IN THE SUPREME COURT OF THE STATE OF NEVADA

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

NO. 52921

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S OPENING BRIEF

ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT'S DECISION TO ADMIT THE PRELIMINARY HEARING TRANSCRIPT OF **DEJA JARMIN** VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND THE BEST EVIDENCE RULE OF **NRS 52.235.**

II. APPELLANT WAS DENIED A FAIR TRIAL WHEN THE DISTRICT COURT ALLOWED WITNESSES TO TESTIFY ABOUT THE CONTENTS OF A SECURITY VIDEO THAT WAS NEVER PUBLISHED TO THE JURY OR PROVIDED TO THE DEFENSE.

III. THE COURTS VIOLATED APPELLANT'S SPEEDY TRIAL RIGHTS BY CONTINUING HIS CASE, AT THE STATE'S REQUEST, FOR **541 DAYS**.

IV. THE DISTRICT COURT ERRED IN ALLOWING **DETECTIVE FLENNER** TO OFFER EXPERT TESTIMONY DESPITE NEVER BEING NOTICED AS AN EXPERT WITNESS.

V. APPELLANT'S CONVICTIONS WERE NOT BASED ON SUFFICIENT EVIDENCE.

PROCEDURAL HISTORY

I. Invocation of the Right to a Speedy Trial

Ronald Ross was arraigned in District Court on September 5, 2007, where he invoked his right to a speedy trial. (AA 387-390). The State was anxious to consolidate the instant case with an unrelated case in District Court Department V: **C220916**. However, the DC V motion

was delayed because **C220916** was before this honorable Court on an extraordinary writ. The State requested numerous continuances in the instant case in order to facilitate its motion to consolidate with **C220916.** All the State's continuances were granted despite Ross's repeated demands for a speedy trial.[1] Eventually, the motion to consolidate with **C220916** was heard and denied in DC V. Mr. Ross finally went to trial in this case on November 12, 2008, 541 days after the filing of his criminal complaint. (AA 437). Ross never agreed to waive his right to a speedy trial in the instant case.

II. The Charges Against Ross

The State's criminal complaint charged Ross with 20 felony counts arising from three completely separate events: 1) The alleged theft of a wallet from Georgia Stathopoulos at the Tropicana Hotel on March 17, 2007; 2) The alleged theft of cash from James Violette at the Santa Fe Station Hotel on March 23, 2007; and 3) The alleged theft of a wallet from Bertha Lundquist at the Paris Hotel on March 31, 2007. (AA 50).

The preliminary hearing began on June 19, 2007, but could not be completed on that day. (AA 9). Part two of the preliminary hearing was held on August 17, 2007, nearly two full months later.[2] (AA 56). The 10 counts related to the Paris Hotel were dismissed after the State repeatedly failed to produce the alleged victim, Bertha Lundquist, at the preliminary hearing. (AA at 58).

During the preliminary hearing, several witnesses testified that they viewed security footage of the charged thefts prior to court, and that they recognized Ronald Ross as the man

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[1] This case was continued on the State's motion on October, 11, 2007, December 11, 2007, June 10, 2008, July 8, 2008, and September 16, 2008. The case was also continued on August 26, 2008 and September 2, 2008 because the Nevada Department of Corrections failed to transport Mr. Ross to court. *See* (AA 387-431).

[2] The State filed a motion to continue the preliminary hearing on August 7, 2007. The resulting delay violated Ross's right to a speedy preliminary hearing under **NRS 178.556**.

they saw in the videos. However, the State did not play any of the videos during the preliminary hearing. The defense properly objected based on the Best Evidence Rule, but was overruled. (AA 25).[3] Ross was bound over to District Court based on the improperly admitted testimony. The folly of the justice court's decision to ignore the Best Evidence Rule was highlighted on the very first day of trial.

On the first day of trial, the State was forced to dismiss all counts related to the Santa Fe Station. After holding Ross in custody for 18 months on the Santa Fe Station charges, the District Attorney *finally* reviewed the surveillance video (something that should have happened during the preliminary hearing). D.A. Walsh stated it was "**immediately apparent it [was] not Mr. Ross**" on the video. (AA 439). *See also*, (AA 788, Screen capture from Santa Fe Station security video).[4]

Ultimately, Ronald Ross was convicted of the six felonies and one gross-misdemeanor arising from the Tropicana Hotel incident. The State filed a Notice of Intent to Seek Habitual Criminal Treatment in the case. At sentencing, Ross informed the court that both the Presentence Investigative Report (PSI) and the State's "Notice of Intent" contained misinformation about his prior criminal history. (AA 761-62). The court continued sentencing to allow the State time to obtain booking photos.

Though issues concerning Ross's prior criminal history were never fully resolved, the court proceeded with sentencing on April 7, 2009. In rendering its sentence, the court considered only five of the prior felonies listed in Ross's PSI, each of which was non-violent in

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[3] The testimony should have been ruled inadmissible under **NRS 52.235.** *See also*, **Goldsmith v. Sheriff**, 85 Nev. 295 (1969). The erroneous decision to admit it damaged more than just the preliminary hearing. It ultimately poisoned the *trial* when the preliminary hearing transcript of Deja Jarmin was admitted in lieu of live testimony. **AA 528-536**.

[4] Of course, this is an excellent example of why the Best Evidence Rule exists. It also demonstrates the fallibility of eyewitness testimony.

nature. (AA 775). Ross was adjudged guilty under the Large Habitual Criminal Statute and received a sentence of Life in Prison, with parole eligibility after 20 years.[5]

STATEMENT OF FACTS

A. Overview

The convictions in this case were largely based on the preliminary hearing testimony of Deja Jarmin, an "unavailable" witness who based his identification of the defendant on his review of the security camera video from Sheikh Shoes, Jarmin's place of employment. This video was never produced to the defense, nor was it played in court.

Appellant has included the security videos from both the Tropicana Hotel and the Santa Fe Station Hotel in his Appendix. (AA 789, 790). Appellant strongly encourages the Court to view both videos as they will aid in the evaluation of several of Appellant's claims, including "sufficiency of the evidence." The State of Nevada will no doubt rely heavily on the perceived infallibility of video evidence in its Answering Brief and tout the fact that Detective Flenner of the Metro Tourist Safety Unit positively identified Ross from the Tropicana video. (AA 673). When that happens, the Court should consider both the poor quality of the Tropicana video, and the fact that Detective Julie Holl, also of the Metro Tourist Safety Unit, positively (and *erroneously*) identified Ross as the man in the Santa Fe Station video. (AA 788 Screen capture of the Santa Fe Station suspect). *See also*, (AA 24, 439).

B. Evidence at Trial

The State's first witness at trial, Georgia Stathopoulos, testified that on March 17, 2007 at approximately 1:00 p.m., she was playing penny slots at the Tropicana Hotel. (AA 562-563). Her purse, which contained a wallet with her identification and credit card, was sitting on a

[5] Ross received numerous sentences of 10 years to life, two of which were run consecutively. **AA 785.**

nearby chair to her left. (AA 564). The purse was not on Ms. Stathopoulos's person. *Id.* The zipper of the purse was open and the wallet was inside. (AA 565).

Suddenly, Ms. Stathopoulos' slot machine began making noise, indicating that she had won something. (AA 566). While this was going on, she was approached by two black males. The two "very friendly" men asked her what she had won. *Id.* Ms. Stathopoulos engaged the man to her left in a brief conversation, while barely sparing a glance away from her machine. *Id. See also*, (AA 790 Video Surveillance Recording).[6]

Understandably distracted by her slot machine, Ms. Stathopoulos "didn't pay close attention" to the men. (AA 578). Ms. Stathopoulos did not see either of the two men take her wallet; she only noticed it missing after she returned to her room. (AA 581-582). When asked how old the men looked, she answered "teenagers, 20's, 30's." *Id.*[7] She could not describe what either man was wearing, how tall they were, whether one man was taller than the other, whether the man she spoke with had an unusual accent, whether he had facial hair, or any other physical details except race. (AA 578-581). Despite this, she affirmatively identified Ronald Ross as the man who took her wallet. (AA 566). At the time of her "identification," Ross was the only black man seated next to defense counsel. The sign on his table read "defendant."

After discovering her wallet missing, Ms. Stathopoulos called her credit card company. She was informed that someone had used her card to purchase items from Sheikh Shoes. (AA 584, 590). She called Sheikh Shoes and spoke to a clerk named Deja Jarmin. (AA 585). Jarmin informed her that the card had been used, but that he did not check the identification of the person who used it. (AA 588).

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[6] When reviewing the video, the Court should note that Ms. Stathopoulos is focused on her machine. She glances at the man to her left only briefly, and when she does, only his profile is visible.

[7] Mr. Ross was born January 20, 1970. At the time of the incident he was 37 years old.

Jarmin's testimony was instrumental in establishing Ross's identity as the man who entered Sheikh Shoes and used Stathopoulos's card. His positive identification formed the basis for Ross's arrest, and ultimately, Stathopoulos' identification of Ross. Interestingly, however, Jarmin did not testify at trial.

On November 4, 2008, Deputy District Attorney Walsh announced that the State was "**ready**" for trial, but in truth, her office had received no indication whether Jarmin, an indispensible witness, would actually appear at trial. (AA 519). The State's investigator admitted that he "never had personal contact with Deja Jarmin." (AA 523). Deputy D.A. Walsh made no record of this during the calendar call. She simply announced that the State was "ready" for trial.

On the first day of trial, D.A. Walsh informed the Court that Mr. Jarmin would not be present. According to Walsh, Jarmin's girlfriend informed the State's investigator that Jarmin was in a hospital in California. *Id.* Thus, the State made an untimely oral motion on the first day of trial to admit Jarmin's preliminary hearing testimony. *Id.* The defense opposed the motion because admitting the preliminary hearing transcript would violate the defendant's Sixth Amendment right of confrontation. (AA 529). The defense first moved to exclude the transcript and then, as an alternative, asked that the State request a continuance under Bustos v. Sheriff.[8] (AA 532). The District Court improperly ruled in favor of the State, admitting Jarmin's transcript in lieu of live testimony.

Jarmin testified, by way of his preliminary hearing transcript, that he recognized "the defendant" as a customer of Sheikh Shoes, and stated that he viewed a security video showing

[8] 87 Nev. 622, 491 P.2d 1279 (1971). Of course, the State would not have qualified for a continuance under Bustos since they failed to exercise proper diligence in locating the witness and, given that they never received a promise to appear, could not fairly claim "surprise" at Jarmin's absence. *Id.*

him buying something from Sheikh Shoes on March 17, 2007. He stated that, in the video, the defendant was wearing a "t-shirt and maybe a jersey." (AA 592). As with the preliminary hearing, this video was never shown in court.[9]

Jarmin rang-up the purchases that were made on Stathopoulos's card. (AA 593). Jarmin recalled that "the defendant" paid with a credit card, but Jarmin never looked at the name on the card, nor did he check the identification of the person presenting it. *Id.* Jarmin produced a receipt that he believed to be from the transaction and it was admitted into evidence. (AA 595-96).

About an hour after the transaction, Jarmin received Ms. Stathopoulos's call stating that someone had used her card at Sheikh Shoes without authorization. Jarmin could not recall who had made the purchase, so he and his fellow employees reviewed the security video. Several days later, Jarmin reviewed the video again in the presence of Detective Flenner, the investigating officer. (AA 599, 605). After reviewing the video, Jarmin and two other store employees were shown photo arrays including Ronald Ross's picture. They identified Ross as the man they saw in the security video. Jarmin was allowed to testify as to the contents of this video over Ross's Best Evidence Rule objection. (AA 25); *See* **NRS 52.235**, *et seq.*

Jarmin identified Ross as the man who used the credit card based, not on his recollection, but his review of the video. (AA 599). Jarmin did not know Ross by name, nor did he remember Ross making a purchase with Stathopoulos's credit card. (AA 599). His testimony about the transaction was merely a recounting of what he viewed on the security video. (AA 606). However, the video was never played in court, nor was it ever produced to the defense. In

[9] Thus, an absent witness was allowed to testify about the contents of a video that was never admitted into evidence.

fact, though he was fully aware of its existence, Detective Flenner allowed the video to be destroyed. (AA 607).

The State proceeded to call additional witnesses from Sheikh Shoes, but none offered any direct evidence that the defendant committed a crime. Luis Valdez remembered that Ross (or a man resembling him) was inside the store on March 17th, and a few times *after* that date as well. (AA 618). He did not personally observe Ross use a credit card to make a purchase on March 17th. In fact, he only learned about the "stolen credit card" *after* speaking to the detectives. (AA 622).

The police showed Valdez a receipt that they believed to be from the defendant's transaction and told him the credit card had been stolen. (AA 623). So Valdez was not testifying from his personal knowledge at all. He was merely recounting what he heard from detectives, who got their information from Jarmin, who got his information from the security tape that was never produced at trial.[10]

Kevin Hancock, another Sheikh Shoes employee, also testified. The security footage formed the basis for all of Hancock's testimony as well, since he did not personally observe the defendant in the store on March 17th. (AA 654). Hancock testified that he knew the man in the video as "Phillie," and that he had seen him in the store before. (AA 630-31, 645, 647). He could not recall what "Phillie" was wearing in the video, or what his hair looked like. (AA 657). Hancock could not make out the name on the credit card "Phillie" used in the security video. (AA 658). Interestingly, Hancock testified that the security footage was from **12:53 p.m.**, at least seven minutes **before** Stathopoulos' credit card was stolen. (AA 659).

Hancock also explained that the security footage was saved on a digital system that was set to purge itself automatically after a certain period of time. The video was not immediately

[10] For those keeping score, that is *triple* hearsay.

saved and produced to the police because no one at the store knew how the equipment worked. Eventually, a technician was contacted to help operate the system, but by then it was too late. (AA 638).

Neither Valdez nor Hancock personally observed the transaction involving Ms. Stathopoulos's credit card. Valdez's testimony was based mostly on hearsay and Hancock simply testified about the security video he saw 18 months earlier. (AA 608). Naturally, all the witnesses were able to identify the man sitting behind the "defendant" sign as "the defendant" during the trial.

Lead investigating officer, Detective Flenner, closed the State's evidence. Flenner testified that he reviewed the Sheikh Shoes security video and that he recognized the man in the video by name as Ronald Ross. Flenner informed the jury that he was "familiar" with Ronald Ross prior to March 17, 2007. (AA 680). He also claimed to recognize the man in the static-filled, black and white Tropicana video as Ronald Ross; an incredible claim given the video's poor quality. (AA 790, Tropicana Video).

Recognizing the obvious evidentiary importance of the Sheikh Shoes video, Flenner asked the store's regional manager for a copy. Flenner was informed that no one knew how to copy the video from the computer to a DVD.[11] (AA 680-81). Although Flenner had physical access to the system, he personally made no attempt to copy the video. Flenner did not send out a Crime Scene Analyst or Metro computer technician to preserve the video, nor did he seize the hard drive. As a result, the video was destroyed during the routine computer purge.

Though he was never noticed as an expert, Detective Flenner was allowed to offer expert testimony about "distract thefts." (AA 669-679). As with any expert, the State began its direct

[11] Apparently, nobody was interested in, say, *reading the instruction manual*. After all, it is just evidence in a felony case.

examination of Flenner by discussing his qualifications in the field of "tourist crimes," including "crimes that occur at hotels... certain burglaries, larcenies, pickpockets, distracts [and] auto burglaries." (AA 669). Flenner then offered his expert analysis of the Tropicana security video and his *opinion* about what the jury was seeing. (AA 670-679). Even though the video did not clearly show it, in Flenner's *expert opinion*, Ross used his jacket to mask the theft of the wallet and transfer the stolen property to his co-conspirator. (AA 674-675,728). The jury must have credited Flenner's expert testimony, as it returned convictions on all counts.

ARGUMENT

I. THE DISTRICT COURT'S DECISION TO ADMIT THE PRELIMINARY HEARING TRANSCRIPT OF DEJA JARMIN VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND THE BEST EVIDENCE RULE OF NRS 52.235.

A. Law governing the use of preliminary hearing transcripts at trial:

Every defendant has a Sixth Amendment right to confront the witnesses against him. *See* **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354 (2004). "Face-to-face confrontation is the foundation upon which the United States Supreme Court's Confrontation Clause jurisprudence evolved." **Chavez v. State**, 213 P.3d 476, 484 (2009). However, Nevada allows prosecutors to use a preliminary hearing transcript at trial if they can prove the witness is legally "unavailable" and that defense counsel had an adequate opportunity to cross-examine the witness. *See* **Hernandez v. State** 188 P.3d 1126, 1128-1130 (2008); **Chavez**, *supra,* 213 P.3d at 484; **Crawford**, *supra*, 541 U.S. at 53-54, 124 S.Ct. 1354.

The opinion in **Chavez v. State**, *supra*, directly addresses the use of preliminary hearing transcripts at trial in light of Crawford. The Chavez Court held that "a preliminary hearing *can* afford a defendant an adequate opportunity to confront witnesses against him," but that the "adequacy of the opportunity to confront will be decided on a case-by-case basis." *Id.* at 482-

483 (emphasis added). The Court reviews such matters *de novo*, and analysis turns "upon the discovery available to the defendant at the time and the manner in which the magistrate judge allow[ed] the cross-examination to proceed." *Id.* at 482.

Generally, the State is required to file a motion to admit a preliminary hearing transcript at least 15 days before the start of trial. *See* **EDCR 3.20(a); EDCR 3.28; NRS 174.125.** The Court may consider an untimely motion, but only if the motion is supported by "an affidavit or sworn testimony regarding its efforts to procure the witness prior to the pretrial motion deadline." Hernandez, *supra*, 188 P.3d at 1131. Again, the existence of "good cause" is a mixed question of law and fact that requires *de novo* review. *Id.* Thus, in reviewing the district court's decision to admit Deja Jarmin's preliminary hearing transcript, this Court must consider four questions:

1) **Did the State demonstrate good cause for failing to timely file its motion to admit Jarmin's transcript?**

2) **Did the State prove that Deja Jarmin was *actually* unavailable for trial?**

3) **Did the State exercise reasonable diligence in procuring Jarmin's attendance?**

4) **Did defense counsel have an adequate opportunity to cross-examine Jarmin?**

If the answer to any of these three questions is "no," then Ross's Confrontation Clause rights were *violated* and this case must be *reversed.*

B. The District Court erred when it admitted Deja Jarmin's preliminary hearing transcript.

1) The State did not demonstrate "good cause" for failing to file a timely motion to admit Jarmin's transcript.

When the State makes a late request to use a preliminary hearing transcript, it must submit an affidavit or other sworn testimony demonstrating good cause for the delay.

Hernandez, *supra*, 188 P.3d at 1131.[12] Here, the State gave no indication of its intent to use Jarmin's transcript until the morning of trial, a move that blindsided defense counsel. (AA 519). The State had no valid reason for this delay.

Four-Hundred-Thirty-Four days transpired between the preliminary hearing and the trial. Not once, in over a year, did the prosecution directly communicate with Deja Jarmin. (AA 523, Ln. 6-7). During her oral motion to admit the transcript, D.A. Walsh gave her reason for failing to file a timely motion: "We didn't file the motion prior to calendar call because we were also **very optimistic** that we would be able to find Deja, given the fact that he was very cooperative at the preliminary hearing, albeit it was over a year ago." (AA 525-526) (Emphasis added). So, the State's "good cause" for missing their filing deadline was *unbridled optimism* that a man they had not heard from in 434 days would suddenly appear on the first day of trial.

Matthew Johns, the State's investigator, testified that he began serving subpoena's in the case on October 16th, approximately four weeks before trial. (AA 521). Johns never received a subpoena return from Jarmin. (AA 523). Johns testified that he served Jarmin's subpoena at "What was once a valid address for him." (AA 522). It is unclear whether Johns ever attempted to serve a subpoena at a "valid" address.

Johns had what he described as a "current" phone number for Jarmin, but he never managed to get Jarmin on the phone. (AA 522-523). Johns said that he made "numerous contacts" with Tammy Henson, Jarmin's girlfriend (or possibly "ex-girlfriend.") *Id.* Johns did not mention when these "numerous" contacts took place, save the last one.

According to Johns, Tammy informed him on the morning of November 12th that Jarmin had entered a hospital in San Bernardino, California on November 7th. Upon hearing this, Johns attempted to contact some unspecified members of Jarmin's family in San Bernardino. He had

[12] *See also*, **EDCR 3.20(a), EDCR 3.28** and **NRS 174.125.**

no success. (AA 523-524). Apparently, Johns waited until the first day of trial to attempt to contact Jarmin's family. Johns did not even *try* to contact any San Bernardino hospitals because he *assumed* that the hospitals would refuse to confirm whether Jarmin was there due to HIPPA regulations. (AA 524).

In Hernandez v. State, the prosecutor made an oral motion to use a preliminary hearing transcript on the first day of trial—exactly the same situation we have here. In reversing the case, the Hernandez Court held that "the procedural safeguards addressed in Bustos should apply to motions to admit preliminary hearing testimony." *Id.* (citing Bustos v. Sheriff, 491 P.2d 1279 (1971)). Among the procedural safeguards of Bustos is the requirement that the State be legitimately surprised by the absence of the witness. *See* Bustos at 1281.

D.A. Walsh could not possibly have been "surprised" by Jarmin's absence. She had no subpoena return, and no one from the prosecutor's office had spoken to Deja Jarmin in over a year. In Bustos, the prosecutor had "every reason to believe the subpoena would be obeyed." By contrast, Walsh had no reason to believe her subpoenas had even been *received.* If Walsh was surprised by Jarmin's absence, it was only because she failed to diligently manage her case.

Lack of diligence does not equal "good cause" for the admission of Jarmin's transcript. The State's motion to admit the transcript should never have been *considered* by the court, much less granted.

2) The State did not prove Jarmin was *actually* unavailable

Under **NRS 51.055** a declarant is "unavailable as a witness" if he is "[u]nable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity" or he is "beyond the jurisdiction of the court to compel appearance and the proponent

of his statement has exercised reasonable diligence but has been unable to procure his attendance or to take his deposition."

The State provided no direct evidence as to Jarmin's whereabouts. Investigator Johns testified that Jarmin's "girlfriend," Tammy Henson, told him Jarmin was admitted to a hospital on November 7th due to a "heart condition." (AA 522-523). Henson apparently did not know the name of the hospital.

This information was completely uncorroborated. Johns could not provide the name of the hospital or specific information about the severity of Jarmin's condition. Johns testified that Jarmin was in California on November 7th, but he said nothing about Jarmin's whereabouts on November 12th. **NRS 51.055** requires proof that the witness is unavailable "*at* the hearing," not four days *before* the hearing.

The State did not adequately prove that Jarmin was suffering from an "infirmity," or that he was beyond the court's jurisdiction, as required by **NRS 51.055**. The State's inadequate "offer of proof" would not have garnered an excused-absence from *high school*, much less a felony trial.[13]

3) The State did not exercise reasonable diligence in procuring Jarmin's attendance.

There is no bright-line rule for determining whether a prosecutor exercised "reasonable diligence." There are numerous cases on the subject, but since the determination is largely fact-based, it is difficult to find any that are perfectly analogous. For example, in Drummond v. State, the Court found a lack of reasonable diligence where the State's investigator had been in contact with a robbery victim prior to trial and knew that he resided out of state, but never made

[13] Many schools require an actual doctor's note in order to excuse a student's absence. While the precise standard of proof required by **NRS 51.055** is unclear, it surely must be greater than the standard of proof at Rydell High School.

use of the "Uniform Ac," or any other reasonable means to compel the witness's attendance at trial. 462 P.2d 1012, 1013 (1970).

Though the facts of Drummond are not identical to this case, it would be hard to say that the investigator in Drummond was *less* diligent than the investigator here. At least the Drummond investigator made an effort to keep in touch with the witness. Here, the State waited more than 400 days before they even *tried* to contact Jarmin. Investigator Johns apparently spent much of his time sending subpoena's to a bad address. (AA 522). Though Johns had "several phone numbers" for Jarmin's family in California, he made no effort to *use* them until the first day of trial. (AA 523). Johns could not reasonably rely on Jarmin's so-called "girlfriend" to accept service. She did not even know the name of the hospital in which Jarmin was allegedly admitted.

Prosecutors are not required to make "every *possible* effort" to locate a witness,[14] but they must do more than make a few phone calls and cross their fingers. D.A. Walsh said she was "very optimistic" that Jarmin would appear at trial. Given the State's lack of communication with Jarmin, it is difficult to understand the basis for her optimism.

4) Defense counsel did not have an adequate opportunity to cross-examine Jarmin at the preliminary hearing.

In Chavez v. State, the Court ruled that the using a preliminary hearing transcript at trial in place of an "unavailable" witness does not violate Crawford if defense counsel was afforded an adequate opportunity to cross-examine the witness. Chavez, *supra*, 213 P.3d at 484. Analysis turns "upon the discovery available to the defendant at the time..." *Id.* at 482. The Court determined that Chavez had an adequate opportunity to cross-examine because, "Chavez had the statements that D.C. made to Detective Armitage and Sergeant Dreelan, **including a copy of the**

[14] *See*, Quillen v. State, 929 P.2d 893 (1996)(emphasis added).

videotape, before the preliminary hearing." *Id* at 486 (emphasis added). That was certainly not the case here.

Here, the State's entire case was based on videotape evidence. However, unlike Chavez, Ross did not receive copies of the videotapes until long *after* the preliminary hearing. In fact, Ross *never* received a copy of the Sheikh Shoes video tape that Jarmin testified about. The tape may still have existed at the time of the preliminary hearing, but it was destroyed prior to trial. (AA 34).

Jarmin had no recollection of Ross using Ms. Stathopoulos's credit card. In fact, Jarmin admitted that he did not even look at the credit card before swiping it. (AA 15). His identification of Ross, was based *entirely* on the Sheikh Shoes surveillance video, as was his conclusion that Ross used Stathopoulos's credit card. *See* (AA 16-17). Jarmin also produced a receipt from the transaction. This receipt was produced for the first time in the middle of the State's direct examination. (AA 15). Defense counsel had no opportunity to view this new evidence prior to the hearing or prepare any cross-examination questions about it.[15]

Having never seen the Sheikh Shoes video, defense counsel had no way to effectively cross-examine Jarmin regarding the basis for his testimony. Had the State produced the video, defense counsel could have asked Jarmin *informed* questions about its quality and clarity. For example, Detective Flenner testified at trial that the video was shot at a substantial distance, which would have made it difficult to see the customer's faces. *See, e.g.,* (AA 694). Defense

[15] This also serves to underscore the real-world difference between preliminary hearing examinations and trial examinations. The State would never be allowed to spring this kind of evidence on the defense in the middle of a trial, but it happens as a matter of course in preliminary hearings. The reason is simple: preliminary hearings are treated more like discovery tools than they are evidentiary hearings. That is why the decision to admit a preliminary hearing transcript at trial must be intensely scrutinized and seldom allowed.

counsel had no way of knowing this during the preliminary hearing. The absence of the Sheikh Shoes video made it *impossible* for the defense to competently cross-examine the witness.

Defense counsel was also prejudiced by the absence of the Tropicana, Paris, and Santa Fe Station surveillance videos. For example, the State admitted (eventually) that the man in the Santa Fe Station video was *not* Ronald Ross. (AA 439) Had the Santa Fe video been available during the preliminary hearing, defense counsel could have asked Jarmin if he recognized the man in *that* video as Ronald Ross. Had Jarmin answered "yes," the State's case would have been utterly destroyed.

The missing video also created an evidentiary problem that was carried over to trial. The court permitted Jarmin to testify about the contents of the security video in violation of the Best Evidence Rule. *See* **NRS 52.235.** It is all-too-common for justice courts to "relax" the rules of evidence at preliminary hearings, despite this Court's holding in Goldsmith v. Sheriff that the rules of evidence apply equally to both the justice court and the district court.[16] The justice court probably reasoned that any evidentiary violation would be cured prior to trial when the State produced the video. After all, this was *just* a preliminary hearing.

Unfortunately, this was not "just a preliminary hearing." Unbeknownst to defense counsel, *this* was the trial.

Jarmin spent the majority of his direct examination testifying about the contents of the security video, the State making sure to establish that the video was a "clear and accurate depiction of what he described to the court." Defense counsel never got the chance to test this assertion, and when Jarmin's testimony was admitted at trial, so was the violation of the Best Evidence Rule.

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[16] *See* Goldsmith v. Sheriff, 85 Nev. 295, 303, 454 P.2d 86, 91 (1969);

In his opposition to the use of the preliminary hearing transcript, defense counsel made it very clear that he did not have the chance to effectively cross-examine Jarmin, and that there were "several lines of inquiry" he did not pursue. (AA 530-532). Counsel attempted to pursue one of these "lines of inquiry" at trial during his cross-examination of Jarmin's co-worker, Kevin Hancock. During trial, a question emerged as to whether Jarmin identified Ross *himself*, or whether the identification really came from Hancock. Defense counsel attempted to question Hancock concerning Jarmin's knowledge and state of mind, but was stopped by the court. (AA 648). Of course, defense counsel was unable to question Jarmin on this subject because he was not present.

In an abundance of generosity, defense counsel even suggested an alternative to outright exclusion of Jarmin as a witness, "I think we continue the case or we do a Bustos motion because I do not think my client's right to confront and cross-examine witnesses is preserved at all by... the preliminary hearing transcript." (AA 532). The district court refused defense counsel's conciliatory offer, and opted to use the flawed and constitutionally insufficient preliminary hearing transcript instead. Under the rules set forth in Chavez and Hernandez, the instant case must be reversed.

II. APPELLANT WAS DENIED A FAIR TRIAL WHEN THE DISTRICT COURT ALLOWED WITNESSES TO TESTIFY ABOUT THE CONTENTS OF A SECURITY VIDEO THAT WAS NEVER PUBLISHED TO THE JURY OR PROVIDED TO THE DEFENSE.

The Best Evidence Rule exists for a *reason.* Defendants have a statutory and constitutional right to examine and test the evidence against them, rather than the mere *perception* of that evidence form a secondary source. *See* **NRS 52.235**; U.S. Const. amend. V, VI, XIV. The value of this rule was made abundantly clear on the first day of trial.

At the preliminary hearing, State witnesses, including a seasoned Metro Detective, testified under oath that they recognized the man depicted in a Santa Fe Station security video as Ronald Ross. *See* (AA 19, 24). In rendering its decision, the court relied on these secondary sources instead of adhering to the requirements of **NRS 52.235**. As a result, Ronald Ross was wrongfully held on 10 felony charges for nearly 18 months. Had the court followed the Best Evidence Rule, that injustice would never have occurred.

There were two violations of the Best Evidence Rule at trial. As stated earlier, the first violation resulted directly from the Justice Court's erroneous ruling at the preliminary hearing. Deja Jarmin was allowed to testify about the contents of the Sheikh Shoes video even though, at the time, the video may still have been available. (AA 16, 34).[17] Defense counsel objected to the State's repeated violations of the Best Evidence Rule, but was overruled. See (AA 25, 31). When the preliminary hearing transcript was admitted at trial, the Best Evidence violation went with it.

The second Best Evidence violation came when Detective Flenner and two store employees were permitted to testify about the contents of the Sheikh Shoes video at trial. **NRS 52.255** discusses the circumstances under which this type of testimony may be used in place of an original recording:

> 1. All originals are lost or have been destroyed, unless the loss or destruction resulted from the fraudulent act of the proponent;
>
> 2. No original can be obtained by any available judicial process or procedure;
>
> 3. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

[17] Both Deja Jarmin and Detective Flenner testified that they did not know whether the video was still available. Flenner stated that Sheikh Shoes, "said they would try to save it," but he did know whether they did. (AA 34).

4. The writing, recording or photograph is not closely related to a controlling issue.

Id.

The State will no doubt argue that the testimony was properly admitted under the first exception. That is only true, however; if this Court determines that the video was not destroyed as a result of the State's bad faith.

The **NRS 52.255** exceptions were discussed in Tomlinson v. State, 878 P.2d 311 (1994). The Tomlinson Court pointed out that Nevada's statute was based on a draft of the Federal Rules of Evidence, which stated that secondary evidence is *inadmissible* if the original recording was destroyed or loss as a result of "bad faith." *Id.* at 313.

The police department has a duty to preserve evidence, particularly evidence that might exculpate the defendant. *See generally*, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995). While it is usually very easy to prove that the police department failed to do its job properly, it is extremely difficult for a defendant to prove actual "bad faith." Here, there is no question that Detective Flenner could easily have obtained and preserved the Sheikh Shoes video. He certainly had no problem viewing the video. (AA 680-81). He could have used his police powers to seize it; something the defendant was powerless to do. But, Flenner chose to do nothing. So the question the court must decide to is this: when does obvious dereliction of duty amount to bad faith?

There is at least some evidence in this case of bias on the part of Detective Flenner and the other members of his "Tourist Safety Unit." Taken to its logical conclusion, this evidence could support a finding of bad faith. Flenner's partner, Detective Holl, testified that she recognized Ross in the Santa Fe Station video, even though it was "immediately apparent" to the

District Attorney that the man in that video was *not* Ross. (AA 24, 439). Did this highly trained and experienced Detective make a mistake, or was her testimony proof of Metro's bias against Ross? Appellant suggests the latter, but leaves that decision to the Court.

Even if the Court ultimately finds that the trial testimony was properly admitted under **NRS 52.255 (1)**, the same cannot be said of Jarmin's preliminary hearing testimony. The State has no proof that the Sheikh Shoes video had been lost or destroyed at the time Jarmin testified. That error was built into the record at the time of the preliminary hearing, and its improper inclusion in the trial warrants reversal.

III. THE COURTS VIOLATED APPELLANT'S SPEEDY TRIAL RIGHTS BY CONTINUING HIS CASE, AT THE STATE'S REQUEST, FOR 541 DAYS.

The Sixth Amendment right to a speedy trial attaches when a defendant is arrested or a criminal complaint or information is filed. **Dillingham v. United States**, 423 U.S. 64 (1975). The test for determining a violation centers on four factors:

A. Was the delay before trial uncommonly long?

B. Who was more to blame for the delay, the government or the defendant?

C. Did the defendant assert his right to a speedy trial in due course?

D. Was the defendant prejudiced as a result of the delay?

Doggett v. United States, 505 U.S. 647(1992). The Doggett analysis is applied below:

A. Ross's delay was "uncommonly long"

The State filed its first criminal complaint against Ross on May 22, 2007. From there, it took 107 days for the State of Nevada to complete Ross's preliminary hearing and arraign him in District Court. After his District Court arraignment, Ross waited another 434 days for his trial. In total Ross spent approximately 541 days in custody without a trial.

A delay of 541 days is certainly long, but how long is "uncommonly" long? In cases analyzing this question, delays of 7 months, 13 months and 16 months have all been deemed sufficient to trigger violations of the right to a speedy trial. *See* **State v. Erenyi**, 85 Nev. 285,

454 P.2d 101 (1969) (finding a violation of the right to a speedy trial when the prosecutor would not extradite a defendant for trial in Nevada until the defendant's out-of-state prison term was completed); **Wood v. Sheriff**, 88 Nev. 547, 501 P.2d 1034 (1972) (finding a violation when there was a sixteen month delay between the time the defendant requested a disposition of the charge against him, under the IAD, and the time he was returned to Nevada for trial); **State v. Lujan**, 112 N.M. 346, 815 P.2d 642 (1991) (where the New Mexico Appeals Court affirmed the dismissal of a charge with prejudice for a 13-month delay in bringing a defendant to trial when the defendant was in the custody of the state, in a New Mexico prison, during the same time period).

While there is no bright-line definition of the term, "uncommonly long," Ross's **18 months** vastly exceeds the norm. Our system is designed to get incarcerated defendants to trial within "sixty-days." Ross's "sixty days" came and went **nine times** before he ever saw a jury. Furthermore, Ross was not stuck in some other state, awaiting transfer through the Interstate Agreement on Detainers. He was right here in the Clark County Detention Center. Surely, that is an "uncommon delay."

2. The State was more to blame for the delays than the defendant.

The State asked for numerous continuances in this case, each of which was designed to strengthen its position at trial. The following list was derived form court minutes:

8/7/2007: Preliminary hearing continued at State's request because of a missing prosecution witness.

9/5/2007: Defendant arraigned in District Court, right to a trial within 60 days invoked.

10/11/2007: Trial continued at State's request to accommodate a consolidation motion in front of Department V in case number **C220916**.

12/11/2007: Another State continuance to accommodate the consolidation motion.

6/10/2008: State requests another continuance on its consolidation motion.

7/8/2008: Ross re-asserts his speedy trial rights in court and personally objects to further continuances. (AA 410-411). Courts set a new calendar call for August 26, 2008.

8/26/2008: Continued because the prison failed to transport Ross to court.

9/2/2008: Continued because the prison *again* failed to transport Ross.

9/16/2008: Once again, Ross personally demands a speedy trial. The State requests another continuance because it "can't be ready" by the Court's suggested date of September 29, 2008. (AA 422).

11/12/2008: Ronald Ross's case finally goes to trial 541 days after the filing of the complaint.

The defendant was not responsible for these delays. The State asked for several lengthy continuances in order to accommodate witnesses, prosecutor schedules, and its ultimately unsuccessful bid to consolidate Ross's cases in Department V. Mr. Ross had no control over any of these continuances, and at every opportunity, he vocally demanded a speedy trial. Doggett requires that we ask "who is *more* to blame" for the 541 day delay in Ross's case. The answer to that question is not open to interpretation: it is the State.

3. Did the defendant assert his right to a speedy trial in due course?

According to court minutes, Ross requested a trial within sixty days on September 5, 2007. He subsequently re-asserted his rights several times in open court. There is no record of Ross ever waiving his right to a speedy trial.

4. Was the defendant prejudiced as a result of the delay?

"The presumption that pretrial delay has prejudiced the accused intensifies over time." **Doggett** at 652. While, again, there is no "bright line" rule, "courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." **Id.** at 652 Fn.1.

In **Doggett**, the Court identified several forms of the type of prejudice caused by pretrial delay, including (but not limited to): "oppressive pretrial incarceration; anxiety and concern of the accused; and the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." **Id.** at 655 (internal citations and quotation marks

omitted). Unlike Doggett himself, who was not confined during his long pretrial delay, Ross has suffered *all three* of these forms of prejudice.

Ross spent 18 months in the Clark County Detention Center, so he suffered "presumptive prejudice" as a matter of law. His long incarceration was *certainly* "oppressive." Ross was locked up for 18 months in a facility that is, as this honorable Court is aware, approximately 30% overcrowded on any given day. Ross was usually in North Tower, so he spent approximately 23 hours per day in his cramped cell. Incarceration in CCDC is far more oppressive than prison. The facility was simply not designed for the kind of long-term, pre-trial incarceration Ross suffered, and it was *certainly* not built to hold the number of people now housed there.

As for "anxiety and concern of the accused," the process of waiting for trial is an exercise in dread and fear, even under the best of circumstances. Here, Ross was forced to feel that dread build up over the course of 18 months. He appeared at numerous calendar calls, only to have the district court continue his case time and time again.

Most important of all, Ross's ability to receive a fair trial was irrevocably prejudiced by the delay when the Sheikh Shoes security video was destroyed. Had the trial proceeded on time, there is at least a possibility that the video would have been available. There is an even better possibility that Deja Jarmin would have been available to testify at trial. But, thanks to the long delay, Ross was denied both a vital piece of physical evidence, and a full and fair opportunity to cross examine a critical prosecution witness.

The State's numerous continuances robbed Ross of his Due Process rights. The fact that he ultimately received a trial did not remedy the violation, or lessen the hardship Ross suffered during those 18 months. The only appropriate remedy for a Due Process violation of this type is dismissal. **Piland v. Clark County Juvenile Services**, 85 Nev. 489, 457 P.2d 523 (1969).

IV. THE DISTRICT COURT ERRED IN ALLOWING DETECTIVE FLENNER TO OFFER EXPERT TESTIMONY DESPITE NEVER BEING NOTICED AS AN EXPERT WITNESS.

NRS 50.275 governs the admissibility of expert testimony at trial. In general, witnesses can offer expert testimony if they possess "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." In the instant case, Detective Flenner testified as an expert for the State of Nevada. Unfortunately, Flenner was never *noticed* as an expert.

Before a party can use expert testimony in its case in chief, it must file the proper notice under **NRS 174.234 (2).** Notice must be filed not less than 21 days before trial and include (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his testimony; (b) A copy of the curriculum vitae of the expert witness; and (c) A copy of all reports made by or at the direction of the expert witness. *Id.*

In the instant case, Detective Flenner used his "specialized knowledge" to provide the jury with a guided tour of the Tropicana Hotel security video. Flenner's testimony as an expert in "tourist safety" crimes was vital to the State's case because, on its face, the Tropicana video showed nothing remarkable.

There was no footage of a suspect reaching into Stathopoulos's purse or removing her wallet. There was no video of an overt transfer of the wallet from one suspect to the other. Ms. Stathopoulos didn't notice her wallet was missing until after she returned to her room, so there was no image of her frantically searching for her wallet or questioning passers-by. *See* (AA 790). To a lay person, the Tropicana video would have seemed innocuous.

It was Flenner's job, as the State's expert, to explain to the jury what they were *really* seeing on the video (or more appropriately, what they *were not* seeing). Though it may have

looked like a harmless conversation, to a *trained expert* like Flenner, the video showed a classic "distract theft," pulled off by sophisticated con-men.

Flenner used his "specialized knowledge" to educate the jury about the use of "props" in distract thefts. He explained that it is normal for a suspect to conceal his crime by carrying a jacket on his arm "matador style." (AA 674). Flenner informed the jury, based on his specialized training and years of experience, that Ronald Ross used his jacket to mask the theft of the wallet and transfer the stolen property to his co-conspirator. (AA 674-675,728). All of this was opinion evidence; the type of testimony only qualified a expert is allowed to provide. Without Flenner's expert testimony, the jury could never have convicted.

The Court committed reversible error when it allowed Flenner to testify as an expert without first being properly noticed under **NRS 174.234 (2).**

V. APPELLANT'S CONVICTIONS WERE NOT BASED ON SUFFICIENT EVIDENCE.

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). This Court must reverse a conviction when the state fails to present evidence to prove an element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Martinez v. State, 114 Nev. 746, 961 P.2d 752 (1998).

This Court may review the evidence presented at trial and determine whether the State presented evidence sufficient to sustain the conviction. State v. Van Winkle, 6 Nev. 340, 350 (1871). "The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Carl v. State, 100 Nev. 164, 165, 678 P.2d 669 (1984); Oriegel-Candido v. State, 114 Nev. 378, 382, 956 P.2d 1378 (1998).

This Court reviews for sufficiency of the evidence on appeal by evaluating whether the trier of fact, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Kazalyn v. State, 108 Nev. 67, 70, 825 P.2d 578 (1992). In the instant case, the trier of fact did not act reasonably in finding Ross guilty because the evidence connecting Ross to the theft of Ms. Stathopoulos's wallet and the use of her credit card was insufficient and unreliable.

A. The in-court identifications were not sufficiently reliable to sustain the convictions.

This was an identity case, plain and simple. Early in this case, Detective Flenner, Detective Holl, and the Metropolitan Police Department's Tourist Safety Unit *decided* that Ross was "their man." This decision was based, not on the evidence before them, but on the single-minded desire to get a conviction. Detective Holl even testified that Ross was pictured in the Santa Fe Station security video, a claim so obviously wrong that the State dropped all charges related to her identification. (AA 439).

Detective Flenner lead the charge to "identify" Ross in both the Tropicana video and the Sheikh Shoes video (which, again, the State failed to preserve). Flenner claimed that he recognized Ross from the Sheikh Shoes video, but later admitted that the video only offered a "far, distant view." Flenner "figured" it was Ross "based on the clothing [with] the number 6 on it." (AA 681).[18]

There were four other identifying witnesses in the case, but none was sufficiently reliable. Interestingly, all the identifying witnesses spoke to Flenner *before* making their identifications.

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[18] The suspect in the Santa Fe Station video, who the State admits is *not* Ross, was also wearing a jersey with the number "6" on it. (AA 788)

Ms. Stathopoulos's identification was unreliable because she was completely focused on her slot machine during the entire time her wallet was allegedly being stolen. She even admitted that she "didn't pay close attention" to the men. (AA 578).

Deja Jarmin was so inattentive that he ran Ms. Stathopoulos's credit card without even looking at it first. (AA 17). When he received the phone call from Ms. Stathopoulos inquiring about the transaction, he could not recall who had used the card. He concluded that it was "Ross" only after he reviewed the surveillance video and spoke to Flenner. (AA 16, 599). Again, even Flenner admitted that the Sheikh Shoes video was shot from a distance, and that the "tape was good, but it was in doubt." (AA 694). How could a reasonable jury have concluded that the State met its burden when even Detective Flenner admitted the Sheikh Shoes video left a doubt?

Two of Jarmin's co-workers, Luis Valadez and Kevin Hancock, also identified Ross, both in court, and upon viewing a police photo array. Neither actually witnesses Ross use the stolen card. Luis Valdez testified that he saw Ross *in the store* on March 17th, but he was busy "working with other people" at the time. (AA 612). Hancock never saw Ross in person on March 17th. His identification of Ross was based entirely on his review of the store's security tape and his conversations with police. (AA 630).

Grainy video and shoddy identifications; this was the only evidence against Ronald Ross. This is not sufficient evidence on which to base a conviction.

B. The Conviction of Larceny from the Person cannot be sustained because Ms. Stathopoulos testified that her wallet was not on her person.

To sustain a conviction for Larceny from the Person, the State was required to prove that Ross took Ms. Stathopoulos's wallet "from [her] person." (AA 96, Jury Instructions). However, Stathopoulos testified that, while she was playing her slot machine, she set her purse down on

the chair to her left. (AA 564). The zipper of the purse was open and the wallet was inside. (AA 565). The purse was not on her person, and the conviction for Larceny from the Person cannot be sustained.

CONCLUSION

For the foregoing reasons Appellant requests that his case be reversed and the charges against him dismissed. In the alternative, Appellant requests a new trial. Appellant also requests oral argument in this case.

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 a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of April, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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