IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman

RONALD ROSS,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 52921

RESPONDENT'S ANSWERING BRIEF

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

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE ISSUE(S)

1. Did the District Court Properly Admit the Preliminary Hearing Transcript of an Unavailable Witness Who Was Hospitalized In California with Heart Problems?
2. Did the District Court Properly Admit Testimony Regarding the Contents of a Surveillance Tape That Was Inadvertently Destroyed Despite Efforts to Save It?
3. Did the District Court Improperly Violate Defendant's Right to a Speedy Trial?
4. Did Detective Flenner's Testimony Constitute Unnoticed Expert Testimony?
5. Was There Sufficient Evidence to Convict Defendant of All Crimes?

STATEMENT OF THE CASE

On November 12, 2008, Defendant was charged, by way of Third Amended Information, with Counts 1 & 3– Burglary, Count 2 – Larceny from the Person, Count 4 – Possession of Credit or Debit Card Without Cardholder's Consent, Count 5 – Fraudulent Use of Credit or Debit Card, Count 6 – Theft, Count 7 – Conspiracy to Commit Larceny. (I Appellant's Appendix "AA" at p. 91-93). On November 12, 2008, trial began. (III AA at p. 437). The jury found him guilty on all counts on November 13, 2008. (Id. at p. 124-26). The State filed its Notice of Intent to Seek Punishment as a Habitual Criminal and an Amended Notice of Intent to Seek Punishment as a Habitual Criminal on November 17, 2008, (I AA at p. 127-132), and a Second Amended Notice of Intent to Seek Punishment as a Habitual Criminal on January 5, 2009. (Id. at 136-38).

On April 7, 2009, Defendant was sentenced under the Large Habitual Criminal Statute as to: COUNT 1 - to a MINIMUM of TEN (10) YEARS and a MAXIMUM of LIFE in the Nevada Department of Corrections (NDC); COUNT 2 - to a MINIMUM of TEN (10) YEARS and a MAXIMUM of LIFE in the Nevada Department of Corrections (NDC) to run CONCURRENT with Count 1; COUNT 3 - to a MINIMUM of TEN (10) YEARS and a MAXIMUM of LIFE in the Nevada Department of Corrections (NDC); COUNT 4 - to a MINIMUM of TEN (10) YEARS and a MAXIMUM of LIFE in the Nevada Department of Corrections (NDC); COUNT 5 - to a MINIMUM of TEN (10) YEARS and a MAXIMUM of LIFE in the Nevada Department of Corrections (NDC); COUNT 6 - to a MINIMUM of TEN (10) YEARS and a MAXIMUM of LIFE in the Nevada Department of Corrections (NDC); COUNT 7 - to ONE (1) YEAR in the Clark County Detention Center (CCDC) COURT FURTHER ORDERED, Counts 3-7 are to run CONCURRENT with each other and CONSECUTIVE to Counts 1 & 2 with 200 DAYS credit for time served. (IV AA at p. 785). Judgment of Conviction was entered on April 16, 2009. (II AA at p. 374-76). Defendant filed his Notice of Appeal on December 5, 2008. (I AA at p. 133-35). Defendant filed the instant brief on April 20, 2010 to which the State responds as follows.

STATEMENT OF THE FACTS

On March 17, 2007, the victim, Georgia Stathopoulos was visiting Las Vegas with her husband on vacation. (III AA at p. 562). The couple was staying at the Tropicana Hotel and Casino. (Id.). Around one in the afternoon, Ms. Stathopoulos and her husband had just finished having lunch at the hotel buffet and as they walked through the casino, Ms. Stathopoulos decided to throw some money into a nearby slot machine. (Id.). At the time she was carrying her purse on her shoulder. (Id. at p. 563). As Ms. Stathopoulos sat down at the slot machine, she placed her purse, with its strap still resting on her shoulder, on seat next to the chair where she was sitting at. (Id. at 564). In fact the purse was so close to her, it rested against her left hip as she played the machine. (Id.). As she began to play, the machine started making lots of noise so much so that her husband wondered what was going on. (Id. at 566).

The noise also caught another man's attention, the Defendant. (Id.). Defendant walked up to her, with his coat draped over his arm and began to talk to her. (Id. at 670-79). Defendant

walked up right next to the side of her where she set down her purse. (III AA at p. 567). Defendant then got very close to her almost to the point that he touched her. (III AA at p. 567). He talked to her and began pointing at the slot machine and asked her questions such as "What did you win?" and "How does this machine work?" (Id. at p. 568). All of these questions were asked to distract Ms. Stathopoulos from his actual goal – to steal her wallet from her purse. (Id. at 670-79). As Defendant engaged in this conversation, he took his hand that had the coat draped over it and stole her wallet without her noticing. (Id. at p. 570, 674).

Defendant also had another accomplice in this crime. (Id. at p, 675). Shortly after Defendant began engaging Ms. Stathopoulos another man showed up. (Id.). His role was to assist Defendant in what is more commonly known as a "distract theft." (Id. at 670-79). Defendant's accomplice stood in such a manner so that passer-bys could not see what was going on with Defendant's attempt to steal her wallet from the purse. (Id.). After Defendant stole the wallet and concealed in his coat, he passed the coat off to his accomplice. (Id.). At this point, Defendant's accomplice walked away and a few seconds later Defendant left Ms. Stathopoulos walked in a completely different direction than his friend. (Id.). The point of this exit strategy would be if Ms. Stathopoulos had discovered shortly thereafter that her wallet was missing and believed Defendant had taken it, if Defendant was stopped by casino security or police, he would not have the wallet physically on his person. (Id.).

However, Defendant and his accomplice escaped the Tropicana Hotel with the wallet. (Id.). A half-hour to 45 minutes later, Defendant and his accomplice arrived at the Sheikh Shoes store near the Boulevard Mall in Las Vegas, Nevada. (III AA at p. 571-72, 592). Defendant proceeded to use Ms. Stathopoulos' credit card there to purchase various merchandise. (Id. at p. 591-96). Defendant went to the counter and conducted the transactions with a store employee, Deja Jarmin. (Id.). Jarmin recognized Defendant as a return customer as he had previously been there to buy merchandise. (Id.). Since, Jarmin was familiar with Defendant he did not review the credit card Defendant handed him. Defendant handed him Ms. Stathopoulos' credit card and charged $490 to her account. (Id.). Defendant then left the store with the merchandise and Ms. Stathopoulos' credit card. (Id.).

Shortly after this transaction, Ms. Stathopoulos' credit card company notified her of this illegal transaction. (III AA at p. 571). After speaking with her credit card company, Ms. Stathopoulos contacted Sheikh Shoes and spoke with Jarmin. Jarmin recalled that Defendant came in that day to make such a transaction. (Id. at p. 596-97). Jarmin recalled that Defendant was the likely suspect and after reviewing the security tape, Jarmin as well as other employees identified Defendant as the man who made this illegal purchase. (Id. at p. 603-606). Furthermore, Ms. Stathopoulos as well as the detective involved in this case, who happened to have prior interactions with Defendant, positively identified Defendant as the man who stole her purse. (Id. at p. 566, 671).

ARGUMENT

I. THE DISTRICT COURT PROPERLY ADMITTED THE PRELIMINARY HEARING TRANSCRIPT OF AN UNAVAILABLE WITNESS

Defendant claims that the District Court committed reversible error by admitting the preliminary hearing transcript of an unavailable witness, Sheikh Shoes employee Deja Jarmin. Overall, trial courts have considerable discretion in determining the relevance and admissibility of evidence, and their rulings should not be disturbed absent a clear abuse of that discretion. Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004). However, this Court considers a purported violation of a defendant's Confrontation Clause rights as a question of law subject to *de novo* review. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Under either standard the record illustrates that the Court's admission of the preliminary hearing transcript was proper.

The Sixth Amendment's Confrontation Clause guarantees every criminal defendant the right to confront the witnesses testifying against him. Id. In light of this right, the Confrontation Clause precludes the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross examination. Crawford, 541 U.S. at 53-54, 124 S.Ct. 1354. This Court concluded that a preliminary hearing can provide a defendant with an adequate opportunity to confront witness within the spirit of Crawford. Chavez v. State, 213 P.3d 476, 482-83 (2009). Thus, the two main questions for this Court to resolve are whether the witness was unavailable and whether

Defendant had sufficient opportunity to confront the witness. Id. The adequacy of a defendant's opportunity to confront a witness must be decided on a case-by-case basis and the relevant factors include the discovery accessible to the defendant at the time of the confrontation and the manner in which the magistrate allowed the cross examination of the witness to proceed. Id.

Here, Defendant alleges that the transcript was improperly admitted for several reasons. (See Def. Br. at p. 10-18). First, Defendant claims that the State failed to demonstrate good cause for untimely filing the motion to admit the preliminary hearing transcript. (Def. Br. at p. 11-13). Second, Defendant claims that the State did not prove Jarmin was unavailable. (Def. Br. at p. 13-14). Third, Defendant claims that the State did not exercise any reasonable diligence in procuring Jarmin. (Def. Br. at p. 14-15). Fourth, Defendant claims the ruling violated his Confrontation Clause rights under the United States Constitution because he allegedly did not get an opportunity to cross-examine Jarmin. (Def. Br. at p. 15-18). Each of these arguments is without merit.

A. The State Demonstrated that There Was Good Cause For the Untimely Filing of the Motion to Admit the Preliminary Hearing Transcript

Nevada Revised Statute 174.125, EDCR 3.20(a) and EDCR 3.28 requires that a party wishing to admit a transcript of a former proceeding, such as a preliminary hearing, must file a motion making the request no later than 15 days before trial. However, these statutes also provide that if the motion is not filed in a timely fashion, the district court can admit the motion if the moving party demonstrates good cause for the delay. See NRS 174.125, EDCR 3.20(a), EDCR 3.28. In order to establish good cause, the moving party must either prepare an affidavit or present sworn testimony that establishes the following facts:

> (a) the names of the absent witnesses and their present residence, if known; (b) the diligence used to procure their attendance; (c) a brief summary of the expected testimony of such witnesses and whether the same facts can be proven by other witnesses; (d) when the affiant first learned that the attendance of such witnesses could not be obtained; and (e) that the motion is made in good faith and not for delay.

Hernandez v. State, 124 Nev. 60, 188 P.3d 1126, 1132-33 (2008).

Here, the record reveals that State put on sworn testimony sufficient to support the District Court's factual finding that there was good cause for the State's delay in filing the motion. See Id.; (III AA at p. 518-536). On Wednesday, November 12, 2008, the first day of trial, Deputy District Attorney Jessica Walsh informed the District Court that Jarmin was unavailable. (III AA at p. 518-21). On the record, Walsh stated that the State had informed the Court on Monday, November 10, 2008 that this situation could be possible. (Id.). Walsh stated that on the morning of November 12, 2008, the State first learned that Jarmin was in a California hospital with heart problems. (Id.). Walsh offered as sworn testimony not only herself but also the State's criminal investigator, Matthew Johns. (Id.).

Johns testified that he began serving subpoenas on October 16, 2008, including a subpoena for Jarmin. (III AA at p. 521). Johns testified that the address and phone number he had for Jarmin was valid and he verified that by speaking with Jarmin's girlfriend who lived at that address. (III AA at p. 522: 5-20; 524: 14-18). Johns testified that he tried to contact Jarmin ten to fifteen times and left messages for him starting in mid-October 2008. (III AA at p. 522:23 – 523: 2). Johns testified that he had three personal contacts with Jarmin's girlfriend to verify this information. (III AA at p. 523: 3-5). Johns testified that the last personal contact he had with Jarmin's girlfriend was on the morning of November 12, 2008 – the first day of trial. (III AA at p. 523). That morning, Jarmin's girlfriend informed Johns that she learned on Friday, November 7, 2008 that Jarmin had been admitted to a San Bernardino hospital because of a heart condition. (III AA at p. 523: 9-17). Johns testified that he confirmed Jarmin had family in California and acquired several phone numbers for them. However, Johns testified his efforts to get a hold his family in California that morning were unsuccessful as two of the numbers were disconnected, another had no response and he left a message. (III AA at p. 523-524). Johns also testified that he is unable to confirm whether Jarmin was in the hospital due to HIPAA regulations which bar him from personally contacting the hospital himself and getting any information from hospital officials about Jarmin. (III AA at p. 524-525).

Walsh then explained to the Court that the motion to admit this transcript was being made orally and after the 15 day deadline, because the State only discovered that Jarmin as in

the hospital and unavailable the morning of trial. (III AA at p. 525-26). Walsh then testified that the State had no reason to believe, prior to the day of trial, that Jarmin would be unavailable given that he had previously been very cooperative and testified at the preliminary hearing (III AA at p. 527). Walsh testified that her investigator informed her that the contact information and address for Jarmin was still valid and that he confirmed the validity of this information with Jarmin's girlfriend. (III AA at p. 527). Walsh testified that there was good cause to bring this motion because 1) the State did not know he would be unavailable until the morning of trial and 2) Jarmin was just admitted into the hospital on November 7, 2008, which would have made it impossible to even raise the motion previously as that date was after the last scheduled calendar call in this case before trial. (III AA at p. 527).

As further support of a factual finding of good cause by the Court, Defendant's counsel, the Clark County Public Defender, conceded there was good cause for the motion, yet now on appeal has reversed course. Defendant's counsel stated at trial:

"I don't think the untimely part really has much relevancy here…they didn't find out until just recently. They didn't have the 15 days. I don't think there's any reason to believe they delayed in telling me this because we talked about – I talked with them on Friday or Monday and they had no idea that they weren't going to be able to get this guy yet."

(III AA at p. 528: 20 – 529:1).

Defendant's counsel continued to expressly concede the matter by stating: "I'd be willing to concede that they have made as many and any kind of attempt that I could imagine making in terms of getting this guy here." (III AA at p.532:7-9). In light of this factual record, the District Court properly determined that there was good cause to file this motion admit the preliminary hearing transcript. Defendant's argument that the District Court erred in finding good cause is erroneous. Specifically, his claim that the announcement that Jarmin would be unavailable on the morning of trial "blindsided defense counsel" is belied the record. (Def. Br. at p. 12: 1-2). Defense counsel conceded there was good cause and specifically added that the State had no possible way of knowing about this fact prior to that morning. The issue of untimeliness was never an issue for Defense counsel until inexplicably raising the matter on appeal. Moreover, Defendant's characterization of the State's belief that Jarmin would appear as mere "unbridled

optimism" is simply belied by the record. (Def. Br. at p. 12: 11-13). Here, the State was justified in believing Jarmin would appear for a number of reasons. He was a cooperative witness. He testified at the preliminary hearing. His girlfriend confirmed to the investigator that Jarmin not only resided at the address they had but also could be reached at the phone number he provided the State. The record clearly demonstrates that the State believed Jarmin would appear and thus when it discovered on the day of trial that he was hospitalized in California, good cause for filing this motion was established. Defendant's brief fails to explain why this finding of good cause was abuse of discretion and accordingly, this Court should find the District Court's determination that there was good cause to be a proper exercise of discretion.

B. Defendant's Rights Were Not Violated, Because Jarmin was Unavailable

Defendant's claim that it was an error for the District Court's decision to admit the preliminary hearing transcript because he believes Jarmin was not really unavailable is wholly without merit. As discussed supra such a transcript can only be admitted if in fact the witness is unavailable. Chavez, 213 P.3d at 482-83. Defendant based this claim on the fact that the State failed to provide "direct evidence" that Jarmin was being treated in a San Bernardino hospital for a heart condition. (Def. Br. at p. 14). However, the only way to provide direct evidence of this fact would be to force the hospital that is treating Jarmin to disclose the fact that he is a patient of the hospital. However, as was testified to under oath, the current HIPAA regulations make such a demand impossible. No hospital is legally permitted to disclose such information about a patient without the patient's consent. Thus, there was no way to acquire direct evidence of his hospitalization, because there was no way to contact Jarmin and the hospital would not release such information. Accordingly, the only way to verify that Jarmin was in the hospital was to speak to his loved ones. That is precisely what the State did. The investigator spoke to Jarmin's girlfriend who confirmed was being treated in San Bernardino. (III AA at p. 523). After discovering that information, the State took the extra step of acquiring contact numbers for Jarmin's family members in California. (Id. At p. 523-24). However, through no fault of his own, the efforts to reach Jarmin's other family members were unsuccessful. (Id.). Here, the State provided as much evidence about the status of his health as possible given the status of the

law as well as the timeframe in which the State had to work with – a matter of hours before trial. (Id. at 521-527). And in light of this testimony, there was sufficient evidence for the District Court to conclude that Jarmin was unavailable to testify at trial within the meaning of Crawford.

C. The State Exercised Reasonable Diligence in Procuring Jarmin's Attendance

Defendant's claim that the State failed to exercise reasonable diligence in getting Jarmin to trial is without merit. Here, Defendant erroneously focuses his argument on the effort the State's investigator made to reach Jarmin at his home. Defendant argued that the investigator's efforts were insufficient to amount reasonable diligence because he took too long subpoenaing to a "bad address." (Def. Br. at p. 15) However, characterizing Defendant's residence in Clark County as a bad address is flawed. At no point did Jarmin's girlfriend ever tell him that Jarmin did not reside at that address. (III AA at p. 527). Rather, Jarmin's girlfriend said while he may not spend every single night there she still believed that Jarmin considered that residence his home. (Id.). Furthermore, she confirmed the phone number to reach Jarmin was accurate. (Id.). Thus, there was no reason to stop his attempts to contact Jarmin at that address. Moreover, characterizing the State efforts as making "a few phone calls and cross[ing] their fingers" is simply myopic. (Def. Br. at 15: 14-15).

Here, Defendant argument fails to grasp the context of the situation. The State did not learn Jarmin was in a California hospital ***until the morning of trial***. To expect the State to somehow travel to San Bernardino to scour each area hospital for scintilla of evidence of Jarmin's whereabouts and health status just hours before the trial began was unreasonable. The only reasonable and practical efforts the State could make at that juncture was to speak to Jarmin's girlfriend, acquire as many contact numbers for Jarmin's family in California and subsequently call each number received. That is precisely what the State did. Based on the timing and circumstances surrounding when the State learned of this hospitalization and how soon the information was discovered from the time of trial, the State's effort to reach Jarmin were more than reasonably diligent. Accordingly, the District Court properly concluded that the State exercised reasonable diligence in trying to bring Jarmin back to trial.

D. His Rights Were Not Violated, Because Defendant had an Opportunity to Cross Examine Jarmin at the Preliminary Hearing

Defendant mistakenly argues that he did not have the opportunity to cross-examine Jarmin at the preliminary hearing. As discussed, a district court cannot admit a preliminary hearing transcript unless the defendant had an adequate opportunity to confront witness within the spirit of Crawford. Chavez, 213 P.3d at 482-83. Here, Defendant's primary argument is inextricably tied to what he considers to be a violation of the Best Evidence Rule. Specifically, that the Jarmin was able to testify about what he viewed on the Sheikh Shoes surveillance footage during the preliminary hearing, despite the fact that the video was inadvertently destroyed and ultimately was not able to be given to Defendant for review. In support of this "Best Evidence" argument, Defendant claims that the State's "entire case" was predicated on videotape evidence. (Def. Br. at p. 16: 3-4). This is simply not true. Here, the State presented multiple witnesses who positively identified Defendant as the man who not only stole the victim's wallet but also subsequently used her credit card to purchase several hundred dollars in merchandise. The record reveals, as discussed infra, that the Sheikh Shoes video was only used to reaffirm what the witnesses already remembered about Defendant illegal purchase. However, Defendant mistakenly claims that since Jarmin's testimony was "entirely" based on what he watched on the videotape, it was therefore impossible for Defendant to have an "opportunity" to cross-examine him during the preliminary hearing, because Defendant did not have a chance to review the video. (Def. Br. at p. 16: 11-17). This argument is flawed for several reasons.

First, Defendant should be precluded from raising this issue, because Defendant failed to object not only during the preliminary hearing, but also during trial when the preliminary hearing transcript was admitted. (I AA at p. 14-18; III AA at p. 589-608) This Court has consistently held that the failure to object at trial generally precludes the issue from being reviewed on appeal. Miller v. State, 121 Nev. 92, 110 P.3d 53 (2005). Here, if Defendant believed that it was a violation of the Best Evidence Rule was imminent, Defendant could have raised an objection to that line of questioning during the preliminary hearing. However, Defendant elected not to do so and permitted full questioning by the State regarding the surveillance tape. Furthermore, at trial, Defendant could have sought a redaction of the preliminary hearing transcript to exclude any questions about the video tape when the District

Court decided to admit the transcript if he honestly felt that it was improper for the jury to hear Jarmin's testimony about the videotape. However, Defendant allowed the transcript, in its entirety, to be read to the jury. Accordingly, this Court should not consider this argument on appeal and at worst this issue should only be reviewed for plain error. See Id.

Second, the record wholly belies Defendant's contention that Jarmin's entire testimony is derived from the videotape. Here, Jarmin testimony is primarily based on his own personal recollection of the events that occurred in the store. Jarmin only used the videotape to confirm his past recollection of what occurred when Defendant entered into the store. Here, Jarmin explained his identification of Defendant and his recollection of what happened in the store when Defendant entered were based on his own memory and that the video only served to reconfirm what he already remembered. (See I AA at p. 14-18). A review of the questions asked of Jarmin further illustrates that fact. During the preliminary hearing there were sixty-six questions asked during Jarmin's direct examination yet only ten discussed the video.

However, the strongest proof of Defendant's mischaracterization Jarmin's testimony as being entirely predicated on viewing the videotape comes from his counsel's cross-examination of Jarmin. During cross-examination, Jarmin clearly explains that his recollection of this crime was derived from his own memory rather than solely what he watched on a videotape. The exchange between Jarmin and defense counsel was as follows:

Q: ***But you are positive that these two receipts and this printout comes from you seeing my client on the 17th of March around two o'clock when he came in and bought almost $500 worth of shoes?***
A: ***Yes.***
Q: ***And this blue ink signature is something the guy sitting to my left put on this piece of paper? (Indicating)***
A: ***Yes, it is.***
Q: ***No question about that?***
A: ***No question.***

…

Q: So you found out – or you heard a visitor to Las Vegas calling up and saying I think someone fraudulently used my card at your place, and then you turned around and in addition to looking it up, you contacted your supervisors?
A: Yes.
Q: They all got together with you before your shift ended?
A: Yes.

Q: And, among other things, you gathered up these papers and ran the videotape ***for the time you remembered him – you remember the transactions possibly to have happened?***

A: From the time that's on the credit card machine, from the time I talked to her. She called me and said that she had talked to her – her credit card company and they reported that the purchase was made for a certain amount with her card. She gave me the number and that's when I found it. It was a match. That's how I knew.

…

Q: So then you go to it, ***back it up to the time you think this transaction was supposed to have occurred and watched the cameras*** that would have focused on wherever you would have been standing and that's what you said you looked at and ***it showed what you remembered to have happened a couple hours earlier?***

A: ***Right.***

(I AA at p. 17: 30: 7 – 18: 32: 24) (emphasis added). This record illustrates Defendant's claim that Jarmin's memories are entirely based on the videotape is baseless. Accordingly, to claim the lack of the video denied Defendant a fair opportunity to adequately cross-examine him is without merit. Defendant did have and took the opportunity to cross-examine him about what he remembered, as noted supra. Consequently, this argument is without merit.

Third, Defendant is not entitled to claim that he did not get a full opportunity to cross-examine the witness, when his counsel expressly admitted that he knowingly withheld lines of questioning from the witness during the preliminary hearing as part of their case strategy. (III AA at p. 531: 15 – 532: 1). Unlike some other states, Nevada law is very liberal in affording a defendant the right to discovery and cross-examination at a preliminary hearing. Chavez, 213 P.3d at 484. Furthermore, Nevada law is clear that a cross examination during a preliminary hearing can satisfy the Confrontation Clause. Id. at 482-83. Thus, Defendant knew or should have known that an unavailable witness was a possibility, and thus, would necessitate the admission of the witness' preliminary hearing testimony. Moreover, in conjunction with Nevada's liberal stance on the scope of cross-examination during a preliminary hearing, Defendant knew or should have known that he was free to ask essentially any relevant line of question of each witness. However, during trial, Defense counsel admitted that he willingly did not take the opportunity to fully examine Jarmin during the preliminary hearing. Defense counsel explained to the District Court, prior to its ruling to admit the transcript at trial, "[T]here's a series of lines of inquiry that I didn't use at preliminary hearing because, ***number***

one, it didn't occur to me, and, number two, I would not use a preliminary hearing examination that way anyway. So to say that I already had a fair chance to question him…and that would take the place of me being able to cross-examine him today if he was here, I think that's just simply not – it's a fiction. It's not true. It doesn't really reflect the way we do preliminary hearings as defense attorneys…." (III AA at p. 531: 15 – 532: 1) (emphasis added).

Despite Defendant's protestations on appeal, the record makes it evident that the only thing that held back the scope of Defendant's cross-examination during the preliminary hearing was the tactical choices of Defendant. Whether or not it "occurred" to counsel that he should fully cross-examine this witness or whether or not defense counsel simply does not "do" a preliminary hearing in that particular fashion is immaterial. Nevada law is structured to enable a defendant the full opportunity to cross-examine a witness, precisely because unavailable witnesses do happen from time to time. If Defendant elected to not take that opportunity be it through tactical strategy or ignorance, he cannot now claim on appeal that the District Court denied him the opportunity to cross-examine this witness. The only limits on Defendant's cross-examination were through his own doing and accordingly his argument fails.

It is clear that based on all of the aforementioned reasons that Defendant received a full and fair opportunity to cross-examine Jarmin during the preliminary hearing. To the extent that Defendant's raised any further "Best Evidence" arguments in its first ground for relief, the State applies all of the arguments its sets forth in its response to Defendant's second ground for relief, infra at p. 14-17, which is Defendant's claim that the Best Evidence Rule was violated as a result of the District Court permitting testimony about the inadvertently destroyed videotape from Sheikh Shoes.

E. The Record Illustrates That the District Court Properly Admitted the Preliminary Hearing Transcript

As discussed above, none of Defendant's arguments provide a legitimate legal basis to find the District Court's ruling in error. Here, the record supports the District Court's determination that the motion was made in good faith, the witness was, based on the totality of the circumstances, unavailable and Defendant was afforded the opportunity to cross-examine Jarmin at the preliminary hearing. Accordingly, the District Court's ruling should be upheld.

II. TESTIMONY DISCUSSING AN INADVERTENTLY DESTROYED SURVEILLANCE TAPE WAS NOT A VIOLATION OF THE BEST EVIDENCE RULE

Defendant's second ground for relief is the argument that the District Court erred in admitting any witness testimony about the contents of an inadvertently destroyed surveillance tape from the Sheikh Shoes store. (Def. Br. p. 18-21). As discussed, trial courts possess extensive discretion in determining the relevance and admissibility of evidence, and their rulings should not be disturbed absent a clear abuse of that discretion. Crowley, 120 Nev. 30, 83 P.3d 282 (2004). Specifically, Defendant claims that there were two violations: 1) Jarmin's preliminary hearing testimony regarding the Sheikh Shoes surveillance tape that was ultimately admitted at trial and 2) Detective Flenner and the other two Sheikh Shoes employees, Kevin Hancock and Luis Valadez's trial testimony regarding the Sheikh Shoes surveillance tape. (Def. Br. at p. 19). Defendant's claim for relief fails for a number of reasons.

A. Defendant Waived His Right to Appeal this Issue

Defendant waived this issue on appeal by failing to object to the matter either at trial or in the case of Jarmin, at the preliminary hearing. On appeal, Defendant claimed that defense counsel presumably preserved his right to make a best evidence objection on appeal as it relates to Jarmin's preliminary hearing testimony as well as Flenner's and the other Sheikh Shoe employees' trial testimony about the surveillance tape by citing to I AA at p. 25, 31. A review of those citations demonstrates that Defendant claim is utterly belied the record and reflects a disingenuous attempt, at best, to misconstrue the record.

In each instance cited by Defendant, defense counsel made a best evidence objection to testimony completely unrelated to any testimony about the Sheikh Shoes surveillance tape. At I AA at p. 25 of the record, Defendant made a best evidence objection to Detective Holl's preliminary hearing testimony about a surveillance tape from the Sante Fe hotel. At I AA at p. 31, Defendant made a best evidence objection about Flenner's preliminary hearing testimony about a surveillance tape from the Tropicana Hotel. Defendant's claim that these "best evidence" objections preserved for appeal the issue of whether the best evidence rule was violated during testimony about the Sheikh Shoes surveillance tape utterly fails for the following reasons.

First, neither objection involved the correct surveillance tape in question on appeal. These objections dealt with a Santa Fe Hotel and a Tropicana Hotel surveillance tape, not the Sheikh Shoes surveillance tape. Second, these objections did not involve the purported testimony in question on appeal. These objections dealt with Detective Holl's testimony about her Sante Fe theft investigation and what Detective Flenner viewed on the Tropicana Hotel surveillance tape. It had absolutely nothing to do with Jarmin, Detective Flenner or the other two Sheikh Shoes employees' testimony about what they saw on the Sheikh Shoes videotape. Third, a review of the actual record of the four witnesses' testimony proves that not only did Defendant not raise a single objection to any of these witnesses testifying about the content of the surveillance tape, but also defense counsel asked extensive questions about what each witness actually saw on the tape. (See I AA at p. 14-18, III AA at p. 608-25; 628-59; 668-700). Accordingly, Defendant is now estopped for raising the matter now on appeal and this Court can only review the matter for plain error. Miller, 121 Nev. at 92, 110 P.3d at 53.

B. There is No Best Evidence Violation Because the Tape Was Inadvertently Destroyed.

While NRS 52.235 requires that an original recording of a videotape be provided to prove its contents at trial, NRS 52.255 delineates the four limited circumstances that a non-original may be used in lieu of the original recording. One of the four circumstances includes if the original recording has been lost or destroyed. In the event the original is destroyed, the burden is on the party seeking to introduce the non-original recording must prove the original's destruction was not done in bad faith. Tomlinson v. State, 110 Nev. 757, 878 P.2d 311 (1994).

Here, the District Court properly allowed testimony from these four witnesses about the Sheikh Shoes surveillance tape, because the State established that the video was inadvertently destroyed despite the best efforts of the shoe store to preserve the video. At trial, there was testimony from Jarmin, Hancock and Detective Flenner about the fact that none of the employees of the store knew how to make a copy of the video or how to indefinitely preserve a digital copy of the video on the system's hard drive in order to prevent the system from recording over it with new surveillance footage. (I AA at p. 18: 32: 12-14; III AA at p. 636-638; 695). Specifically, employee Hancock gave a detailed account of the circumstances surrounding

the inadvertent destruction of the surveillance recording. (III AA at p. 636-38). He testified that at the time the police came to view the footage, none of the employees knew how to work the surveillance system other than to view footage. (III AA at p. 636: 23-25). He explained that he did not know how to make a copy of the video, how to take the footage off the hard drive or how to save the video. (Id. at p. 637). He testified they only knew how to prolong its deletion for a short period time, (Id.), and that they made multiple attempts to try and save the video but were unsuccessful. (Id. at 638). Moreover, he testified that the store made attempts to have the surveillance company who installed the system come out to the store from California in order to help preserve the video evidence. (Id.). However, the surveillance company did not arrive in time and the system re-recorded over the video. (Id.).

Based on this record, there was ample evidence provided by the State to illustrate that the destruction of this surveillance video was not done in bad faith. However it appears Defendant claims that bad faith was present because of his bald assertion that "there is no question that Detective Flenner could easily have obtained and preserved the video." Here, Defendant fails to offer a shred of evidence that would indicate the ease with which the detective could have preserved the video. The record reveals that the employees of Sheikh Shoes informed the detective that they would attempt to make a copy of video, because on the date that the detective came to the store, none of the employees knew how to make a copy of the tape. Detective Flenner relied in good faith on this assurance. The record also illustrates that the employees of Sheikh Shoes attempted to make good on their promise. Hancock testified that they tried repeatedly to copy and even requested the California company who installed the system to come out to the store to instruct them on how to make a copy. Unfortunately, the surveillance company did not arrive in time.

Once again, Defendant engages in a blatant mischaracterization of the record when he alleges that there was "no proof" that the Sheikh Shoes video had been destroyed at the time Jarmin testified at the preliminary hearing. (Def. Br. at p. 21: 5-10). That is simply not the case. On cross examination, after Hancock testified that the California surveillance company did not arrive in time to preserve the video, Defendant asked Hancock when exactly the company

arrived to fix the problem of making copies of surveillance videos. Hancock testified that the company arrived one or two months after Defendant's March 17, 2007 illegal transaction in the store. (III AA at p. 646: 10-16). Thus, the California company, which failed to arrive in time to save the video, came in either April or May 2007. However, Jarmin's testimony at the preliminary hearing occurred on June 19, 2007, ***at least one to two months after*** the belated arrival of the surveillance company. Thus, the record indicates Jarmin testified ***at a minimum one to two months after*** the destruction of the video. The evidentiary record once again flatly refutes Defendant's bald allegation of an absence of proof. Consequently, there is nothing in the record to suggest that the video was destroyed in bad faith and Defendant's bald assertions to the contrary were entirely without merit.[1]

III. THERE WERE NO VIOLATIONS OF DEFENDANT'S CONSTITUTIONALOR STATUTORY SPEEDY TRIAL RIGHTS

Defendant claims that his right to a speedy trial was violated and that at no point in these proceedings did he ever waive those rights. (Def. Br. at p. 21-24). It appears that Defendant is alleging that not only were his Constitutional rights to a speedy trial, but also his statutory rights to a 60-days were violated. (See Id.). Here, neither Defendant's Constitutional or statutory rights to a speedy trial were violated.

A. Defendant and Defendant's Counsel Impliedly Waived His Statutory Right to a Trial Within 60 Days.

NRS 178.556 affords a defendant the right to a trial sixty days after the arraignment. "However, a defendant can waive this statutory right and ***such a waiver can be expressed by counsel***." Furbay v. State, 116 Nev. 481, 484 998 P.2d 553, 555 (2000) (emphasis added). In fact, this right can even be waived even if a defendant is not present in court. Schulta v. State, 91 Nev. 290, 535 P.2d 166 (1975). Moreover, "***waiver may be implied, as well as express; thus, if***

[1] Defendant's claim that Flenner was bias a result of another officer's, Detective Holl, misidentification of Defendant is without merit. It fails to show how Detective Flenner exercised bias against Defendant in the instant case. Furthermore, the State, once it discovered Holl's misidentification of Defendant in the entirely different matter, immediately dismissed the those charges against Defendant. Thus, Defendant suffered no prejudice resulting from Holl's misidentification.

the defendant is responsible for delaying the trial beyond the 60-day limit, he may not complain." Broadhead v. Sheriff, Clark County, 87 Nev. 219, 223, 484 P.2d 1092, 1094 (1971) (citing Oberle v. Fogliani, 82 Nev. 428, 420 P.2d 251 (1966)) (emphasis added).

Although Defendant claims that he "was not responsible for these delays," (Def. Br. at p. 23: 9) and that "there is no record of Ross ever waiving his right to a speedy trial," (Def. Br. at p. 23:18-19), these claims are belied by the record ***given that the conduct of Defendant's counsel as well as his own implicitly waived his right to trial in 60 days.*** Broadhead, 87 Nev. at 223, 484 P.2d at 1094. On September 5, 2007, Defendant was arraigned and he invoked his right to a speedy 60-day trial. (III AA at p. 389). In accordance with this request the Court set a trial date for him within 60 days on October 22, 2007. However, on October 11, 2007, eleven days before the beginning of his trial, ***Defendant's counsel formally made the request that Defendant trial date be vacated for five weeks.*** (III AA at p. 395: 7–12). Moreover, after receiving the requested continuance, Defendant who was present in court at the time never objected to the continuance and when asked by the Court whether he understood why his attorney requested the continuance, explicitly told the Court that he understood why his attorney made such a request. (III AA at p. 395:23-25).

Specifically, Defendant's counsel explained to the Court that there were two other pending cases that shared similar actions and similar legal issues with the instant case before the Court. (III AA at p. 394). Defendant's explained that one case was dismissed by Judge Halverson and the State appealed to the Supreme Court on the matter. (Id.). Defendant's counsel also explained to the Court that Defendant filed a motion to dismiss the second case, but Judge Glass denied the motion which resulted in an appeal in that case. (Id.). Defendant's counsel explained that both cases had a status check before Judge Glass in a month.

The State then explained that the importance of a continuance in this matter. (III AA at p. 394-395). The State explained that there was also an additional motion to consolidate before Judge Glass and if Judge Glass granted the motion the instant case would go before her in Department 5. (Id.). Furthermore, the State pointed out that if Defendant received a favorable ruling from the Supreme Court and in lieu of a continuance in the instant case, the Court

proceeded and ultimately tried and convicted Defendant, the likely result would be the conviction would come back to the Supreme Court on appeal due to the prior ruling. (Id.).

Subsequently, ***Defendant's counsel, not the State, formally requested*** that the trial date be vacated and a status check for five weeks later to see if the rulings from the Supreme Court as well as from Judge Glass on the motion to consolidate had been made. (III AA at p. 395: 7–12). Accordingly, the Court granted the request made by both parties and set a new trial date for December 11, 2007, a date set ***for two months after*** the original speedy trial date of October 11, 2007. (Id. at p. 395: 13-16). Immediately, after setting the new trial date sixty days later, the Court asked if Defendant if he understood why his counsel and the State were requesting a new trial date. Defendant told the Court "I understand exactly what's going on, Your Honor." (III AA at p. 395:23-25). The record reveals that Defendant's only desire at this stage had nothing to do with ensuring his 60-day speedy trial rights were preserved, but rather with his ultimate desire to spend his time waiting for trial while these proceedings in Nevada State Prison. (See III AA at p. 395:23-25; 396: 15-17). Thus, the record illustrates that the conduct of Defendant's counsel impliedly waived his speedy trial right by formally requesting a continuance that delayed the original trial date for another two months. Furthermore, the record indicates that Defendant's own conduct – due to his failure to object to this waiver of his speedy trial right as well as his acknowledgement to the Court that he expressly agreed with the reasons for postponing his trial for another two months amounted to an implicit waiver of this right. Here, Defendant willingly waived this speedy trial right, because he believed that these pending outcomes could have benefited him in the instant case.

There is further evidence that Defendant and his counsel impliedly waived this right at subsequent status checks. At the December, 11, 2007 status check, Defendant stated that he was perfectly content to continue the matter again in order to wait for the pending rulings, rather than proceed to trial as soon as possible. (III AA at p. 398-402). Specifically, the record indicates that Defendant, who was present, never reasserted his speedy trial rights at this time or complained about the delay during this proceeding. (Id.). To the contrary, Defendant's counsel, with Defendant present, explained that his client was willing to "***wait as long as it takes,***" and that his

client was simply far more concerned with having the opportunity to "wait it out up in [Nevada State] prison" versus remaining in the Clark County Detention Center. (III AA at p. 400: 2-12) (emphasis added). There is nothing in the record to suggest that Defendant wanted a speedy trial at this juncture. His only two concerns were 1) learning of the disposition of the pending matters and 2) serving his time in Nevada State prison versus the Clark County Detention Center.

Again, at the ensuing June 10, 2008 status check, over six months after the original speedy date, Defendant's conduct was consistent with an implied waiver of his 60-day speedy trial right. Here, Defendant's counsel informed the Court that he found the State's request for another continuance "appropriate" given the fact that the motion to consolidate had yet to be ruled upon. (III AA at p. 405: 5-6). At no point during did Defendant complain about the decision to delay his trial and await the ruling on the consolidation motion. (Id. at p. 404-406).

However, at the July 8, 2008 status check, over seven months after the original speedy date, Defendant, for the first time, makes the unsupported claim that he did not waived his 60-day trial right. (III AA at p. 409-10). While Defendant may have been correct in stating that he never *expressly* stated that he formally waived his 60-day right to trial, the record reveals that he and his counsel's conduct impliedly waived this right. As discussed supra, Defendant's repeated continuance requests delayed the original the 60-day trial date by over seven months. Despite this implied waiver, the Court attempted to accommodate Defendant and set a trial out 60 days from the July 8, 2008 status check. (Id. at p. 410). However, the Court explained that such a date fell within his civil calendar making such a request impossible. (Id.). As a result, Defendant agreed to "waive" his right for one week past the 60 days to accommodate the Court's civil calendar. (III AA at p. 411). The Court then set a new trial date for September 2, 2008. (Id.).

On the date of Defendant new trial date of September 2, 2008, Defendant was not transported to court. As a result, the Court set a status check two weeks later for September 16, 2008 and vacated the September 2, 2008 trial date. (III AA at p. 416-17). At the September 16, 2008, status check, Defendant once again erroneously claimed he had continually invoked his 60-day speedy trial right, despite the fact that his prior conduct waived the right. (III AA at p. 420). The Court once again sought to accommodate Defendant's current desire to have a trial as

soon as possible. (III AA at p. 420-22). After the Court offered a trial date of September 29, 2008, which was just thirteen days from the current status check, the State informed the Court that it would be unable to be ready to go to trial on such short notice. (III AA at p. 422). The Court admitted that the proposed date was inappropriate given that it was too soon. (III AA at p. 422-23). The Court then offered a trial date of Monday, November 10, 2008, which was the first week that the Court was back handling a criminal calendar. (III AA at p. 423). When Defendant objected to this particular date as being to far out, the Court once again explained the Court's split calendar and that this November 10, 2008 date, was the first date the Court had available to handle a criminal trial. (III AA at p. 423: 6-16). Defendant then acknowledged that while he would have preferred an earlier trial date, if the Court's schedule prevented an earlier trial he understood why there would need to be a continuance. (III AA at p. 423: 17-18). Prior to the conclusion of this status check, the Court set Defendant's trial date for November 10, 2008 and stated that Defendant's trial could begin on Wednesday, November 12, 2008 if there was scheduling conflict. (III AA at p. 424). At the calendar call on November 4, 2008, both the State and Defendant acknowledged that there were ready to proceed to trial, however the Court set trial for Wednesday, November 12, 2008.

As discussed, supra, the record reveals that Defendant's own conduct as well as his counsel, impliedly waived his speedy trial rights. It is clear that Defendant wished that his trial to be postponed while he awaited the results from the Supreme Court on two different appeals as well as a motion to consolidate. The record demonstrates that Defendant was perfectly content with delaying his trial for over seven months, until July 8, 2008 when Defendant suddenly had a change of heart. Although at that juncture Defendant attempted reasserted his trial rights, his previously waiver made this subsequent attempt unavailing. Regardless, the record illustrates that the Court made diligent efforts to give Defendant a trial as soon as possible, given the scheduling limitations posed by the Court's civil calendar. As Defendant's counsel clearly stated to the court, his client was willing to "wait as long as it takes" for the results from appeals before the Supreme Court as well as the motion to consolidate. (III AA at p. 400: 2-12). Accordingly, Defendant is now not entitled to complain about the delay in his trial as the delay

is the result of his own strategic planning. Broadhead, 87 Nev. at 223, 484 P.2d at 1094. Thus, Defendant and his counsel impliedly waived his right to a 60-day trial.

B. Defendant's Sixth Amendment Speedy Trial Rights Were Not Violated

To determine if there is a Sixth Amendment violation of Defendant's speedy trial rights, this Court applies the four-part test laid out in Barker v. Wingo, which examines the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Prince v. State, 118 Nev. 634, 55 P.3d 947 (2002) (quoting Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182 (1972)). Here, the application of these factors does not lead to a determination that Defendant's Sixth Amendment rights were violated. In examining the first Barker factor, the length of the delay, the record reveals that he was his wait, while long, was not so extensive that he suffered any actual prejudice. It took approximately a year-and-a-half for Defendant to go to trial. In support of his contention that the delay was unconstitutionally long, Defendant erroneously relied upon a series of decisions in attempt to paint a year-and-a-half wait as an overly prejudicial. However, Defendant's reliance upon these case are unavailing as the instant case presents a key factual difference that distinguishes it from the cited authority - Defendant and his counsel's conduct were directly responsible in requesting these continuances and causing this delay, thus Defendant cannot now claim prejudice from the ensuing delay. See Manley v. State, 115 Nev. 114, 126 979 P.2d 703, 710 (1999) (holding Defendant cannot claim that he suffered from undue delay, where defendant is responsible for the ensuing delay). As discussed supra, these continuances were requested either by Defendant or if viewed in a light most favorable to Defendant – in a joint effort by both parties. In these decisions relied upon by Defendant, the defendants did not have a role in causing a delay of the trial. However, here Defendant kept extending the trial date far beyond the 60-day window in order to learn about the outcome of two pending appeals and a motion to consolidate his various cases in Department 5. Accordingly, since the trial delay was created by Defendant's own efforts, it cannot be said that he unfairly suffered as result his own wishes.

It should also be noted that in examining the second Barker factor, the reason for the delay, the basis for these continuances were entirely proper. As noted previously, Defendant

repeatedly expressed a desire for these continuances at each status check in order to learn the outcome of two pending appeals before the Supreme Court as well as a pending motion to consolidate in Department 5, before proceeding to trial in this case. As Defendant explained to the Court the outcome of these pending matters were particularly important before proceeding to trial in this case, because "they share the same Defendant and similar actions and similar legal issues." (III AA at p. 394: 10-11). Accordingly, the record reveals that it was Defendant's desire, or in best case scenario for Defendant – both parties – that wanted to repeatedly delay this trial in order to learn the outcome of these pending appeals and motion to consolidate. Defendant's crystallized how important it was for his client to wait for these rulings by pronouncing to the Court that his client was willing to "wait as long as it takes." (III AA at p. 400: 2-12). Accordingly, the reason for this delay falls squarely on the shoulders of Defendant in the instant matter and therefore cannot result in a finding of Sixth Amendment violation.

In examining the third Barker factor, the defendant's assertion of his right, it is clear there was no violation. Defendant baldly claims that "he subsequently re-asserted his right several times in open court." (Def. Br. at p. 23: 18). However, Defendant neglected to mention that after initially asserting this right on September 5, 2007, Defendant and his counsel proceeded to impliedly waived it by making repeatedly continuance requests over the course of the next seven months. While it is true that Defendant re-asserted the rights almost eight months later, the right was effectively waived at this point. However, despite this implied waiver, the Court upon hearing of Defendant's reassertion of his rights made every effort to give him as speedy of a trial date as possible. Accordingly, there was no violation of the third Barker factor, given that Defendant failed in preserving his right to a speedy trial.

In examining the fourth and final Barker factor, the prejudice suffered by defendant, the record demonstrates that Defendant was in no way harmed by the delay. Here, Defendant received the benefit of continuances that he repeatedly sought – he learned the outcome of both Supreme Court appeals as well as the disposition of the motion to consolidate in Department 5. Accordingly, he cannot now complain about the fact the Court granted his request and delayed the trial until those rulings came down. Defendant's claim that his incarceration was "certainly

'oppressive,'" (Def. Br. at p. 24:4), is belied by the record. Here, Defendant counsel's in seeking yet another continuance for his client told the Court his client was willing to "***wait as long as it takes***." (III AA at p. 400: 2-12). At no point during any of the numerous status checks that occurred during this case, did Defendant or his counsel every expressed that he was suffering in the Clark County detention center. Despite speaking up multiple times in court during this status checks, not once did Defendant informed the court that his cell was overly crowded or that he was unhappy with his living situation. The record reveals that Defendant was perfectly happy to wait for the results of these appeals and the motion to consolidate. Yet, on appeal Defendant claims that he "was forced to feel that dread build up over the course of 18 months." (Def. Br. at p. 24: 12-13). Without shred of evidentiary support in the record to substantiate this claim, it appears Defendant merely engaging in hyperbole to garner sympathy from the Court.

Defendant's claim that the delay in his trial resulted in the destruction of the Sheikh Shoes videotape is also without a scintilla of factual support. (III AA at p. 24:16-22). The record completely belies this claim, as Kevin Hancock, a Sheikh Shoes employee testified that the only reason why the tape was destroyed was due to the fact that none of the employees knew how to extract the video and burn it onto a DVD and that the installers of the security system took too long to travel from California to Las Vegas to instruct the employees how to complete this task. (III AA at p. 636-638). Thus, the erasing of that security video had absolutely nothing to do with Defendant's effort, or at best joint efforts with the State, to repeatedly continue the trial.

Defendant failed to provide a shred of factual support to illustrate how he was prejudiced. There is no evidence to suggest that the memories of any of the witnesses had faded nor did he demonstrate any manner in which he was unable to put forth a vigorous defense as a result of the delay. To the contrary, the record reveals that the delay in the trial produce a result that Defendant wanted all along – to learn of the outcome of two different Supreme Court appeals as well as a motion to consolidate in Department 5. Once those outcomes were known, the record establishes that the Court made good faith efforts to set a trial date for Defendant as soon as possible. Accordingly, as none of the Baxter factors support a finding of a Sixth Amendment violation, Defendant's third claim for relief is without merit.

IV. THE TRIAL COURT DID NOT ALLOW IMPROPER EXPERT TESTIMONY TO BE INTRODUCED AT TRIAL

Defendant contends that the State improperly elicited expert testimony from Detective Flenner without notice. Defendant takes exception his testimony regarding his observations of the Tropicana Hotel security camera tape that recorded Defendant's theft of the victim's wallet.

A. The "Alleged" Expert Testimony Of Detective Flenner

Defendant failed to object to Flenner's testimony. (III AA at p. 668-84). Therefore, this Court may only address the error if it was plain and affected the defendant's substantial rights. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Furthermore, Defendant's counsel stipulated to the admission of the Tropicana Hotel security camera surveillance tape in order to enable Detective Flenner to testify about what he witnessed on the video. (III AA at p. 672). Therefore, Defendant is estopped from now objecting to Detective Flenner's testimony as improper expert testimony. Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005). The bulk of Detective Flenner's testimony was factual in nature. Flenner testified about how long he has been with the police and what area he works in – the tourist safety unit. (III AA at p. 669). Flenner also testified to the observations that he made as he watched the security video at the Tropicana. He explained how the video showed Defendant and his accomplice engaged in what was commonly known as a distract theft. The detective testified that the steps Defendant took to steal the victim's wallet were similar to other cases he has handled in the past. He explained how the video caught Defendant stealing the victim's wallet without her noticing. He described he saw part of the victim's wallet appearing from underneath a coat that Defendant has draped over his arm as further proof of the theft.

None of the above testimony is expert testimony. It is factual testimony of percipient witnesses and Defendant was properly notified that he would testify. While Defendant complains that there was allegedly insufficient notice, because the State did not identified the detective as an expert witness 21 days before trial, this argument fails. Here, Defendant knew that Flenner was going to testify long before his trial took place. In fact, prior to trial, Defendant already heard the same testimony, because Flenner testified during Defendant's preliminary

hearing. Like trial, Defendant also did not object to the detective's testimony about what he witnessed on the surveillance tape. To the extent that Defendant argues the officer's opinions regarding how Defendant carried out this theft made them experts for the purposes of NRS 174.234(2), the State submits that an opinion based on observations, without any scientific testing, falls more within the confines of a lay opinion rather than the purpose of that statute.

Case law supports the State's position. In Collins v. State, 113 Nev. 1177, 1184 946 P2.2d 1055, 1060 (1997), the defendant argued that police officers gave improper expert opinions when they testified to what they saw at home that was allegedly burglarized. However, this Court found that the officers' testimony was rationally based on what they saw at the home and was helpful to the jury regarding the issue of whether the house was burglarized; therefore the testimony was admissible under NRS 50.265. Id. Likewise, in Thompson v. State, 221 P.3d 708, 714 (2009), the victim, who identified the defendant at trial, testified about her special training in art, which aided in remembering the proportions of her assailant's face. Like in Collins, this Court held that the victim's statements did not constitute expert testimony despite testimony regarding her art background. Id.;

NRS 50.265 states a witness not testifying as an expert may testify in the form of opinions or inferences as long as the witness limits the opinions or inferences to those rationally based on his/her perception as a witness and are helpful to understanding the witness' testimony or the determination of a fact in issue. Flenner's testimony regarding what he saw on the tape was based on what the detective witnessed and his prior work experience as a police officer.

Detective Flenner's testimony is not the type of testimony contemplated under NRS 174.234(2). NRS 174.234(2) requires three items from an expert: (a) a brief statement about the subject matter and substance of the expert's testimony; (b) the expert's curriculum vitae; and (c) a copy of the expert's report. The statute contemplates an expert with a particular set technical or scientific knowledge rather than a police officer who simply underwent training at the police academy. This type of witness does not typically have curriculum vitae. Nor did Flenner produce any form of report besides the standard police report prepared after Defendant was arrested. Accordingly, Flenner is not an "expert" within the meaning of NRS 174.234(2).

B. The Trial Court Did Not Plainly Err In Allowing the Testimony Of Detective Flenner

However, *assuming arguendo*, this Court considered Detective Flenner as unendorsed expert witness, the court did not plainly err in allowing in such testimony. This Court reviews a trial court's decision whether to allow an unendorsed witness to testify for abuse of discretion. Mitchell v. State, 192 P.3d 721, 729 (2008) (citing Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000)). If a defendant fails to object to the State's nondisclosure of expert testimony, than plain error review applies. Id. (citing Grey v. State, 178 P.3d 154, 161-62 (2008)). First the issue as to whether NRS 174.234(2) applies to this type of testimony is uncertain and therefore it is not clear error under existing law. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). Second, the failure to provide notice did not affect Defendant's substantial rights. As noted above, the statute requires the provision of three pieces of information: (a) brief statement about the subject matter and substance of the expected testimony, (b) a copy of the expert's curriculum vitae; and (c) a copy of the expert's report. Defendant essentially received this information through normal discovery involving the officer's police reports.

Third, the Information listed Detective Flenner as a witness with his badge number. (I AA at p. 74-78). Flenner also testified at Defendant's preliminary hearing and Defendant had an opportunity to fully cross examine him. (I AA at p. 32-37). It is also clear from the cross-examination record that Defendant was prepared for Flenner. Defendant questioned the detective about his review of the Tropicana surveillance tape. (III AA at p. 688) Defendant's counsel asked the detective why he was sure that the individual on the tape was in fact the defendant. (Id. at p. 689-90). The detective was also cross examined on how sure he was that the person stealing the victim's wallet in the Tropicana hotel was the same man who later entered Sheikh Shoes with the victim's credit card. (Id. at p. 690). The detective was then cross examined about the employees he interviewed at the Sheikh Shoes store, as well as the comparative quality between the surveillance video at the hotel and the shoe store. (Id. at 684-99).

Defendant through the preliminary hearing testimony and standard police reports knew the details of Detective Flenner's testimony and opinions and was able to effectively cross-examine them. The record does not reflect that Detective Flenner produced any additional

reports or anything that could be classified as an "expert report". Finally, there is no indication that the detective possesses a curriculum vitae. Therefore, even if this Court finds that the statute applies, any error in failing to comply with the statute did not violate the Defendant's substantial rights and thus Defendant's conviction should be affirmed.

V. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT

In order to determine if a verdict "was based on sufficient evidence to meet due process requirements, this Court will inquire whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Mitchell v. State, 192 P.3d 721, 727 (Nev. 2008) (internal citations omitted). This Court should not "reweigh the evidence or evaluate the credibility of witnesses because that is" the jury's responsibility. Id. (citing McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). Furthermore, in evaluating the sufficiency of the evidence presented at trial, this Court recognizes that circumstantial evidence alone may sustain a conviction. Cunningham v. State, 113 Nev. 897, 909, 944 P.2d 261, 268 (1997).

A. The Jury Found the Various Witnesses' In-Court Identification of Defendant Sufficiently Reliable to Sustain a Conviction

Defendant complains the in-court identifications of him by various witnesses were not "sufficiently reliable" to sustain a conviction. "Ordinarily, the weight and credibility of identification testimony is solely within the province of the jury." Jones v. State, 95 Nev. 613, 617 600 P.2d 247, 250 (1979). Defendant claims that Flenner's identification was insufficient but failed to offer a substantive argument other than the fact that Defendant believes the detective had it out for him from the outset of this case. The argument ignores a number of factors that suggest Flenner's identification was reliable. He had prior interactions with Defendant and the opportunity to see both surveillance videos. (III AA at p. 668-700). He also concluded that Defendant was wearing the same outfit in both video. (Id.). Accordingly, there

was enough substance to Flenner's identification to allow the jury to decide how much weight to afford it.

Defendant claims that Ms. Stathopoulos's identification was unreliable because she was entirely too focused her slot machine to properly identify Defendant. However, once again this argument is simply a question of how much weight show be afforded to her identification – an issue for the jury to resolve. The record at trial demonstrated that the victim had no doubt that Defendant was the thief who stole her purse. (Id. at 566-67). The record reflects that the jury, in conjunction with the other numerous identification, must have found this identification credible. Accordingly, this Court should not disturb this factual finding made by the jury.

Defendant claims Jarmin's' identification to be insufficient because he failed to examine the credit card Defendant used. Once again, this is an issue of how much weight should be afforded to his identification, a matter to be left to the jury. Here, even upon closer scrutiny this argument is without merit. Jarmin explained that he failed to review the card, because he was so familiar with Defendant given his frequent trips to the store he figured he did not need to check his credit card. (See Id. at 589-607). This familiarity and past interactions with Defendant only bolster the in-court identification made by this witness, a fact apparently not lost on the jury.

Defendant fails to offer any criticism to suggest employees Hancock or Valadez's identifications were improper. Defendant fails to point out anyway they were deficient. Defendant only points out that one employee failed to conduct the purchase at the register ***yet*** saw him in the store and the other employee positively identified him on a surveillance video. Neither of these facts would warrant as a matter of law that their identifications were flawed. For all of these aforementioned reasons, this ground for relief is without merit.

B. There Was Sufficient Evidence to Convict Defendant of Larceny From the Person

Defendant's claim that there was insufficient evidence to convict him of Larceny from the Person is meritless. NRS 205.270 defines the crime as "[a] person who, under circumstances not amounting to robbery, with the intent to steal or appropriate to his or her own use, takes property from the person of another, without the other person's consent…." The law was designed precisely to punish pickpocketers, such as Defendant. Terral v. State, 84 Nev. 412, 414

442 P.2d 465, 466 (1968). Here, the claim that Ms. Stathopoulos' purse was separated from her is belied by the record. At trial she equivocally testified that her purse was still strapped on her shoulder and resting against her leg at the time of the theft. (III AA at p. 564). Accordingly, Ms. Stathopoulos remained in constant physical contact with her purse when Defendant stole here wallet. Given that the record indicates that Ms. Stathopoulos continued to physically hold onto to her purse during the crime, there was sufficient evidence presented at trial to find Defendant guilty of the crime of Larceny from the Person. Consequently, Defendant's claim is without merit.

CONCLUSION

For all of the aforementioned reasons, Defendant's appeal should be denied.

Dated this 21st day of June, 2010.

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 21st day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 21, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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