 and 466. RA 1223-24. The retail cost of the chest of drawers was $450 and $189 for each of the two nightstands. RA 1226. One of the wall art pieces retailed for $199, and a resin mirror with a goldish frame retailed for $250. RA 1227. No one had permission to possess these items. Michael Paulson identified several State Exhibits depicting the stolen items. RA 1784-85. In Exhibit 463 he also identified a limited edition animation cell by Friz Freeling which he initially did not realize was missing at the time he did the initial report. RA 1785-86. He valued the Freeling cell as something that would

appreciate over time and which he valued at $800 retail, $400 wholesale. RA 1786. The wholesale price of the table base in Exhibit 468 is $200 to $300, retail $300 to $400. The mirror depicted in 471 retailed for about $250; they paid $175 for it. RA 1788. Another table base retailed for about $300. RA 1789.

Count 26. Keith Veltre, owner of Platinum Collectibles, Inc. which sold autographed memorabilia including guitars, posters and photographs, was burglarized on March 17, 2002. RA 1422-23. He identified the stolen items as shown in State Exhibits 490 to 496. RA 1424. Within those exhibits he identified three autographed guitars one of which had a serial number and the stores "unique identification code on them. RA 1426-27. Wholesale value of the autographed guitars is between $1500 and $2500 with a retail value of $3500 and $5000. RA 1428. They are unique items because they are autographed. AA 1427-28. The Aerosmith guitar retailed at $3995. RA 1429. The Who signed guitar retails for $4000, and the NSYNC one retails for $3000. There were eight other guitars belonging to him that were at the Cutler residence. RA 1431-32. No one had permission to possess these items. RA 1430.

Count 27. Robert Hathcock owned a production study called Right on the Beat Productions (which was a high-end professional digital recording studio) when it was burglarized on April 15, 2002. RA 1310-11. Over $40,000 worth of equipment (about 99% of the equipment in the studio) was stolen. RA 1311. As a result he was forced to close his business. RA 1312. He identified State Exhibits 497 to 500, 578 to 579, 580 to 609 as depicting the property stolen from his studio. RA 1313-14. Among the items depicted were a CDR Recorder, DAT player, rack stand (which he recognized because of the Velcro he added to it to stabilize it), a bass and drum station (identified by serial numbers), a pair of Alesis Monitor speakers, and two Ensoniq DP4 (an effects sonic processor) which is valued at $750 each. RA 1316-23. The drum and bass station each cost $600. RA 883. No one had permission to take his property. RA 1324.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH SEARCH WARRANTS

Defendant complains that the evidence in the instant case was unlawfully obtained and should have therefore been suppressed. Specifically, he asserts that his detainment and arrest on September 24, 2006 (as represented by C227874) was illegal, and that the search warrants and evidence recovered based upon the information gained from that arrest should be suppressed as the 'fruit of the poisonous tree'.[26] It is the State's position that Defendant's detainment and arrest on September 24, 2006, fell well within the parameters of the 4th Amendment, and that all of the evidence seized as a result of his detainment and arrest were, therefore, also lawfully obtained. As such, his convictions in the instant case should be affirmed.

Standard of Review

It is well settled that the Fourth Amendment of the U.S. Constitution prohibits police officers from conducting unreasonable searches and seizures, however, when a police officer has "reasonable suspicion that a person may be involved in criminal activity the police are permitted to "stop the person for a brief time and take additional steps to investigate further. Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 185, 124 S.Ct. 2451, 2458 (2004). "[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873 (1968).

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[26] To the extent Defendant is challenging the legality of Defendant's detainment and arrest in C227874 (No. 52234), the State submits that this Court is not bound by its recent decision in 52234 (see Order of Reversal and Remand, filed 9-10-09). Rather, it is the State's position that this Court can make a decision in the instant case based upon additional evidence that was not previously made available to this Court at the time it decided 52234, but which the State has obtained and now includes in its Respondent's Appendix. The State would note that a Petition for En Banc Reconsideration in 52234 is pending dealing with the propriety of remanding for an evidentiary hearing and new trial, regardless of the outcome of the evidentiary hearing.

An investigatory stop requires reasonable suspicion, "a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Thomas, 211 F.3d 1186, 1189 (9th Cir. 2000).

NRS 171.123 represents Nevada's codification of the principles as set forth in Terry by setting forth the parameters within which police must operate when detaining a person suspected of criminal behavior. NRS 171.123(1), (3) and (4). Once the district court denies a defendant's motion to suppress evidence, the burden falls on the defendant to show that the district court's decision was an abuse of discretion.[27] "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 17 P.3d 998, 1000 (2001). Here, Defendant has not met his burden.

September 24, 2006

On May 12, 2008, the district court judge presiding over Defendant's instant case, denied his motion to suppress concluding, among other things, that the initial stop and detainment of Defendant on September 24, 2006, was lawful. RA 779-83 Defendant challenged (1) Salisbury's initial description of the stop on September 24th in Defendant's Arrest Report as a traffic stop rather than an investigative Terry stop, and (2) his continued detainment after the police discovered the doors to the Dentistry were locked as improper.

Salisbury's Terry Stop

As to Defendant's first challenge, that the initial stop was a traffic stop, a review of the substance of Salisbury's entire testimony at the preliminary hearing in C227874 as referred to in the pleadings filed below, shows that his reference to the stop of Defendant as a "traffic stop in a police report was a misnomer. See RA 346-47, 414. Salisbury received a call from dispatch of a burglary "in progress and that "the suspects were inside the business . RA 29, 342, 344. This information, coupled with the rural setting of the area and Salisbury's observations of the van as the only vehicle in front of the Dentistry, led him to

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[27] It is not the State's burden on appeal to show that the district court's decision to deny Defendant's motion to suppress was correct.

perform a "felony car stop of the van: "[a]t that time to our knowledge we have a felony crime that's been committed . . . and we [were] going to make sure we've got any and all occupants out of the vehicle and do any sort of Terry stop investigation in front of our patrol car. . . RA 346-47, 414. Further, during Defendant's trial in this case Salisbury testified on cross-examination that he mistakenly termed the stop a "traffic stop as a direct result of his "inexperience of being a new officer and not . . . using the correct verbiage. RA 893-94. While Salisbury termed the stop a "traffic stop in Defendant's Arrest Report, the record is clear he and MacDonald conducted a Terry stop. The district court so found. RA 782-83.

Dentistry Investigation Ongoing When Anku Investigation Began

As to Defendant's second challenge, Salisbury's investigative Terry stop of Defendant and Fergason did not, as Defendant asserts, cease at the time it was determined the doors to the Dentistry were locked (RA 716; see AOB 10-11) The record is clear the investigation into the Dentistry burglary went beyond the initial determination that there was no forced entry into the business.

As noted in the Statement of Facts, the police did not cease to investigate the Dentistry burglary when officers found the front door was locked. Salisbury knew people had been inside the building and the owners discussed that the police did a walk-through with them. Clearly the investigation did not end simply because the doors were locked. Moreover, the CAD Report for the Dentistry reads that the investigation continued well into the morning. The State would further note that the CAD Report for Dentistry reads that Defendant was stopped at 2:19 a.m., and that the two burglaries were deemed "related at 3:02 a.m., which is approximately 40 minutes after the stop.

Salisbury made the connection between the unusual crystal object he observed inside Defendant's van during his protective sweep and the Anku burglary within 15 to 20 minutes after he stopped Defendant's van. RA 432. The record is clear that the investigation into the Dentistry burglary call was still ongoing by the time Salisbury's Terry stop of Defendant shifted to include Anku and before Engle was taken to the scene.

The district court did not err in finding the Terry stop had not ended when investigating officers discovered the Dentistry doors were locked and that the detention and arrest were reasonable. [28] RA 783.

Defendant's Detainment for the Anku Investigation

The record also supports the finding that the focus of the officers' Terry investigation had already shifted to Defendant's involvement in the Anku burglary before the investigation into the Dentistry burglary concluded. Within moments of stopping the van, Salisbury noticed in plain view a unique-looking "glass crystalline object on the floorboard of the van which struck him as odd because it looked "out of place. He already knew about the Anku burglary. About 15 to 20 minutes later, Salisbury made the connection between the crystal piece he observed inside Defendant's van and the Anku burglary. The proximity of the two businesses and the Defendant's prior record for burglary together with the presence of burglary tools in the van all constituted reasonable suspicion that Defendant was involved in the Anku burglary. Significantly, Salisbury described his thought process at that moment as follows:

> [A]nd I'm like that's a crystal shop that just got robbed a mile away and there's a crystal fixture or object in [sic] the bottom of this van, so let's have those officers go and see if this came from that store.

RA 351. At this juncture the focus of the investigation had clearly shifted from reasonable suspicion that the occupants of the van were involved in the Dentistry burglary to reasonable suspicion the occupants were also involved in the Anku burglary.

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[28] During trial Defendant renewed his argument that the purpose behind the Terry stop ceased upon determining the Dentistry's doors were locked to which the court responded as follows:

> I'm not quite sure I agree with that. I'm not sure they said there was no burglary. I think they said there was nothing taken. . . . *You can enter with the intent to commit something and you don't see shit in there that you like and so, you know, that doesn't mean that there isn't a burglary.*

[Emphasis added.] RA 1354-55.

Thereafter, Salisbury communicated over the phone with the officer at the Anku scene with Mr. Hung who described to Salisbury the items Mr. Hung told him were missing. RA 351-52. The description of the items Mr. Hung determined were missing matched the items Salisbury observed in plain view inside Defendant's van. At this point, Salisbury had sufficient probable cause to arrest Defendant and Fergason for the Anku burglary. RA 185-86. As the State argued in its Opposition, all of the information available to Salisbury as discussed, supra, constituted "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed] Defendant's detainment. Terry, 392 U.S. at 21; RA 732-33. Based on the foregoing, Defendant has not met his burden of showing that the district court abused its discretion when it denied Defendant's motions to suppress.

Doctrine of Inevitable Discovery

Even if this Court were to conclude that Defendant's detainment became unreasonable upon the discovery that the doors to the Dentistry were still locked, the police would have inevitably discovered that Defendant and Fergason were involved in the Anku burglary. Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984).

If Salisbury had ceased his Terry stop and let Defendant go when he heard the doors at the Dentistry were not forced, he still would have the information culled from his investigatory stop of the van's occupants. Once he learned of the Anku formation on the radio, it is inevitable that Salisbury would have made the connection between the van's occupants and the Anku burglary. At that point, Salisbury would have the necessary information on both occupants and their van to issue a request for the van to be pulled over as well as sufficient probable cause for their arrest.

Even if the van were not stopped again that night, the police already had enough probable cause for a search of Defendant's residence and the van and a warrant would still have issued. Based on the information gleaned from those searches, the additional warrants would still have issued and all of the merchandise recovered at the storage units and other residences as a direct result of that warrant would still have been found. The same argument

applies to the merchandise recovered pursuant to the other warrants at issue here. As such, Defendant has not, pursuant to Jackson, met his burden of showing that the district court abused its discretion when it concluded his detainment and arrest on September 24th was unlawful. Most significantly, Defendant has not shown that the merchandise seized in the instant case pursuant to the valid search warrants at issue here falls within the purview of the doctrine of the fruit of the poisonous tree.[29]

II
THE DISTRICT COURT PROPERLY CONCLUDED THERE WAS SUFFICIENT PROBABLE CAUSE TO SUPPORT THE SEARCH WARRANTS

Defendant complains there was insufficient probable cause to support the search warrants executed at 3250 North Buffalo, 1504 Cutler Drive, 5900 Smoke Ranch, 8265 West Sahara, 8100 W. Charleston Blvd., and 7400 Pirate Cove. See RA 1-248. These warrants were based on the events of September 24, 2006 and subsequent investigations including jailhouse phone calls. .

"[A] search warrant has three basic components: 1) it must be issued upon probable cause and have support for the statement of probable cause; 2) it must describe the area to be searched; and 3) it must describe what will be seized. The linchpin of a warrant, however, is the existence of probable cause. State v. Allen, 118 Nev. 842, 846-47, 60 P.3d 475, 478 (2002). See also NRS 179.045.

The burden of proving that a search warrant is invalid is on the defendant by a preponderance of the evidence. U.S. v. Richardson, 943 F.2d 547, 548 (5th Cir. 1991) and U.S. v. Wapnick, 60 F.3d 948, 955 (2nd Cir. 1995). Additionally, in Illinois v. Gates, 462 U.S. 213, 236. 103 S.Ct. 2317 (1983), the U.S. Supreme Court made it clear that a magistrate's decision regarding probable cause should be given great deference. Probable

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[29] In the event the Court determines an evidentiary hearing should have been held below and that the district court abused its discretion in denying the motions to suppress without such a hearing, the appropriate remedy would be to decide the other issues raised in this case and hold any decision on the Fourth Amendment allegations until after the evidentiary hearing being conducted upon remand in Case No. 52234 and have the parties certify the record and decision in that proceeding to the Court in the instant case.

cause is determined by a totality of the circumstances test Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983).

Defendant has failed to show that the lawfully recorded phone calls made to or by Defendant while he was incarcerated at the Clark County Detention Center (CCDC), and the investigation resulting from the substance of said phone calls, were insufficient to support a finding of probable cause for any of the warrants. See RA 1-248. Notably, while Defendant notes he never admitted to possessing stolen property in any of the phone calls (AOB 13), he fails to cite to any case from any jurisdiction which stands for the proposition that probable cause can only be established upon an admission. Indeed, a thorough review of the six search warrants at issue, and their supporting affidavits and exhibits (see RA 1-248) show that the phone calls and ensuing investigation properly established sufficient probable cause to support all of the search warrants and the evidence recovered as a result of those warrants at issue here.

A review of Nickell's affidavits in support of the search warrants shows he went into great detail describing the events of September 24, 2006, that led to Defendant's (and Fergason's) initial detainment, arrest, and incarceration at CCDC. RA 9-12, 44-7, 93-7, 143-46, 174-78, 220-23. Specifically, he discussed ADT's reports regarding the activation of front door and interior motion sensor alarms for both Anku and Dentistry, Salisbury's observations upon his approach to the Dentistry, the items Salisbury observed inside Defendant's van during his protective sweep, Defendant's extensive criminal history (19 felony convictions, many of which involved commercial burglaries), as well as Mr. Harris-Inman's walk-through upon his arrival at the Dentistry. RA 9-12, 44-7, 93-7, 143-46, 174-78, 220-23. Nickell then detailed the progression of his investigation after Defendant's initial arrest which ultimately supported his request for the search warrant of the residence that Defendant shared with Ms. Issa (Trevarthen), his former girlfriend.[30] RA 13-27, 48-62,

[30] Nickell discovered that Defendant's van was registered to his girlfriend, Tonya Issa (formerly Trevarthen), so he started his investigation by checking for phone calls made to her phone number from CCDC, as well as for calls made to and from Defendant while he was at CCDC. RA 12-13, 47-8, 97-8, 146-47, 178-79, 223-24.

98-112, 147-61, 179-93, 224-38. Notably, Nickell began reviewing phone calls made by and to Defendant from CCDC and detailed the substance of the calls which supported his requests for the search warrants. Given the details provided by Nickell, Defendant has not shown that the affidavits used in support of all the warrant at issue here were so lacking in probable cause that no reasonable police officer or judge could justify their issuance.

Further, the additional warrant for Defendant's storage unit at 8265 W. Sahara was similarly supported by sufficient probable cause. The rental agreement for the Storage West Sahara unit rented by Defendant under the name Ashton Monroe was discovered pursuant to the search of Defendant's residence at 1504 Cutler Drive. RA 135-6. Defendant's ID, which was also recovered as a result of the search, had his picture on it coupled with the name 'Ashton Monroe', the same name written on the storage rental agreement. RA 135-36. Given these facts it was reasonable for the detectives investigating Defendant to wonder why Defendant would rent a storage unit using a quasi-alias (Ashton Monroe), which corresponded with his picture on a NV ID card, for any reason other than for illicit purposes such as to hide stolen goods. RA 135-6. In addition, the detectives heard Defendant telling a third party to clean out the storage unit because he was afraid the detectives would search it. The warrant for his storage unit was therefore supported by sufficient probable cause, and the merchandise recovered therein lawfully recovered.

Finally, contrary to Defendant's assertions the State has never asserted that it relied solely on Defendant's prior arrests to provide sufficient probable cause to support the search warrants. See AOB 13-14. It fact, the affidavits and supporting exhibits for all of the search warrants include details regarding his initial seizure on September 24, 2006, his various jailhouse phone conversations, and the results of the detectives' meticulous investigations over a period of time as the primary source of probable cause. While Defendant's prior arrests may have contributed to the establishment of probable cause, they have never been relied upon by the investigating detectives as the primary support any of the search warrants

at issue here. Based on the foregoing, the magistrate properly concluded the detectives established sufficient probable cause to support the search warrants for all the locations at issue here including the search warrant for Defendant's storage unit B106 at 8265 W. Sahara.

III
THE DISTRICT COURT PROPERLY CONCLUDED THE SEARCH WARRANTS WERE SUFFICIENTLY PARTICULARIZED AND DID NOT AUTHORIZE GENERAL SEARCHES

In Defendant's Arguments C and D he argues that the search warrants at issue were not sufficiently particularized regarding the items to be seized. AOB 14-20. For the following reasons, Defendant's argument is without merit.

The specificity requirement is intended to prevent general searches where police have too much discretion as to what to seize. Berger v. State of New York, 388 U.S. 41, 87 S.Ct. 1873 (1967). Significantly, while a "boiler plate list may be invalidated as too general, People v. Frank, 38 Cal.3d 711, 700 P.2d 415 (1985), the United States Supreme Court has held that items found in a search, but not specifically mentioned in a search warrant, will not be suppressed as long as there was probable cause in the search warrant to look for those items and the scope of the search did not exceed what would be reasonable. Horton v. California, 496 U.S. 128, 138-39, 110 S.Ct. 2301, 2309 (1990).

In support of his assertion that the search warrants in the instant matter lacked the requisite specificity, Defendant relies in large part on the Ninth Circuit's decision in United States v. Spilotro, 800 F.2d 959 (9th Cir. 1986). In Spilotro the Ninth Circuit Court of Appeals held that the specificity requirement in search warrants will depend on the circumstances and the type of items involved in the search in question. Id at 963. A search warrant which "describe[s] generic categories of items will not be deemed invalid if a more specific description of an item is not possible. Id. Significantly, Spilotro is clear that the level of specificity required depends on the particular facts and circumstances unique to each case. Id. Even more significant is the court's conclusion that the use of generic descriptions in a search warrant will not be fatal when the search warrant specifically identifies the alleged criminal activities in connection with the items sought: "[r]eference to specific illegal

activity can...provide substantive guidance for the officer's exercise of discretion in executing the warrant. Id. at 964.

Notably, the Spilotro court articulated a test to determine whether a description is sufficiently precise. That test requires the court to determine if one or more of the following are present in the warrant: "(1) whether probable cause exists to seize all items of a particular type described in the warrant [citations omitted]; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure for those which are not [citations omitted]; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued [citations omitted]. 800 F.2d at 963.

In the instant case, a list of the property sought to be seized pursuant to the warrant for the Cutler residence as detailed in Nickell's affidavit (RA 43). The piggyback warrant for unit B106 at the Storage West Sahara facility similarly detailed the property sought to be seized and the criminal activities in connection with those items sought. RA 54-5. The same is true of the remaining warrants. RA 2, 3, 134-65. As with the Cutler Drive warrant, the Smoke Ranch, W. Charleston, and Pirate Cove warrants each described burglary tools and items used to make burglary tools and stolen property identified by serial numbers, etc., as well as articles of personal property which would tend to establish the identity of a person in control of said premises including but not limited to papers and documents, all of which would tend to demonstrate "that the criminal offense of Burglary, Grand Larceny, Possession of Stolen Property & Possession of Burglary Tools have been and are continuing to be committed. RA 92-3, 173-74, 219. The record is clear that all of the warrants detailed the property sought to be seized and the criminal activities in connection with those items sought. RA 1-2, 42-3, 92-3, 134-35, 173-74, 218-19.

Such facts did not escape the district court:

> I think, given the information that the police had and the observations that they made, and what they knew was going to be there, and the dozens to hundreds of burglaries they think these people did, and then the looking at the storage unit, . . . that it was reasonably specific. . . . I don't find it to be overbroad.

RA 780. A review of all of the search warrants at issue here will show that they were sufficiently particularized pursuant to the three-pronged test enunciated in Spilotro

Good Faith Exception

Notwithstanding the foregoing, deficient specificity does not mandate suppression if the State can show the police officers acted in good faith. Exclusion is only appropriate where the remedial objectives of the exclusionary rule are served. An officer's objectively reasonable reliance on an invalid warrant issued by a magistrate or judge will not act to suppress evidence seized under the warrant. Powell v. State, 113 Nev. 41, 930 P.2d 1123 (1997), citing United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984). Where the officers were dishonest or reckless, the good faith exception will not apply and suppression in such an instance would be the appropriate remedy. Point v. State, 102 Nev. 143, 717 P.2d 38 (1986). Further, "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. 468 U.S. at 921.

The State submits that the Leon good faith exception would apply here. As previously discussed, Defendant is not asserting that the issuing magistrate was not impartial or that Nickell made material misrepresentations in order to obtain the warrant. Moreover, as argued, supra, all of the warrants were sufficiently particularized and were supported by probable cause. Defendant therefore cannot show that the good faith exception would be inapplicable in this case.

IV

SUFFICIENCY OF THE EVIDENCE

Defendant generally contends there was insufficient evidence to support his convictions on all counts. Notably, although Defendant labels his argument a 'sufficiency of the evidence' argument, he does not specifically address the evidence elicited during his trial to show that a reasonable jury could not have been convinced of his guilt on all counts

beyond a reasonable doubt.[31] Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994); Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994). Rather, his assertion is based solely on his position that the evidence used to convict him should have been suppressed, and that he would not have been convicted of any of the crimes for which he was charged without it. As such, the State will not address this Argument separately. To the extent Defendant complains his motions to suppress should have been granted, the State respectfully directs this Court's attention to its arguments as detailed in Arguments I through III, supra. To the extent Defendant complains the State failed to meet its burden of proving the element of value with regard counts 2 through 27, the State respectfully directs this Court's attention to its Argument V, infra.

V
SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE ELEMENT OF VALUE FOR ALL COUNTS CHARGING POSSESSION OF STOLEN PROPERTY

Defendant is arguing there was insufficient evidence presented to support the element of value for all counts charging possession of stolen property. In support of his argument he accuses the State of improperly substituting the retail or purchase price of the items at issue for fair market value and that it did so without justifying its use of an alternative method of valuation in contradiction of this Court's holding in Bryant v. State, 114 Nev. 626, 959 P.2d 964 (1998). The State submits, however, that with the exception of counts 11 and 12 (to be discussed, infra), it properly set forth sufficient evidence to support the jury's conclusion that the stolen items in this case had a value in excess of either $250 or $2,500, as required by NRS 205.275(2)(b) and (2)(c) in support of the C or B felony counts.[32]

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[31] Defendant is not asserting the State failed to prove he committed the crime of Conspiracy to Possess Stolen Property And/Or to Commit Burglary (count 1) beyond a reasonable doubt. As such, the State will not address this issue. The State would further note that Defendant's (Appellant's) Opening Brief is replete with arguments that are not supported by any citations to any portion of the record.

[32] This Court has long held it will not overturn a district court's decision to admit or exclude evidence unless the district court abused its discretion. Petty v. State, 116 Nev. 321, 997 P.2d 800 (2000). Nevada has long held that an owner of property may testify as to its value without being qualified as an expert witness. The general rule is that an owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value. City of Elko v. Zillich, 100 Nev. 366, 683 P.2d 5 (1984). Therefore, to the extent Defendant complains the district court improperly denied Fergason's Motion in Limine to

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979).

First, as to Counts 11 and 12 the State concedes the evidence did not support the jury's finding that the items at issue in those counts had a fair market value in excess of $2,500, as required by NRS 205.275(2)(c). Regarding Count 11, during closing arguments the State specifically conceded this point to the jury, arguing instead there was sufficient evidence to show the hot tub's value was in excess of $250 rather than $2,500. RA 1992-93. Neither party either at the time the verdict was read or at the time of sentencing, however, noted this error. Regarding Count 12, Mr. Moss testified that the icemaker, the sole item listed in the Second Amended Indictment, was valued at about $1500 which is below the requisite $2500 minimum for the felony, but sufficient for a conviction for the $250 or more C felony pursuant to NRS 205.275(2)(b). As such, the State requests a remand to the district court for resentencing as to both counts as gross-misdemeanors and for the filing of an Amended Judgment of Conviction. Notwithstanding, there was sufficient evidence to support Defendant's convictions on the remaining counts.

NRS 205.275(6) specifically reads that "the value of the property involved shall be deemed to be the highest value attributable to the property by any reasonable standard. In Bryant, the defendant was charged with possession of stolen property with a value of $250 or more. At trial the State presented evidence of the replacement cost of the tools which was

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Bar Admission of Expert Testimony, or Evidence of Value for the Property at Issue, the State submits Defendant has not shown an abuse of discretion.

$339.62. This Court reversed the defendant's conviction because the State failed to show the fair market value of the tools at the time and place they were stolen and provided no explanation to justify using the replacement cost method of valuation. Here, unlike in Bryant, the record is replete with testimony from the victims as to the retail and/or wholesale cost of items in question at the time of the theft. Further, contrary to Defendant's assertion, the jury could properly consider the wholesale and retail values of the stolen items when determining whether the State met the thresholds established by NRS 205.275(2)(b) and (2)(c).

In Counts 5, 6, 18, 19, 20, 21, 25 and 27 the State presented sufficient evidence for the jurors to conclude that the stolen property at issue in these counts was valued at $250 or more. RA 647-658 This is illustrated by the testimony on these counts related in the Statement of Facts.

Counts 2, 7, 9, 10, 13, 17, 22, and 23 involved items with an aggregate value of $2500 or more per victim.[33] Similarly, a review of the testimony relating to those counts in the statement of facts demonstrates sufficient evidence of value was presented.

Finally, Counts 3, 4, 6, 8, 14, 15, 16, 18, 24, and 26 involved artistic works of art and memorabilia which are by their very nature unique and which also had an aggregate value $2500 or more as indicated in the Statement of Facts.

Aside from the victims' testimony, the State admitted over 1000 photographs depicting the stolen merchandise at issue, items which were identified by the owners and available to the jurors for their perusal to help them determine reasonable value. Further, the jurors were specifically instructed on how to reasonably determine value: "The value of the property involved shall be deemed to be the highest value attributable to the property by any reasonable standard. Value may be shown by evidence as to purchase price, price tag, or by replacement cost. [34] RA 675. See NRS 205.275(6).

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[33] Each count represents one victim and the aggregate of the items stolen from that victim.

[34] Defendant is not arguing that the jury instructions failed to comport with the relevant statutes or that they were improper in any respect. Indeed, the record shows Defendant's counsel implicitly agreed to Instruction No. 11 which defines value. RA 1868-69. As such,

Additionally, this Court has held that jurors are entitled to rely on their common sense and experience (Instruction No. 26 (RA 690)) in addition to the facts and evidence elicited in the course of the trial proceedings when being asked to reasonably determine fair market value. Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003).

The State would also note that Counts 3, 4, 6, 8, 14, 15, 16, 18, 24, and 26 all involved unique items such as artwork and various pieces of memorabilia. In Romero v. State, 116 Nev. 344, 996 P.2d 894 (2000), this Court stated that in instances involving artwork or unique property, value may be "best determined by the initial price of the piece or the replacement cost. 116 Nev. at 347, fn3.

Finally, during argument on Fergason's motion to prevent the victims from testifying about the value of their property (as adopted by Defendant), Fergason's counsel conceded it was in fact permissible for them to do so:

> Court: Well, you - - you don't dispute, do you, Ms. Dustin, that it is the law that an owner can testify as to value of their property as they understand it, and then the jury has to decide whether they believe that testimony or not. That's the law, isn't it?
>
> Ms. Dustin: It's - - yes, Your Honor. That is the law.

RA 792; see RA 595-97, 605-08. The district court then went on to state that it was for the jury "to decide whether they believe the owner. RA 793. The record is clear the State properly set forth sufficient evidence to support the jury's conclusion that the stolen items in this case had a value in excess of either $250 or $2,500, as required by NRS 205.275(2)(b) and (2)(c), respectively, and that given the aggregate of the evidence presented it was in fact reasonable for the jurors to find that the State proved that the value of the respective items as represented by counts 2 through 10 and 12 through 27 were either $250 or more, or $2500 or more, depending on the count.

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it is the State's position Defendant's failure to raise the issue of the sufficiency of any of the jury instructions constitutes a waiver of the issue.

VI
THE COURT PROPERLY PERMITTED THE STATE TO AMEND COUNT ONE

Defendant complains the district court erred when it granted the State's Motion to Amend Indictment as to Count 1 (which charged conspiracy) on May 1, 2008.[35] The amendment simply specified what burglaries formed the basis of the conspiracy charge, that is the Anku and Dentistry burglaries. For the following reasons Defendant's arguments are without merit.

First, the district court's decision to grant the State's motion to amend was not, as Defendant asserts, on the eve of trial. In fact, the State's motion was granted on May 1, 2008, 12 days before Defendant's trial commenced on May 13, 2008. Notwithstanding, NRS 173.095 provides an indictment may be amended at any time before verdict within specific guidelines. A comparison of Count 1 in the Indictment with that in the Amended Indictment will show that no additional or different offenses were added as a result of the amendment. See RA 250 and 552.

Further, Fergason filed a Motion to Strike Language in Count One and Count Thirteen of the Amended Indictment wherein he complained that the additional language mentioning Anku and the Dentistry as added by the State to Count 1 constituted a substantive change.[36] After much discussion the district court denied the motion by concluding as follows:

> I think that there is ample evidence in the preliminary hearing [sic] in the Court below that - - and ties these guys into these two things that occurred that night, and that that's just sort of a rhetorical change without substance or prejudice.

AA 784. As argument continued, the district court reasoned that the events surrounding Anku and the Dentistry on September 24th were relevant for the specific purpose of showing that Defendant and Fergason *conspired* to burglarize Anku and/or possess stolen property,

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[35] For clarification, Defendant is not arguing that the Second Amended Indictment filed solely against Defendant on May 13, 2008, was improper.

[36] As this Court will recall, Defendant joined in all of Fergason's motions. RA 595-97. Notably, Defendant's instant argument as discussed in his Opening Brief was taken in principal part from Cynthia Dustin's argument in Fergason's Motion to Strike which was considered and then denied by Judge Bell on May 12, 2008. RA 598-604, RA 783-89.

which is the basis for Count 1. AA 786. Based on the foregoing, Defendant also has not shown the district court abused its discretion or that Defendant's substantial rights were compromised as a result of the amendment.

Contrary to Defendant's assertion, the addition of the September 24, 2006, burglary of Anku and Dentistry to Count 1 did not permit the admission of improper bad acts evidence. The events of the Anku and Dentistry burglary were substantive evidence of the conspiracy, not character evidence. It would have been admissible regardless of the amendment. It was also substantive evidence to demonstrate that Defendant knew the massive amount of property he had in his home and storage units was stolen. In addition, as the district court concluded, the events of September 24th were relevant to establish Defendant's involvement in the conspiracy, his knowledge of the conspiracy and his intent to engage in the conspiracy.

To the extent Defendant's argument implies the amendment unconstitutionally deprived him of adequate notice, the State submits the Indictment, and later the Amended Indictment, in fact provided him with adequate notice of the State's theory of prosecution, a theory the State has pursued since it commenced its investigation in September of 2006 and from which it has never deviated. Sheriff, Clark County v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979); see also State v. Eighth Judicial District Court, 997 P.2d 126 (Nev. 2000).

Defendant also argues that the filing of the Amended Indictment violated the statute of limitations. Given the volume of stolen property, it was reasonable for the jury to conclude the conspiracy to possess said property was ongoing up until Defendant and Fergason's arrest on September 24, 2006, which is less than two years from the Amended Indictment's filing date of May 1, 2008. Notwithstanding, in all of the Indictments filed in this case the conspiracy was alleged to have occurred on or between September 20, 2006, and November 28, 2006. Defendant was not charged with any of the underlying burglaries but with possessing the stolen items within that time frame. Accordingly, the filing of the

Amended Indictment fell well within the statute of limitations, and the district court did not abuse its discretion when it granted the State's motion to amend.

Finally, given the volume of the evidence presented by the State as supported by the testimony of the victims, the police officers and the investigating detectives, as well as the hundreds of photographs depicting the merchandise recovered at the various locations, any perceived error was harmless. An error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25 (2000) (quoting Neder v. United States, 527 U.S. 1, 18 (1999). Based on the foregoing, Defendant's convictions should be affirmed.

VII
DEFENDANT WAS PROPERLY SENTENCED AS A LARGE HABITUAL CRIMINAL

Defendant argues the district court abused its discretion when it sentenced him pursuant to the large habitual criminal statute. The State submits, however, that the Nevada legislature has provided it is lawful to increase the term of imprisonment for a habitual criminal, regardless of the level of the felony. As such, Defendant was properly sentenced.

The United States Supreme Court had made it clear that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). Rather, the "narrow proportionality principle recognized in the Supreme Court's Eighth Amendment jurisprudence only forbids sentences that are "grossly disproportionate to the crime. Id. at 996; Solem v. Helm, 463 U.S. 277, 288, 303 (1983); Rummel v. Estelle, 445 U.S. 263, 271 (1980); Weems v. United States, 217 U.S. 349, 371 (1910). Such was not the case here.

NRS 207.010 as it was written at the time Defendant committed his crimes specifically provides in relevant part as follows:

> 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of: . . . (b) Any felony, who has *previously been three times convicted*, whether in this State or elsewhere, of any crime *which under the laws of the situs of the crime or of this State would amount to a felony*, . . . is a habitual criminal and shall be punished for a category A felony

> by imprisonment in the state prison: (1) For ***life without the possibility of parole***; . . .

[Emphasis added.] NRS 207.010(1)(b)(1). During his sentencing on October 1, 2008, the State filed three certified judgments of conviction from C103744, C105731, and C137115 to support its request for large habitual offender adjudication. AA 2030. At that time the State also pointed out that Defendant had 22 prior felony convictions. AA 2035. Defendant's long criminal history which has consisted of primarily, but not exclusively, of property crimes warrants his adjudication as a large habitual offender.

Moreover, Defendant fails to cite to or include in his Appendix any documentation to support his assertion that Nevada's legislative history shows that a sentence of life without parole pursuant to NRS 207.010(1)(b)(1) was only reserved for repeat offenders of violent crimes rather than recidivist property crime repeat offenders. AOB 27. A defendant's mandatory penalty is "based not merely on [his] most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Rummel, 445 U.S. at 248; see also Solem, 463 U.S. at 296. As the U.S. Supreme Court has recognized, the interest of a State in enacting a recidivist-enhancement statute is not merely that of punishing the offense of conviction; "it is in addition the interest…in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law. Id. Based on the foregoing, Defendant's sentence should be affirmed.

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CONCLUSION

Based on the above arguments of law and fact, the State respectfully requests that Defendant's convictions and sentence be affirmed.

Dated this 5th day of November, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of November, 2009.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 5, 2009. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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