IN THE SUPREME COURT OF THE STATE OF NEVADA

LESEAN TARUS COLLINS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 55716

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUE(S)

1. Did the District Court Err in Denying Defendant's Second Request for a Continuance, After Previously Providing Defendant an 11-week Continuance.
2. Did the District Court Properly Allow an Arson Investigator who Defendant had been of Notice of Since the Grand Jury Proceeding to Testify.

STATEMENT OF THE CASE

On February 24, 2009, a grand jury proceeding was held and on April 8, 2009 Lesean Tarus Collins ("Defendant") was charged by way of Indictment with Count 1 – First Degree Arson (Felony– NRS 205.010), Count 2 – Burglary (Felony – NRS 205.060) and Count 3 – Malicious Injury to Vehicle (Gross Misdemeanor – NRS 205.274, 193.155). (1 Appellant's Appendix "AA" at 1-55). On May 6, 2009, Defendant was arraigned and he entered a plea of not guilty. (Id. at 215). Defendant also waived his right to a trial within 60 days. (Id.).

After granting Defendant's first request for a continuance and then denying Defendant's second request for a continuance, trial was ultimately held on November 4, 2009. (1 AA at 215-21). Just prior to the start of opening statements, Defendant conceded

guilt on Count 3 – Malicious Injury to Vehicle. (3 AA at 542-50). At the conclusion of trial, the jury found Defendant guilty on all counts. (1 AA 193-94). On November 6, 2009, the State filed its Notice of Habitual Criminality. (Id. at 199-200).

On February 18, 2010, the District Court sentenced Defendant under the Large Habitual Criminal Statue as to Count 1 to Life in the Nevada Department of Corrections (NDC) with the possibility of parole after a Minimum of Ten (10) Years has been served, as to Count 2 to Life in the Nevada Department of Corrections (NDC) with the possibility of parole after a Minimum of Ten (10) Years has been served, Concurrent with Count 1 and as to Count 3 to the Clark County Detention Center (CCDC) for Twelve (12) Months, Concurrent with Count 1 & 2 with Five Hundred Sixteen (516) Days credit for time served. (1 AA at 227).

On March 4, 2010, Judgment of Conviction was entered. (1 AA at 208-09). On March 25, 2010, Defendant filed a Notice of Appeal. (Id. at 210-12). On August 2, 2011, Defendant filed the instant Opening Brief to which the State responds as follows.

STATEMENT OF THE FACTS

Facts Pertaining to the Defendant's Burglary and Arson of Shalana Eddins' Home and Destruction of her Property

On September 30, 2008, Defendant slashed his ex-girlfriend's tires, broke into her home and set it on fire. Prior to committing these crimes, Defendant and his ex-girlfriend Shalana Eddins had been in a relationship for ten years. (3 AA at 557). At this point, they had four sons together and Shalana was pregnant with their fifth son. (Id.). Both of them lived in Shalana's home located at 1519 Laguna Palms in North Las Vegas, Nevada. (Id.).

However, by August 2008, the couple's relationship became strained. (3 AA at 558-59). Defendant became increasing controlling, possessive and Shalana decided that she wanted out of the relationship. (Id.). Although Shalana told Defendant that she did not want to be with him anymore, Defendant refused to take "no" for an answer. (Id.). Ultimately, Shalana did not feel safe in her own home and she feared for her life. (Id.). Thus, Shalana and her four sons began to stay with a family member that lived nearby her home. (Id. at

559-60). Shalana slowly began moving items from her home into her family member's place. (Id. at 559-60; 581).

On September 29, 2008, Shalana and her children returned to their home on 1519 Laguna Palms to stay the night in order to do laundry. (3 AA at 560). In order to feel safe, Shalana unplugged the garage door. (Id. at 561). Shalana did this because the Defendant's only access into the home at this point was using the garage door opener. (Id.). That night as she was waiting for her laundry to finish, Shalana was on the phone with Defendant. (Id.). Defendant told her he would call her back and then she heard a noise outside of the house. (Id.).

Afraid, she called Defendant back and asked if he was at the house. (Id. at 562). Defendant told her that it was not him. (Id.). Shalana asked him a few more times but Defendant denied that it was him. (Id.). Shalana then told him that she was going to call the police, but she did not because she knew it was Defendant. (Id.). Moments later, Shalana heard knocking on the front door. (Id.).

Defendant was at the front door and demanded to be let in. (Id. at 563). Shalana told him that he could not come in, but again Defendant refused to take "no" for an answer. (Id.). Defendant then tried to use the garage door opener to gain entry. (Id.). When this did not work, Defendant became infuriated. (Id.). After repeatedly banging and kicking the front door, Shalana finally relented and let him in. (Id.). Once inside, Defendant then began to search throughout the house looking for a house key. (Id. at 564). Defendant found his oldest son's backpack on the floor and discovered a key inside. (Id.). After finding that key, Defendant took it and left the house. (Id.).

Shalana followed him out of the house and noticed that when she came outside two tires on her Ford Expedition were slashed. (Id. at 564-65). Prior to arriving at the home to do laundry, the tires were fine. (Id.). Shalana called the police and filled out a report about the flattened tires. (Id. at 564-65). Shalana also gave the police a gun that was inside the house because she did not think it was safe to leave a gun in the home in light of the situation between her and the Defendant. (3 AA at 564-65).

Shalana then called her father, Robert Eddins in order to help her take her SUV over to a repair service to get the tires fixed. (3 AA at 565-66). Once the car was repaired, Shalana took her four children over to stay at their cousin's home. (Id.).

On September 30, 2008, Shalana and her children returned to their home to get ready for school. (Id. at 566-67). Shalana noticed that Defendant left the duffel bag of his clothing at the home. (Id.). Shalana left the bag sitting in the hallway. (Id.). Shalana then got another key made for her kids since Defendant took one the night before. (Id.). After that she dropped the kids off at school. (Id.). All morning, Shalana received numerous harassing phone calls from Defendant. (Id. at 567-68). Defendant was upset that she called the police. (Id.). Defendant harassed Shalana so much that Shalana got a temporary restraining order against Defendant that morning. (Id.).

Shalana arrived at work around 11:30am. (Id. at 568-69). While at work Shalana received a voice mail from Defendant, in which Defendant realized that his gun from the house was missing. (Id.). Defendant left her a message that said "You better give me my mother fucking shit and if you don't, bitch; I'll knock all this off." (Id.). Shalana did not return the call and continued to work. (Id.).

Around 4:15pm, Shalana got up from her desk and left for about 10 minutes. (Id. at 569). When she returned she discovered that her cell phone that she left right on her desk was missing. (Id. at 570). Shalana concluded that Defendant must have come to her office and took her phone. (Id.). Immediately, Shalana ran down to her car to see if it was okay and she discovered that all four tires of her SUV had been slashed. (Id.). Knowing that her office had a video surveillance system, Shalana reviewed the footage. (Id. at 571-72). On the video she saw Defendant standing outside watching her work. (Id.). The footage also showed that once Shalana left her desk, Defendant entered the building, went to her desk, rummaged around her desk until he found her cell phone. (3 AA at 571-72). Once he found the phone he took it and left. (Id.).

Afraid, Shalana first called her children who were at their home on 1519 Laguna Palms. (Id. at 570-71). She told them to immediately leave the house and go to the next door

neighbor's house that belonged to Darlene Heers. (3 AA at 570-71). Her children complied and went over to Ms. Heers' home around 5pm. (Id. at 570-71; 614).

While the children were at Ms. Heers' home, one of them pointed out the window and Ms. Heers' saw Defendant in a car parked outside Shalana's home around 6:45pm. (Id. at 615-17). At this point, Ms. Heers went outside and went up to the Defendant's car. (Id. at 617). Ms. Heers asked him what he was doing there and Defendant responded that he was waiting for his wife to get home from work. (Id. at 618). Ms. Heers then said "How is she supposed to come home when you've slashed her tires at work?" (Id. at 618). Defendant told her it was none of her business. (Id. at 619). Defendant also told Ms. Heers when his wife got back home he was going to kill her and that he had a gun with him. (Id. at 619). Ms. Heers told him to get the hell away and she went back inside her home. (Id.). Ms. Heers called 911 after her encounter with Defendant. (Id.).

Meanwhile, Shalana then called her father, Robert Eddins, and asked if he could help get the tire situation with her car fixed. (Id. at 572). After speaking with her father, Shalana called the police and filed another report about the slashed tires and the missing cell phone. (Id.). Mr. Eddins had been in a relationship with a woman named Vivian Furlow for over eight years. (Id. at 599). The two were very close and Ms. Furlow was something akin to a stepmother to Shalana. (Id.). After speaking with Shalana, Mr. Eddins asked Ms. Furlow if she could come down and get the children from Ms. Heers' home. (Id.). Ms. Furlow agreed to do so. (2 AA at 300).

Ms. Furlow lived nearby Shalana's home.[1] (2 AA at 302-03). As Ms. Furlow drove into the neighborhood, she saw Defendant, who she knew, racing out of the neighborhood at a very high rate of speed in a blue sedan. (Id. at 303-04). When Ms. Furlow arrived at Ms. Heers home, Ms. Heers was very upset and frantic. (2 AA at 304-05). Ms. Heers was calling the police and explained to Ms. Furlow that she had a confrontation with the Defendant out in front of Shalana's house about 10 minutes before Ms. Furlow arrived. (Id. at 305-06).

[1] Vivian Furlow's testimony was taken by videotaped deposition and played for the jury at trial. (3 AA at 631).

At the same time, Mr. Eddins assisted her daughter with getting the SUV tires repaired. (3 AA at 573). During the period of 5pm to 6pm, Mr. Eddins received multiple phone calls from Defendant. During the first phone call, Defendant told Mr. Eddins that he could tell his daughter that they were even for everything. (Id. at 639). Defendant made a second call to Mr. Eddins around 6:00pm or 6:30pm. At this point, no fire at Shalana's home had been reported and no one is aware that a fire took place. However, during this second call, Defendant told Mr. Eddins that heard his daughter's house was on fire. (Id. at 640). Defendant also told Mr. Eddins that he had been at the house that day. (Id. at 641). Mr. Eddins asked Defendant how the house could be on fire if he had just left there. (Id. at 641). Defendant only responded that "he didn't start the fire." (Id. at 641). At this moment, Mr. Eddins called Ms. Furlow and told her to check on Shalana's house to see if it was on fire. (Id. at 641). After that, Mr. Eddins and Shalana left Shalana's work because they are afraid that the house is on fire. (Id. at 643).

Shortly before receiving Mr. Eddins phone call, Ms. Furlow decided that she was going to get the children's belongings from Shalana's home. (2 AA at 307; 3 AA at 641-43, 658). At this point, the police arrived and they escorted her up to the home. (2 AA at 307-08). As they approached the house, they smelled smoke, noticed the windows of the house were bowed out and they noticed that the doorknob to the house was very very hot to the touch. (2 AA at 307-08, 3 AA at 665-66). They concluded that the house was on fire. (Id.).

Once discovering the house was on fire, Ms. Furlow called Defendant's cell phone. (2 AA at 308). However, instead of hearing a normal phone ring, Defendant had recorded a personal ring tone on his phone for callers to hear. (Id. at 309). The ring tone was a recording of Defendant rapping. (2 AA at 309). During the rap Defendant made the following statement that Ms. Furlow heard "If you can't stand the heat, get out of the kitchen or you'll burn just like my baby's mama's house." (Id.).

When Mr. Eddins and Shalana arrived, her house was, just as Defendant said, on fire. (3 AA at 573). Shalana was terrified because she did not know if her children were safe. (Id. at 573-74). Eventually, Shalana learned that her children were safe. (Id. at 574).

By the time the fire department arrived, the house was burning in three different places, but ultimately the fire was put out. Shalana was able to walk through the home after the fire was put out. (Id. at 575). Shalana testified at trial that they lost almost everything as result of this fire. (Id. at 575). However, Shalana noticed that the duffel bag, which contained Defendant's personal belongings that was still in the hallway that morning, was not in the home after the fire occurred. (Id. at 575). Shalana also explained that it cost $752.00 to repair her Ford Expedition. (Id. at 576).

A fire investigation was conducted by Captain Jeff Lomprey of the North Las Vegas Fire Department. (3 AA at 671-73). His investigation discovered that three separate fires took place from inside the home. (Id. at 674-77). One fire was set on Shalana's bed. (Id.). The second was set in the master bedroom closet, specifically on a pile of Shalana's clothing. (Id.). The third was set on the living room couch. (Id.).

Lomprey also interviewed Defendant as part of his investigation. (Id. at 690). Defendant said that although he was in the house on September 30th he never entered any room of the house. (Id. at 691-92). Defendant admitted that he flattened Shalana's tires when she was at work. (Id. at 691). Defendant said that he got revenge and that he got her back. (Id.). Defendant also changed his story about how he entered Shalana's home on September 30th. Defendant first said that he entered via the garage and then he said that he received a key from his son. (3 AA at 693). Others times Defendant said he never had a key. (Id.). Defendant also said that on the evening of September 29th he was in Pahrump with a friend rather than at Shalana's residence. (Id.). The investigation concluded that this was an incendiary fire/arson and that it was set by Defendant. (Id.). At trial, prior to his counsel's opening statement, Defendant conceded that he was guilty of Count 3 – Malicious Injury to a Vehicle. (3 AA at 542-50).

Facts Pertaining to Pre-Trial and Trial Related Matters on Appeal

Defendant's Multiple Requests for Continuances

On February 24, 2009, a grand jury proceeding was held and on April 8, 2009 Defendant was charged by way of Indictment with First Degree Arson, Burglary and

Malicious Injury to Vehicle. After multiple continuances due to the fact that Defendant had picked up a murder charge in another case, Defendant was ultimately arraigned on May 6, 2009. (1 AA at 213-15). Defendant entered a plea of not guilty and he waived his right to a trial within 60 days.

At Defendant's arraignment, the District Court set the trial out more than three months out and set calendar call for August 12, 2009 and trial for August 17, 2009. (1 AA at 215). At the August 12, 2009 calendar call, Defendant requested a continuance. (2 AA at 249-51). Despite the fact that the State was ready to proceed it raised no objections to this request. (Id.). In making the request for a continuance, Defendant's counsel, Deputy Public Defender Tierra D. Jones, specifically requested that the Court set the trial *eleven weeks* out until November, 2009. (2 AA at 249:23-25). In granting the Defendant's request for a near-three-month extension, the District Court explicitly warned Defendant and his trial counsel on two separate occasions that this new trial date was a "firm setting" and that no further continuances would be granted. (2 AA at 249:12-13, 250:5). The District Court continued the trial to November 2, 2009 and calendar call was reset to October 28, 2009. (Id.). The District Court set a November 2, 2009 trial date, because Defendant's murder trial was scheduled for November 16, 2009. (Id. at 250:6-9).

After allowing eleven weeks to elapse, Defendant's trial counsel arrived at the October 28, 2009 calendar call and requested a second continuance. (2 AA at 257-58). Once again, the State was ready to proceed to trial and informed the court that only seven witnesses would likely be called. (Id. at 257: 17-18). Defendant's trial counsel, Ms. Jones and Abigail L. Parolise informed the Court that they needed a second continuance for two reasons: 1) Ms. Jones and Ms. Parolise got involved with another trial and purportedly had not "put any attention" into this case and 2) Defendant was being uncooperative and refused to assist his counsel and their investigator in preparing for the case. (Id. at 257:6-9, 21-23). In response to these excuses, the District Court told counsel with respect to Defendant's self-inflicted cause for the delay "That's his problem, not yours. If he's not going to cooperate, then you get to try the case from the police report. If that's what he wants, you know, you

don't have – you don't have any control over that." (Id. at 257:10-12). Ultimately, the District Court ordered the trial to be sent to overflow. (Id. at 257-58).

The next day at overflow court, the State explained to the overflow judge that it was ready to proceed with trial, that there were only a few witnesses and that it anticipated the trial would only last one to two days. (Id. at 260-61). Defendant's trial counsel reiterated that they were not ready, because they had been in trial that week and that their investigator was still speaking with the Defendant. (Id. at 261:11-17).

The State then made a record on how this case had proceeded up to this point. (Id. at 262-63). The State explained that the Defendant had a pending murder case and that the State suspected that there may have been some intent on the defense to trail this case after the murder case. (Id. at 262:3-9). The State also informed the overflow judge that this case was originally set for calendar call on August 12, 2009, but on that date when the parties appeared, the Defendant requested a continuance. (Id. at 262:10-14). The State explained that while the District Court was unhappy about moving the trial, the Court reluctantly granted the continuance but clearly explained to Defendant and his counsel that this second trial date would be a firm setting and by the first week in November, Defendant would need to be ready to go. (2 AA at 262:10-14). The State also explained that the District Court already denied Defendant's request for a continuance the day before. (Id.). The overflow judge acknowledged that from the District Court's minutes the judge made it clear that the first continuance would be a firm setting. (Id. at 262:25-263:2).

Ms. Jones conceded that while having this case trail Defendant's murder case would be better, Ms. Jones contended that was not the reason for the continuance. (Id. at 263:11-21). Ms. Jones claimed that, despite the eleven week continuance, defense counsel still had not noticed any witnesses, because the Defendant refused to work with their investigator because he wanted to "resolve" this case. (Id. at 263:11-264:25). After an off-record colloquy between Defendant and his counsel, defense counsel informed the overflow judge that Defendant was in the process of getting the addresses of potential witnesses. (Id. at 265:5-9).

In response, the overflow judge moved the trial date a second time from Monday, November 2, 2009 to Wednesday, November 4, 2009, in order to give the defense few more days to prepare for trial. (Id. at 265:10-13). In explaining his rationale for not overruling the District Court's denial of a second continuance, the overflow judge said: "It's a firm set; Judge Smith has already made some decision on this. My – you know, I'm basically a resources – my job is to allocate resources , and so I'm gonna support Judge Smith's decision that the case is trial-ready, even though the minutes reflect, again, defense motion to continue." (2 AA at 265:16-21).

On Monday, November 2, 2009, Defendant filed his Notice of Witnesses. The notice included ten (10) potential witnesses. At trial, two of the ten witnesses noticed by Defendant were called by the State (Shalana Eddins and Robert Eddins) and one of the noticed defense witnesses was called by the Defendant (Patricia Brewer).

Furthermore, on that same day when the parties were before the district court judge assigned to handle the trial, Ms. Jones once again stated that the defense was not ready to proceed with trial and reiterated the same points they made to the prior district court judge who denied the second continuance as well as the overflow judge. (2 AA at 271:24-275). After hearing defense counsel make what ostensibly amounted to a third separate request for a continuance, the District Court denied the request. (2 AA at 275). In acknowledging that the original district court judge had considered these arguments the District Court, in rejecting this request, stated

> "[h]e obviously denied the continuance because he sent it to overflow. And listening to the reasons, he decided they weren't valid enough, at that time, and said: You're going to go to trial and you're going to go to overflow , and obviously, that's what happened. If you can't find a judge, you always come back. So he listened to all this, made a determination. [The overflow judge] listened to all this, made a determination, sent it to me and I've said: I'll make whatever accommodation."

(2 AA at 275:12-18). The District Court then asked defense counsel if it had any objection to the motion to take a deposition of Ms. Furlow. (2 AA at 275).

After granting the motion to take Ms. Furlow's deposition, Defendant's other trial counsel, Ms. Parolise, once again argued that the defense was not ready for trial and claimed

that they were purportedly "ineffective at this point" because they were not able to completely prepare for this trial. (2 AA at 293:21-294:1). The Court then stated "if you're going to say that you're ineffective, you're going to need to give me very specific things of what you would have done that you didn't get an opportunity to do." (Id. at 294:2-5). Ms. Parolise said that they would only do that *in camera*. (Id. at 294:6).

At this point, the State insisted on making a record, because this was about the "fifth time" defense counsel had sought this continuance. (Id. at 294). The State pointed out at the original calendar call, there were only a handful of witnesses expected to testify and that the State was ready to proceed. (Id.). However, the District Court only granted the first continuance in light of the express understanding between the parties that it was a firm setting and that no other continuances would be granted. (Id.). The State contended the thrust of Defendant's desire for a continuance was to trail this case with the Defendant's other pending murder trial. (Id.).

The State also pointed out the amount of discovery was minimal. (2 AA at 295). Specifically, the State noted that in this case, there were only 15 pages of discovery from the North Law Vegas Police Department. Additionally, if you added the all of the discovery including the Grand Jury transcripts it amounted to a total of 100 pages of discovery in this case. (Id.).

With respect to defense counsel's claim that they were unprepared due to the fact they were in trial the State responded "And I understand that these particular attorneys may have been in trial last week, but I guarantee you they weren't in trial since August 12th through last week." (Id.). The State also pointed out that defense counsel represented to the original district court judge who denied the continuance that one of the reasons why they were unprepared was due to Defendant's refusal to work with his own lawyers. (Id.). In conclusion, the State argued that given the very small scope of the trial there was a very limited amount of preparation that needed to be done. (Id.).

At this point, the Court had the State step outside of the courtroom in order to the defense to explain in camera the reasons why they could not prepare a cross-examination for

one of the State's witness. (2 AA at 296-97). That portion of the record was sealed by the Court. (Id.). At the conclusion of the proceedings on November 2, 2009, the Court made no further ruling on the Defendant's oft-denied request for a second continuance.

Defendant's Objection to the Videotaped Deposition of Vivian Furlow

On Monday, November 2, 2009, the State filed in open court a motion to take a videotaped deposition of one of its witnesses Vivian Furlow. (2 AA at 271). The State explained that when it sent a subpoena out to Ms. Furlow, the subpoena stated that the trial date was on November 2, 2009, which was the firm trial date set by the District Court after it granted Defendant's first continuance. (2 AA at 271). When the State learned that the overflow judge moved the trial another two days to November 4, 2009, it informed Ms. Furlow of the change. (Id.). However, Ms. Furlow explained that in reliance upon the previous subpoena that was sent to her, she made vacation plans around the November 2, 2009 trial date. (2 AA at 271). Specifically, Ms. Furlow purchased nonrefundable tickets to fly on a redeye flight on November 2, 2009 to Florida in order to take a cruise to Mexico and her itinerary did not have her returning to the jurisdiction until November 12, 2009. (Id.). Given that she would be out on a cruise in Mexico and the tickets were nonrefundable the State argued that it would be a great inconvenience to attempt to fly her back out by November 4, 2009 and thus a videotaped deposition would provide a reasonable remedy to the situation. (Id.).

Defendant first objected on the procedural basis that given the short notice he was not given enough days to respond to the motion and that the State failed to file a motion for an order to shorten time. (Id. at 276:10-14). However, the District Court explained that given the circumstances it granted the State permission to file the motion on such short notice. (Id. at 276:15-16). Defendant then reiterated essentially the same procedural objection and argued the State failed to meet the procedural requirements for filing this motion. (Id. at 277: 4-5). When asked by the District Court if Defendant had a substantive objection to the motion, Defendant argued that the State needed to make an offer of proof to explain why Ms. Furlow was so essential to the trial. (2 AA at 277:7-13). The State explained that Ms. Furlow

was essential for a number of reasons. (Id. at 277-79). First, out the limited number of witnesses expected to be called at trial by the State, she was the only witness to see Defendant driving away from the scene of the crime, just prior to the arson starting. (Id.). She was also the witness who ended up calling him on the phone and heard an ring tone set up by Defendant in which he rapped "If you can't stand the heat, get out of the kitchen or you're going to get burned like my babies mama's house." (Id.).

In granting the State's motion, the District Court offered the following rationale: "Really, it's material. They've met their standard of if being material if she's the only one that can place him driving away from the scene." (Id. at 280:5-6).

Defendant's Objection to the Testimony of Jeffrey Lomprey

On November 4, 2009, just prior to the start of opening statements, Defendant objected to the testimony of arson investigator, Captain Jeffrey Lomprey, on the basis that they did not receive an expert witness notice regarding him. (3 AA at 516). The State argued that Lomprey was not going to provide opinion testimony as an expert witness typically would, rather he would testify to the things he observed in the home and explain through a process of elimination how he discovered three separate fires that were started in Shalana's home. (Id.). The State argued much like a detective it was his job to go out and investigate the cause of fires, like a detective investigates how a crime was committed. (Id. at 517).

The State informed the Court that while Lomprey did prepare and arson investigation report, the State provided that report to the Defendant well in advance of the 21-day notice required under Nevada's expert notice statute. (Id. at 518). Defense counsel conceded that they received Lomprey's report, but complained they never received Lomprey's CV. (Id. at 518). At this point, the District Court discussed that Nevada's expert notice statutes requires the parties, within 21 days of trial, to identify 1) the names of all potential expert witnesses, 2) the substance of their testimony and 3) any report they may have prepared and provide those reports to the other party. (Id. at 518:12-18).

The Court then asked a series of question to determine if the State had complied with the spirit of this statute. (Id. at 518:19-519:2). The Court asked the State if they had

identified Lomprey to the defense. (Id.). The State said that it did. (Id.). The Court asked the State if Lomprey had prepared a report and if so was it provided to the defense. (Id.). The State again said a report was prepared and the State explained it provided the report to the defense "months and months ago." (Id.). The Court noted that the only thing potentially lacking in terms with complying with NRS 174.234 was the fact that a CV was not handed over. (Id.).

The State then pointed out to the Court that as an arson investigator, Lomprey was akin to a crime scene analyst in that they are not really experts because they are not asked opinion questions. (Id. at 519:7-13). The State noted that while Lomprey may have had specialized training, he technically should not be considered an expert witness for the purposes of this statute. (Id.).

The Court, in reading from the statute, announced that one of the requirements was that the State needed to provide a "brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his testimony." (Id. at 520:11-13). In response, the State pointed out Lomprey actually testified before the Grand Jury on February 24, 2009, nearly eight months prior to trial, and that Lomprey explained his education and training and discussed the course of his investigation in this case. (Id. at 520:18-23).

In light of these facts, the Court found that the State had complied with virtually all of the requirements under this notice statute. The Court stated:

> "I mean, because it appears as though, of all the requirements that the State or the Defense is required to comply with, the only objection you have and that you didn't get a copy of a CV, because you've got – you've got the 21 day notice, you got his name; you got where he works at, so you knew how to contact him. You got a copy of his report, which is better than a brief statement regarding the subject matter, so they obviously met that. But the statute does say a copy of the CV of the expert witness."

(3 AA at 521:1-7).

In response, while defense counsel argued that in their opinion Lomprey was an expert witness, defense counsel conceded that they knew of his existence, the subject matter of his testimony and the content of his report. (Id. at 522:10-20). However, Defendant

objected to the fact that he was never specifically identified as an expert witness and that he was only listed as a "normal witness." (Id.).

Ultimately, without making a determination of whether or not Lomprey was an expert witness, the Court held that the State complied with the provisions of NRS 174.234. The Court held:

> "Okay. Even if he is an expert witness, I believe the State has met their requirements in complying with the statute. I've read the Grand Jury transcript and you've been on notice of what his background and qualifications are since February 24th of this year."

(3 AA at 522:21-24).

ARGUMENT

I

THE DISTRICT COURT WAS ENTITLED TO DENY DEFENDANT'S SECOND REQUEST FOR A CONTINUANCE AFTER PREVIOUSLY PROVIDING DEFENDANT AN 11-WEEK CONTINUANCE

Defendant's first claim on appeal argues that it was reversible error for the District Court to deny his second request for a continuance, despite the fact that the Court granted his first continuance request which postponed the trial for eleven weeks. (Def. Br. at 9-14). "This court reviews the district court's decision regarding a motion for continuance for an abuse of discretion." Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). The United States Supreme Court has been clear that "[t]rial judges necessarily require a great deal of latitude in scheduling trials…." Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610 (1983). "Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made." Higgs v. State, 126 Nev. ——, ——, 222 P.3d 648, 653 (2010).

Moreover, "[t]his court has held that generally, a denial of a motion to continue is an abuse of discretion if it leaves the defense with inadequate time to prepare for trial." See Id. (citing Zessman v. State, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978)). In other situations, this Court has held that a district court abuses its discretion in denying a continuance if "a defendant's request for a modest continuance to procure witnesses ... ***was not the defendant's fault.***" Rose, 123 Nev. at 206, 163 P.3d at 416 (emphasis added). Furthermore, a district court does not abuse its discretion in denying a continuance request when a defendant

fails to show that he was prejudiced by the denial of the continuance. See Rose, 123 Nev. at 206, 163 P.3d at 416.

Defendant claims that the denial of his second request for a continuance was improper, because in his opinion he presumed the District Court summarily denied his motion without any consideration to the reasons his counsel provided. Not only does the factual record belie this assertion, but also the particular circumstances of this case reveal that the District Court's denial of this continuance request was a proper exercise of its discretion.

A. The Defendant Had Eight Months to Prepare for this Trial

Here, this was not a situation that left Defendant with an inadequate time to prepare his case. Higgs v. State, 126 Nev. ——, ——, 222 P.3d 648, 653 (2010). The posture of Defendant's argument on this issue takes a myopic view of how much time he actually had to prepare for this case. The Defendant would have this Court believe that Defendant and his counsel's time to prepare for this case began only a week prior to the start of the trial date set by the first continuance – November 2, 2009. (See Def. Br. at 10:14-19; 2 AA at 249-51).

During the October 28, 2009 calendar call, defense counsel argued that a second continuance was needed because in the week leading up to this calendar call, counsel were involved in a another trial, and thus, were purportedly unable to prepare for this case. (2 AA at 257). However, this case did not begin on October 21, 2009, but rather on February 24, 2009 when a grand jury proceeding commenced in this case. Those proceedings were over eight months before the October 28, 2009 calendar call and the second trial setting of November 2, 2009. Thus, any attempt to claim that defense counsel was unprepared solely because of the fact that they were involved in another trial a week before the trial in the instant case is a distortion of the record. It is unquestioned that Defendant and his counsel had ***eight months*** to prepare for this case.

Further belying this claim that Defendant simply did not have enough time to prepare was the fact that Defendant had already sought and received a continuance from the District Court. (2 AA at 249-51). This case was originally set for trial on August 17, 2009, but at the

August 12, 2009 calendar call, Defendant sought a continuance. (Id.). Moreover, it was defense counsel that ***specifically told that Court that she needed another eleven weeks*** to prepare and that she would be ready by November 2009. (Id.)

The record is unquestionably clear that the District Court was reluctant to grant the continuance but did so under the condition that defense counsel would be ready to try the case. (Id.). Defense counsel gave the District Court every indication that a November trial date would be more than sufficient. (Id.). Accordingly, if Defendant did not actually believe a November trial date would have been sufficient, Defendant should have asked for a later trial date. However, Defendant elected not to do so, and accordingly, cannot complain about the District Court held him to the trial date that he specifically requested.

Here, having eight months to prepare for a trial that involved only had a handful of witnesses and did not deal with overly complex legal issues was more than enough time for Defendant to prepare his defense. Virtually every single witness that testified at trial testified before the grand jury, and thus, he was well aware of the sum and substance of the State's case against him. In short, it was simply inexcusable for the Defendant not to "put any attention" into this case if he had eight months to get ready. (2 AA at 257:6-9, 21-23).

However, there may have been other factors at play in the Defendant's desire to continue the trial, namely the fact that during this time he had a pending murder case against him that he wanted to occur before going to trial in this case. Ultimately, given the fact that Defendant had eight months to get ready for this case, the excuse that counsel had been involved in a trial one week before this case was woefully deficient to suffice as good cause to result in a second continuance and the District Court properly recognized that fact.

B. Defendant's Own Actions Prevented Defense Counsel From Preparing His Defense

This Court has also been quite clear that a district court does not abuse its discretion in denying a continuance if the delay is caused by the defendant's own actions. See Rose, 123 Nev. at 206, 163 P.3d at 416 (emphasis added). Here, Defendant readily conceded before the District Court and now on appeal that one of the two main reasons for the second

continuance request was the fact that the Defendant refused to cooperate and work with his defense counsel. (Def. Br. at 10:16-19; 2 AA at 249-51).

Despite Defendant's claims on appeal that the District Court summarily dismissed this motion without considering the Defendant's reasons, this is belied by the record. After learning that Defendant simply refused to assist his counsel in preparing his defense, the District Counsel expressly found that this self-inflicted delay certainly did not amount to good cause sufficient to postpone his trial a second time. In response to this excuse, the District Court told counsel "That's his problem, not yours. If he's not going to cooperate, then you get to try the case from the police report. If that's what he wants, you know, you don't have – you don't have any control over that." (2 AA at 257:10-12).

Pursuant to the precedent of this State, the District Court was absolutely correct. See Rose, 123 Nev. at 206, 163 P.3d at 416. Defendant is not entitled to a continuance if he is the reason why counsel cannot adequately prepare a defense. Here, Defendant's appeal simply glosses over this fact and as well as the District Court's express rejection of this excuse as good cause to warrant a second continuance. (See Def. Br. at 10-15). Furthermore, later proceedings in this case further illustrated the depth to which the Defendant impeded his own trial preparation. At a later juncture before the judge who actually tried this case, defense counsel furthered revealed that despite the eleven week continuance the real reason why counsel had not noticed any witnesses, was because the Defendant refused to work with their investigator because he purportedly wanted to "resolve" this case. (2 AA at 263:11-264:25). Consequently, the record unquestionably demonstrates that Defendant has only himself to blame for the purported ill preparedness of his defense case, and accordingly, the District Court did not err in denying his request for a second continuance.

C. The District Court Properly Allowed a Video Taped Deposition of Vivian Furlow

Within this claim on appeal, Defendant has also inserted a claim that it was an error for the trial judge to allow the State to take a videotaped deposition of one of their witnesses Vivian Furlow. (Def. Br. 12:13-13:16). NRS 174.175 permits that State to take the deposition of a witness who may be unable to attend a trial as long as the witness's

testimony is material and necessary in order prevent a failure of justice. Defendant argues that it was improper to do so because the short notice surrounding the taking of the deposition did not allow the defense adequate time to prepare a cross-examination of Ms. Furlow. (Id.). This argument fails for two clear reasons.

First, the only reason the deposition needed to be taken was because Defendant was not ready for the trial date of November 2, 2009. Here, when the State subpoenaed Ms. Furlow they told her that the trial would occur on the firm trial date of November 2, 2009. (2 AA at 271). After the Defendant pleaded with the overflow judge that he was not ready to proceed on November 2nd, the overflow judge attempted to accommodate the Defendant and gave him an additional two days by setting to the trial to November 4th.

However, Ms. Furlow had detrimentally relied upon the previous subpoena that was sent to her, and made vacation plans around the November 2, 2009 trial date. (Id.). Specifically, she bought nonrefundable tickets to fly on a redeye flight on November 2, 2009 to Florida in order to go on a Mexican cruise. (Id.). Ms. Furlow's travel plans did not bring her back into this jurisdiction until November 12, 2009. (Id.). Thus, the only reason why the State even needed to seek a deposition in the first place was because the Defendant claimed he was not ready and caused the trial to be moved. Accordingly, his own actions preclude him from complaining about this issue on appeal.

Second, the record demonstrates that the District Court properly permitted the deposition to be taken in accordance with NRS 174.175. Here, it is unquestioned that Ms. Furlow would be unable to make it to a November 4, 2009 trial date as she would be on a cruise ship in Mexican waters. Furthermore, her testimony was certainly material. As the State explained to the trial judge, she was the only witness to see the Defendant driving away from the scene of the crime, just prior to the arson starting. (Id. at 277-79). She was also the witness who ended up calling him on the phone and heard a ring tone set up by Defendant in which he rapped "If you can't stand the heat, get out of the kitchen or you're going to get burned like my babies mama's house." (Id.). In light of the significance of her testimony, the trial judge properly found that her testimony was material enough to warrant the taking of

her deposition, because "…she's the only one that can place him driving away from the scene." (Id. at 280:5-6). Consequently, this argument is without merit.

D. Defendant Was Not Prejudiced By This Ruling

Lastly, this Court has made clear that a district court does not abuse its discretion in denying a continuance when a defendant fails to show that he was actually prejudiced by the denial. See Rose, 123 Nev. at 206, 163 P.3d at 416. Here, Defendant's arguments on appeal failed to demonstrate actual prejudice. Defendant claims that since the evidence surrounding this case was circumstantial, a continuance would have purportedly enabled defense counsel to put on a more compelling case. (Def. Br. at 14: 4-5). However, it is well understood that circumstantial evidence alone may sustain a conviction. Cunningham v. State, 113 Nev. 897, 909, 944 P.2d 261, 268 (1997).

As evidence of this "compelling case," Defendant offers a series of things he would have done if he had more time. (Def. Br. at 14:4-5). at As an initial matter, the State would note that Defendant had eight months to get ready for this case, and all of the tasks he discussed below could have been accomplished during that time. However, the State will examine each of these steps Defendant purportedly would have taken.

Defendant claims that more time would have enabled his counsel to presumably ensure that his own witness, Patricia Brewer, would not have made a passing reference to the fact that Defendant got out of jail. (Def. Br. at 4-13). While that may have made the direct examination run smoother, this example falls far short of being "compelling" let alone so significant that it would have changed the jury's verdict in this case. Defendant argues that if he had more time, his counsel would have subpoenaed phone records of the victim and two other state witnesses. (Def. Br. at 14:14-17). While that may be true, Defendant fails to devote a single word to explain what would have been discovered on those phone records that would have likely resulted in a different verdict in his case. Defendant also claims if he had more time he would have interviewed four other witnesses. (Def. Br. at 14:17-18). While that may be true, Defendant fails to identify for this Court who they were, what they had to say and how their testimony would have resulted in a different verdict in this case.

Defendant also claims that if had more time he would have subpoenaed the security video from Shalana's office which revealed him spying on her and stealing her mobile phone. (Def. Br. at 14:18-19). This course of action would have been irrelevant as Defendant conceded guilt at trial that he maliciously slashed her tires at her office. He also admitted this fact to the police during his interview with them. (3 AA at 691). Thus, the only thing the video would have provided was more direct evidence that he committed that crime. Defendant also claims that if he had more time he would have obtained details about Shalana's criminal history and secured a copy of the temporary restraining order she secured against Defendant. (Def. Br. at 14:19-21). Once again, while Defendant tells this Court that he would have obtained those documents, he failed to explain how either would have been admissible in this case and why it would convinced a jury not to find him guilty of burglary and arson. While Defendant claims he "simply ran out of time" the record unquestionably illustrated that Defendant and his counsel frittered away eight months in order to prepare for this relatively simple case. (Def. Br. at 14:21).

Finally, even if Defendant had taken all of these steps, none would have been so compelling to convince the jury to change its verdict. Here, the evidence at trial demonstrated that he repeatedly harassed the mother of his children and repeatedly destroyed her vehicle's tires. (3 AA at 560-65, 67-71). The testimony also demonstrated that Defendant had access to Shalana's home. (Id. at 564). Defendant also admitted to police that he was inside Shalana's home prior to the fire starting. (3 AA at 691-93). Defendant was also the last person seen leaving her home shortly before the fire started. (2 AA at 303-04). The evidence also demonstrated that Defendant called Shalana's father and told him about the fire, before Shalana, her father or anyone knew about a fire inside her home. (3 AA at 640-41). The jury also learned that after Shalana's house was set ablaze, Defendant had placed a ring tone on his phone, which allowed callers to hear Defendant rapping the following statement: "If you can't stand the heat, get out of the kitchen or you'll burn just like my baby's mama's house." (2 AA at 309). In short, no additional amount of preparation time was going to be sufficient to overcome this overwhelming evidence of his guilt.

Consequently, although the District Court's denial of the second continuance was a proper exercise of the court's discretion, Defendant is still not entitled to relief due to the fact that he cannot show how he was actually prejudiced. See Rose, 123 Nev. at 206, 163 P.3d at 416.

II
THE DISTRICT COURT PROPERLY ALLOWED ARSON INVESTIGATOR LOMPREY TO TESTIFY AT TRIAL

Defendant's second issue on appeal complains that it was an error to permit arson investigator Lomprey to testify because the State did not file a Notice of Expert Witness 21 days before trial pursuant to NRS 174.234(2). (Def. Br. at 15-22). Defendant argues that this amounted to reversible error because he purportedly "had a right to expect the district attorney to honor it and the district court to enforce it." (Def. Br. at 15:17-22). Defendant contends that the failure to receive this notice violated his right to confront the witness against him. (Id.).

A. The "Alleged" Expert Testimony Of Captain Lomprey

The bulk of Captain Lomprey testimony was factual in nature. Lomprey testified about how long he has been with the police and what area he works in – the arson investigations unit with North Las Vegas Police Department. (3 AA at 669). Lomprey explained that as part of his police training he was trained to investigate the origins and causes of fire. (Id. at 669-70). Lomprey also testified to the observations that he made as he walked through Shalana's home. (3 AA at 671-86). Lomprey described how he saw that the fire burns in the home were most severe in three areas of the home. (Id. at 674-83). Lomprey explained that in his experience that indicated three separate fires were started inside the home. (Id.). Lomprey also explained that based on his observations he ruled out the fire being caused by such things as the stove, television, microwave, candles or tobacco products. (Id. at 683-84). Lomprey also observed that only one circuit breaker, specifically the circuit breaker that powered the smoke detectors inside the home, had been turned off. (Id. at 685). Ultimately, Lomprey concluded, much like a crime scene investigator or a detective that based on what he observed inside the home, the fire was an incendiary fire –

meaning that it was a fire started by a person with intent to destroy people or property. (Id. at 684).

None of the above testimony is expert testimony. It is factual testimony of a 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 Lomprey was going to testify long before his trial took place. In fact, ***eight months before trial***, Lomprey testified during the Grand Jury proceedings. Moreover, the Indictment that was filed shortly after included Lomprey as one of the State's witnesses. Thus, not only, was Defendant put on notice months and months before trial, Defendant was actually aware of Lomprey's education, training and experience as well as the sum and substance of his testimony. To the extent that Defendant argues Lomprey's determinations regarding how the fire started made him an expert 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. Lomprey's testimony regarding what he saw in the home was based on what the captain witnessed and his prior work experience as an arson investigator. Accordingly, Lomprey 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 Captain Lomprey

However, *assuming arguendo*, this Court considered Captain Lomprey as unendorsed expert witness, the District Court did not 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)). 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 an expert witness notice did not affect Defendant's substantial rights. 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. As the District Court properly recognized upon permitting Lomprey to testify, Defendant essentially received all of this information through normal discovery involving the Lomprey's arson investigation report. (3 AA at 521-22).

Third, the Indictment listed Lomprey as an anticipated witness and included his address. (1 AA at 53-55). Lomprey also testified at Defendant's grand jury proceeding eight months prior to trial and thus Defendant possessed a transcript of his entire testimony which laid out his education, training and entire investigation long before trial ever started. (1 AA at 29-42). It is also clear from the cross-examination record that Defendant was prepared for Lomprey. (3 AA at 695-99). Defendant's counsel questioned Lomprey about his failure to examine and investigation certain areas and items of the house that could have caused the fire. (Id.). Defendant's counsel pointed out the fact that Lomprey could not be certain when the circuit breaker in the house was tripped. (Id. at 697). Defendant's counsel suggested that

Lomprey failed to rule out all possibilities and merely presumed it was started by the Defendant. (Id. at 697-98). Thus, the record does not indicate that Defendant or his counsel was ill prepared to cross-examine this witness.

Defendant's argument on this issue clings to the technical fact that an expert witness notice was never actually sent to him. (Def. Br. at 15-22). However, as the District Court properly noted virtually every requirement of NRS 174.234(2) was complied with by the State, sans the providing of a CV. Although the District Court never made a finding that Lomprey was in fact an expert witness, in permitting Lomprey to testify, the Court clearly explained that regardless of whether or not he was or was not an expert, the spirit of this statute had been met by the State:

> "I mean, because it appears as though, of all the requirements that the State or the Defense is required to comply with, the only objection you have and that you didn't get a copy of a CV, because you've got – you've got the 21 day notice, you got his name; you got where he works at, so you knew how to contact him. You got a copy of his report, which is better than a brief statement regarding the subject matter, so they obviously met that. But the statute does say a copy of the CV of the expert witness."

(3 AA at 521:1-7).

> "Okay. Even if he is an expert witness, I believe the State has met their requirements in complying with the statute. I've read the Grand Jury transcript and you've been on notice of what his background and qualifications are since February 24th of this year."

(3 AA at 522:21-24). Accordingly, the District Court properly concluded that to the extent NRS 174.234(2) applied, Defendant's substantial rights were not infringed upon.

Defendant also makes the blanket accusation that the State committed bad faith, simply because Lomprey was not noticed as an expert witness. (Def. Br. at 18-19). However, given the fact that a very strong argument could be made, as discussed supra, that under Nevada law Lomprey would not be considered an expert the State's decision not to designate him as an expert does not constitute bad faith. At worst it could be considered inadvertent. Accordingly, this claim relating to the failure to comply with NRS 174.234(2) simply does not provide a basis in which to overturn his conviction.

Lastly, Defendant argues that it was an error for the Court not to accept Defendant's proposed instruction on expert witness testimony.[2] (Def. Br. at 20-22). The Court is entitled to broad discretion when settling instructions and its ruling will not be overturned absent an abuse of discretion. Crawford v. State, 121 Nev. 744, 748 121 P.3d 582, 585 (2005). A defendant is entitled to a jury instruction on his theory of the case if there is some evidence that supports his theory. Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990). However, a defendant has no right to instructions that are "misleading, inaccurate or duplicitous." Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

Defendant claims that without an instruction regarding expert witness testimony, the jury presumably was not informed that they could disregard Lomprey's testimony if they found him not to be credible. However, this is belied by the record. Here, Jury Instruction 17, clearly explained to the jurors that they could disregard a witness's entire testimony if they found the witness to not be credible or unsupported by the evidence presented at trial. (1 AA at 188). Thus, while technically there was no "expert witness" instruction, the jury was most certainly informed by the Court that they could disregard Lomprey's testimony if they found him to be unbelievable.

Moreover, Defendant failed to demonstrate that he suffered any actual prejudice due to the failure to include his proposed instruction. Here, the inclusion of an instruction regarding an expert witness would likely not have changed the jury's verdict. Here, despite knowing, pursuant to Jury Instruction 17, that they were free to disregard Lomprey's testimony, the jury instead found him credible and convicted the Defendant on all charges. (1 AA at 188). Accordingly, the instruction would have made no difference, especially in light of the overwhelming evidence of his guilt. Here, given the fact that there were adequate instructions already provided to the jury on witness credibility and given the fact that Lomprey was not an expert witness under the guise of NRS 174.234(2), the denial of the

[2] Defendant's counsel opens this argument by mangling the well understood idiom that states "When life gives you lemons, make lemonade." (See Def. Br. at 20, fn. 12). The State is unsure what issue or part of the record Defendant is referring to when he references painted and unpainted rocks in his proverbial lemonade.

proposed instruction was a proper exercise of the Court's discretion. Consequently this argument is meritless and Defendant's conviction should be affirmed.

CONCLUSION

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

Dated this 3rd day of October, 2011.

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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.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 3rd day of October, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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