ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ROSS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 52921

FILED

AUG 24 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S REPLY BRIEF

ARGUMENT

I. DEFENSE COUNSEL NEVER "CONCEDED" THE ADMISSION OF DEJA JARMIN'S TRANSCRIPT; HE CONSISTENTLY ARGUED THAT ADMITTING THE TRANSCRIPT WOULD VIOLATE THE CONFRONTATION CLAUSE.

A. The State never made a showing of "good cause," and defense counsel certainly never conceded the point.

In its answering brief, the State contends that Ross's trial counsel "conceded" that the State demonstrated "good cause" for their untimely motion to admit Jarmin's transcript in lieu of live testimony. *See* **Respondent's Answer (RA) at 7**. The State is confusing "being understanding, polite and agreeable" with "making concessions."

The State fashions its argument by taking the following quote by defense counsel out of context:

> I don't think the untimely part really has much relevancy here. I understand they don't—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.

(RA at 7)(*citing* AA 528: 20 – 529: 1).

The State characterizes this quote as a "concession" that the State showed good cause. It is nothing of the kind. Defense counsel merely said he "understood" that the attorneys present did not personally know their witness was going to be absent and that he did not think they were acting in bad faith or withholding information intentionally. At most, defense counsel expressed no objection to the State *bringing* the motion *itself*. He did not say anything about the issue of good cause which was argued *in* the motion.

This would have been clear had the State cited to defense counsel's **very next sentence**:

> So the question then becomes [does] their request fit within 171.198. And **presuming that it does**, I think a – a more fundamental question faces this Court, and that is does my client's right to confrontation in the Nevada constitution and the US constitution, especially outlined recently in Crawford, US Supreme Court case, whether or not the State's following of criminal procedures that allows them to use a preliminary hearing transcript makes no difference because client has a stronger right to have – to be able to confront the – this witness if he's going to testify against him at trial.

(AA 529: 2-12).

Defense counsel was speaking ***hypothetically***. He said, "**presuming**" the State meets **NRS 171.198**, the "more fundamental question" is the deprivation of Ross's constitutional rights under the Confrontation Clause. **(AA 529: 2)**. Defense counsel goes on to analyze the Hernandez[1] decision, and states that "**even if** this court decides they have done due diligence," his cross-examination at preliminary hearing was constitutionally insufficient. **(AA 530: 2-3)**.

Finally, as the State points out, defense counsel says, "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." **(RA at 7 citing AA 532:7-9)**. Again, this quotation is taken completely out of context. What defense counsel *actually* said was this:

> I think the proper mot—the proper avenue the State has is **make a Bustos motion**. I think they have made – I'd be **willing to** concede that they have made as many and any kind of attempt that I could

[1] **Hernandez v. State**, 188 P.3d 1126 (2008).

> imagine making in terms of getting this guy here. He was working for the store prior to the – this—well, when we had a preliminary hearing, and evidently he worked for the store until a week or so ago. So I think if the State – **I think we continue the case or we do a Bustos motion** because I don not think my client's right to confront and cross-examine witnesses is preserved at all by the State – by the jury being able to listen to the preliminary hearing transcript because it doesn't contain a lot of what I would ask this witness now that I have completed my investigation of the case.

(AA 532: 5-19).

This was not trial counsel "conceding good cause," it was trial counsel suggesting another alternative to the two extremes of 1) outright dismissal, or 2) admitting the preliminary hearing transcript in defiance of the Sixth Amendment.

Defense counsel was overly generous. The State completely lacked basis for a Bustos motion. But, in the spirit of good sportsmanship, defense counsel stated that he would "be willing to concede" to a **continuance**. This would have allowed the State to present their case to a jury without forcing Ross to sacrifice his Sixth Amendment rights.

Sadly, that was not good enough for the State. The State unwisely insisted on going forward with the preliminary hearing transcript, the court erroneously granted the request, and now we have an unconstitutional verdict that must be reversed. Frankly, the State should have taken defense counsel up on his offer.

B. Defense counsel lacked sufficient evidence, investigation and preparation to conduct constitutionally sufficient cross-examination at the preliminary hearing.

First, the State argues that defense should be "precluded" from raising this issue, having "failed to object not only during the preliminary hearing, but also during trial when the preliminary hearing transcript was admitted." **(RA at 10).** It is well established that "a constitutional question can be raised at any time." **Egan v. Teets**, 251 F.2d 571, 576 (9th Cir. 1957). Even so, defense counsel *did* preserve the objection. At trial, the defense objected to admission of the preliminary hearing transcript based specifically on

his inability to effectively cross at preliminary hearing. *See, e.g.,* **(AA 528-533)**. It's therefore unclear what more defense counsel should have done to preserve the issue.

Second, the State claims that appellant's factual analysis about the content of Jarmin's testimony is "wholly belie[d]" by the record. Appellant feels exactly the same way about the State's argument. Jarmin testified that he did not know who used the credit card until he viewed the (missing) video tape because he was not paying attention to the transaction. He "didn't observe the credit card at all." **(AA 603)**. The video did not "refresh" his memory; it gave him information he simply did not have. *See, e.g.,* **(AA 598, 602).**

Given that, in this very case, the State had to **dismiss** several felony counts because another witness **misidentified** Ross from a security video, the defense should have been given the opportunity to test Jarmin's knowledge and the quality of the video on which that knowledge was based. **(AA 439).**

Third, defense counsel never saw the **cash register receipts** or *any* of the **videos** prior to the preliminary hearing (or ever, in the case of the Sheikh Shoes video). *See* **(AA 15)**. To be effective under the Sixth Amendment, and local rules like ADKT 411, there is a certain amount of preparation that must be done prior to cross-examination. Defense counsel had no opportunity to do this preparation because he did not have full discovery. **(AA 529-531).**

Ross had no opportunity to effectively cross-examine Deja Jarmin. Given the stakes of this case, multiple sentences of life in prison, Ross should at least have been afforded the most *basic* right our system of justice has to offer.

II. ROSS DID NOT WAIVE HIS RIGHT TO APPEAL THE COURT'S VIOLATION OF THE BEST EVIDENCE RULE

The State argues that Ross did not properly preserve the best evidence objection, and that preservation of the video tape was somehow beyond everyone's control. The State then accuses defense counsel of being "disingenuous," making "bald assertions," and engaging in "blatant mischaracterization" of the record. However, engaging in name-calling cannot obscure the following facts, "bald" though they may be:

A) The Sheikh Shoes security video did exist at some point.

B) Detective Flenner *saw* the security video.

C) Detective Flenner is a policeman.

D) As a policeman, Detective Flenner has "police *powers*."

E) Detective Flenner works for a police "department" that has crime scene investigators, computer technicians, internet-technology employees, and a whole host of people capable of copying a digital video.

F) If Detective Flenner actually *cared* about preserving this evidence, it was within Detective Flenner's power to do so. It was certainly his legal and professional obligation to do so.

Again, the stakes for Ronald Ross could not have been higher. The question that appellant is asking, and that *only* this Honorable Court may answer, is this: **when does blatant lack of due diligence on the part of law enforcement become "bad faith?"** Mr. Ross is now doing life in prison; it seems a reasonable question to ask.

As for the preservation issue, the State is correct in pointing out that defense counsel's Best Evidence objections were made after the State elicited testimony concerning the Santa Fe and Tropicana videos, and not during the Jarmin testimony:

> Judge, I would object to this witness describing what she sees on a computer monitor or TV screen as not being relevant in this case because its not the best evidence. **(AA 25).**
>
> * * *
>
> We are still objecting, obviously, that these violate the best evidence rule. **(AA 31).**

While one could argue that defense counsel was sloppy in perfecting the record; he certainly did not waive the Best Evidence argument. The first Best Evidence objection does appear to relate specifically to Detective Julie Holl's testimony. The second Best Evidence objection, however, is very general. **"[T]hese violate the best evidence rule"** is an objection to testimony about ***all*** the unproduced security videos. It is not specific to a single video or a single incident, and for good reason. The

preliminary hearing was **bifurcated**, and the State was offering authentication witnesses out of order. (AA 31: pp. 84-86). It took **107 days** to complete Ross's preliminary hearing. It is understandable that the record could become a bit disjointed over such a large period of time.[2]

There is no doubt that the justice court was aware of defense counsel's standing objection to testimony about the contents of unproduced videos. The justice court denied the Best Evidence objection twice, and would have denied it one-hundred times had one-hundred objections been lodged. (AA 25, 31). Furthermore, it is astonishing that the State could so adamantly dismiss the value of the Best Evidence claim in a case where **ignoring the best evidence rule** caused Ronald Ross to spend 18 months in jail on charges the State *admitted* he did not commit. **(AA 439).** [3]

III. DEFENDANT DID NOT WAIVE HIS RIGHT TO A SPEEDY TRIAL

Defense counsel was incredibly generous in acquiescing to the **State's** numerous requests for continuances. However, "acquiescence" to a **State request** for a continuance does not *waive* Speedy Trial. The State is simply attempting to "pass-the-buck" for its continuances to the defense. While this may (and should) make defense counsel think twice when the State calls to request a continuance, it should have no effect on the Court's legal analysis.

Appellant simply requests that the court review the actual record of continuances, and then apply the four-part test in **Dillingham v. United States**, 423 U.S. 64 (1975).

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[2] This is just one more example of the prejudice Ross suffered through the violation of his Speedy Trial rights. And again, this continuance was an accommodation for the **State**, and it was granted over Ross's objection. **(AA 36: p. 106, Ln. 8-12).**

[3] The State claims, in a footnote, that "Defendant suffered no prejudice" resulting from the early misidentification. (RA 17 Fn.1). This "bald assertion," to use the State's preferred nomenclature, ignores two facts: 1) Ross may have afforded bail had he not been wrongfully incarcerated on the Santa Fe Station counts; and 2) the District Attorney is supposed to be concerned with matters of "justice." When the State wrongfully incarcerates someone for 18 months, it should mean something to the DA's office. It is clear from the State's footnote, that they feel no regret for robbing Mr. Ross of his liberty, or even professional embarrassment at having made such an egregious error.

See also, Appellant's Opening Brief at 22-23. The record and the law both support reversal on the Speedy Trial issue.

CONCLUSION

Appellant stands on his opening brief in reply to the remainder of the arguments in the State's Answering Brief. 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 August, 2010.

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Appellant's Reply Brief to the attorney of record listed below on this 19th day of August, 2010.

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