**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| RICKIE SLAUGHTER,<br>Appellant,<br><br>vs.<br><br>THE STATE OF NEVADA,<br>Respondent, | Supreme Court No. 61991<br><br>**APPELLANT'S REPLY BRIEF** |



# APPELLANT'S REPLY BRIEF

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## ARGUMENT

As a preliminary matter, the State contends that Appellant's brief does not conform to NRAP 28(a)(9)(A). (Appellee's Answering Brief 13-14). Appellant asserts that every fact and piece of authority in the analysis sections of Appellant's Opening Brief is cited to in the Statement of Facts and in the explanations of rules that begin each issue.

### I. THE PRESENTATION OF IDENTIFICATIONS AT TRIAL WAS HARMFUL ERROR BECAUSE THEY WERE UNRELIABLE AS A RESULT OF AN IMPERMISSIVELY SUGGESTIVE PHOTGRAPHIC LINEUP.

### A. The use of the unnecessarily suggestive photo lineup was unconstitutional.

Pretrial identifications will be set aside, "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Odoms v. State, 102 Nev. 27, 31, 714 P.2d 568, 570 (1986) (citing Coats v. State, 98 Nev. 179, 643 P.2d 1225 (1982)).

The State argues that Appellant's photo did not stand out, and that "the man with the yellow shirt" was the real man that stood out. (Appellee's Answering Brief 21). Appellant asserts that the background of his photo was different than the other 5 photos. (AA I, Lineups SLAU001-SLAU04). Appellant has made his argument. Whether or not Appellant's photo stood

out and whether or not this photo was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification are ultimately subjective decisions that must be made by the Court. Appellant requests that the Court find that his picture stood out from the others, was unnecessarily suggestive under the circumstances, and gave rise to a substantial likelihood of misidentification.

The State argues that the police officer's decision to produce this photo lineup was reasonable. (Appellee's Answering Brief 20). Appellant asserts that the manner in which the lineup was produced was unreasonable. There was no emergency. The police officer who made the lineup could have used 6 pictures with the same background. (AA I, Transcript of Preliminary Hearing attached to Defendant's Reply to State's Opposition to Motion to Preclude Suggestive Identification, "Prelim," at SLAU189). There is no compelling reason to justify his production of an unnecessarily suggestive photo lineup.

The State completely disregards Ivan's miraculous ability to remember the man who shot him such a lengthy time after the shooting. (Appellee's Answering Brief 21). This sequence of events involving Appellant and Young highlights the suggestibility of the lineup: (1) Young meets Appellant during a vehicle transaction between a friend of Young's

and Appellant (AA II, Jury Trial Transcript, May 16, 2011, 49:13, SLAU345); (2) months later Young is robbed and shot (Id.); (3) Within days, Young is told by friends that the police have a suspect named Rickie Slaughter (Id.); (4) Young picks Appellant out of a impermissibly suggestive photo lineup, but "couldn't see to good," (Id. at 342); and (5) some time later, Young miraculously claims to remember Appellant from the car transaction with his friend. (Id. at 345).

Appellant asserts if you met a man and then, months later, that man terrorized your family and shot you in the face, that you would remember the man. You would remember the man when he first came into your house, you would remember that man in the hospital before police arrived, and you would remember that man when you saw the lineup. It was the impermissibly suggestive photo lineup that Ivan used to identify Appellant that, some time later, "sparked" Ivan's memory into implicating Appellant.

The State completes this argument by attempting to spin the testimony of Joey to a light more favorable to their case. (Appellee's Answering Brief 21). Joey said that Appellant's picture looked different. (AA III Jury Trial Transcript, May 18, 2011, 51:25-52, SLAU436). All of the spinning and explaining in the world by the State cannot change this simple fact.

**B. The identifications were not independently significantly reliable to warrant admission**

The state's argument here is brief. First, the state cites Levasseur v. Pepe, 70 F.3d 187, 195 (1st Cir.1995), stating that a victim's "degree of attention during a traumatic experience is presumed to have been acute". Appellant respectfully asserts that this proposition is ridiculous, and is thankful that this is not primary authority. It directly contradicts all of the research on this subject, which is succinctly summarized by the Utah Supreme Court in State v. Long in Appellant's Opening Brief. 721 P.2d 483, 488-490 (Utah 1986). Appellant respectfully reminds the Court that the Utah Supreme Court is not exactly a bastion of liberal-leaning values, and that its summary on this issue should be respected.

The State's entire analysis on this prong is reprinted here:

> Here, Appellant claims the identifications were unreliable. Appellant errs. See AOB pgs. 11-19. As noted in the factual recitation above, Ivan, Ryan, Jermaun, and Joey each had lengthy interactions with Appellant during the hostage ordeal and ample opportunity to observe him. Their pretrial identifications and trial testimonies, considered together, demonstrate a reliable identification of Appellant as the perpetrator of the hostage ordeal. See Gehrke, 96 Nev. at 584, 613 P.2d at 1030.

(Appellee's Answering Brief).

In Appellant's Opening Brief, a full 9 pages were devoted to breaking down the reliability of each identification. (Appellant's Opening Brief 11-

19). Ivan Young couldn't sign his lineup because "he couldn't see to good" and identified a man who he would later claim to have met prior to the shooting. (AA II, Jury Trial Transcript, May 16, 2011, 49:13, SLAU345-46). At the robbery, Ryan John was immediately tied up and had a jacket wrapped around his head. (AA I "Police Report" at SLAU84). Tied up and made to look away, Joey was a 15 year old boy, scared for his life. (AA I, "Police Report" at SLAU38).

Appellant raised these issues in his brief. The State's response of "Appellee errs" to Appellant's 9 pages of arguments is not a sufficient response for this Court; it is not a sufficient response when a sentence of life in prison is at stake. The State ignores all of the Biggers factors in assessing the reliability of each identification. Neil v. Biggers, 409 U.S. at 199–200, 93 S.Ct. at 382; United States v. Field, 625 F.2d 862, 866–67 (9th Cir. 1980). The state's failure to address any of these arguments should be taken as a concession on the merits of the issues by the Court. Therefore, this Court should find each identification unreliable. Alternatively, Appellant reasserts all of those specific arguments regarding the reliability of each identification from his Opening Brief.

**C. The inclusion of the identifications was harmful error**

After all but conceding that at least some of the identifications were

unreliable in the previous section, the State next argues that the error involving these identifications is harmless because:

> (1) guns identified by victims, forensic evidence relating to those guns, and forensic evidence of bullets, all of which were found in the car driven by Defendant, (2) Defendant's girlfriend's car, his jail calls and his attempts to create an alibi, and (3) items used in the commission or the crime later found in Defendant's possession.

(Appellee's Answering Brief 25).

First, none of the guns can be physically linked to the crime scene. (AA II SLAU411, 141-42). Second, the fact that Appellant drove his girlfriend's green car does not link him to the robbery anymore than any other black male who drives a green car; his jail calls attempt to confirm his alibi and not create one. Finally, the police finding a blue shirt and gloves may be the most meaningless pieces of evidence of this or any criminal case. Appellant asserts that nearly everyone owns at least one blue shirt and one pair of gloves.

So Appellant was a black man, a gunowner, drove a green car, owned a blue shirt, and owned gloves. There are thousands and thousands of Clark County residents who match these five characteristics. They are not just pieces of circumstantial evidence, they are very weak pieces of circumstantial evidence that are only corroborated by an illegal lineup and a video that the State unilaterally authenticated because they could not do so

through documentation.

It is clear that the identifications played a major role in this case, and their unconstitutional inclusion in the case prejudices Appellant; their inclusion was harmful error because of the complete lack of any other evidence tying Appellant to the scene of the crime. Appellant requests a trial free of unreliable identifications based upon impermissibly suggestive photo lineups.

## II. THE AUTHENTICATION OF THE SURVEILLANCE VIDEO WAS INSUFFICIENT AND, THEREFORE, INADMISSABLE

In response to a leading question on direct, Ryan John answered affirmatively that he had made calls to Wells Fargo and found out his cardhad been used "at a 7-11 just after 8 p.m." (Id. at SLAU391). John thought $300 was withdrawn during this ATM transaction, but was "not exact." (Id.). Besides numerous assurances by the State, this was the only evidence used to authenticate the fact that John's card was being used in the video.

Without the original document or the testimony of the Wells Fargo employee, the statement made by the Wells Fargo employee to John is hearsay because it is an out of court statement offered in evidence to prove the truth of the matter asserted and it is not saved by an exception. NRS 51.035. John's affirmative answer to the State's question is another layer of

hearsay as it repeats the Wells Fargo employee's hearsay. Id. Because both these statements are inadmissible hearsay, neither could be used to authenticate the fact that John's card was used during the time and place depicted on the video. Because this fact could not be authenticated, the admission of the video into evidence was improper.

Appellant pleads with the Court to use common sense here. A man orally claiming a check was forged cannot establish a check fraud case; he must show a copy of the check from a bank to the prosecuting authorities. An SEC case cannot be established through the oral testimony of a person alleging the illegality; there must be records of stock purchases/sales for the SEC to establish such a case. The alleged victim testifying that his card was stolen and used cannot establish an ATM transaction fraud case; there must be a record of the illegal transaction for the prosecutor to establish such a case.

Under the rule established in this case, any Nevada citizen can be tried and convicted of ATM crimes through the oral testimony of the alleged victim; no record of the transaction is required. And if the State really wants to proceed with the case, then they just have to get a video of a person that fits the same general characteristics of the suspect using any ATM machine with any card. In opening, the State tells the jury the time and place the card

was used; when asked if his card was used and stolen, the alleged victim says "yes;" the State hammers home how the transaction depicted in the video is connected to the alleged victim's card; and the jury comes back guilty. It is the 21st century. If the State wants to put someone in prison for life for crimes including an illegal ATM transaction, then, at minimum, they need to prove the existence of such a transaction in accord with Nevada's evidentiary rules.

After a lengthy argument on issues not brought on appeal, the State finally addresses Appellant's argument concerning the video:

> The employee's statement to Ryan was admissible under NRS 51.075 because "its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness"; the employee was merely telling a customer what his banking records reflected, likely his previous few transactions. NRS 51.075. The statement was admissible under NRS 51.085 as a present sense impression of the status of Ryan's account."

(Appellee's Answering Brief 36).

**A. John's statement recounting the statement of the Wells Fargo Employee is inadmissible hearsay not covered by the general hearsay exception.**

Appellant argues that the general hearsay exception should not apply here because the accuracy of the time, date, location, and amount of money withdrawn from the ATM machine would have undoubtedly been enhanced by calling an employee of Wells Fargo as a witness and such a witness was

available. NRS 51.075. As the Utah Supreme Court documented in State v. Long, memory is negatively affected by traumatic experiences. 721 P.2d 483, 488-490 (Utah 1986). John was physically attacked, tied up, blindfolded, and heard Ivan get shot; (AA I "Police Report" at SLAU84)he had been through a traumatic experience. John would tell the jury what Wells Fargo had told him some seven years prior, but this hearsay statement is not sufficient to establish the ATM transaction. (AA II, Jury Trial Transcript, May 17, 2011, 30, SLAU391). There was nothing special here that ensured accuracy of John's relay of information; just the opposite is true. The accuracy would be increased if a Wells Fargo employee told the jury the exact time, exact place, and exact amount of money involved in the ATM transaction.

"In all criminal prosecutions the accused shall enjoy the right. . . to be confronted with the witnesses against him." Crawford v. Washington, 541 U.S. 36 (2004). The contents of the writing read to John by the Wells Fargo employee is a testimonial statement. Because Appellant has no means to cross-examine the Wells Fargo employee, a Wells Fargo employee is available, and the Wells Fargo employee was never previously cross-examined by Appellant's counsel, this use of hearsay is a Crawford violation.

"To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in this title." NRS 52.235. There is at least one writing or recording of this ATM transaction from Wells Fargo; there is probably another writing or recording of the transaction maintained by the ATM company. The employee at Wells Fargo who supposedly spoke with John on the night of the shooting was relaying information about this document to John. To prove its content, the State must produce the original and not use hearsay to prove this mythical document's contents.

**B. The Statement from The Wells Fargo Employee to John reciting the contents of an ATM receipt is inadmissible hearsay not covered by the present sense impression exception.**

Next, the State argues that the statement was admissible under NRS 51.085 as a present sense impression. (Appellee's Answering Brief 36).

> A present sense impression is:
>
> A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule.

NRS 51.085 & FRE 803(1). The policy for admitting statements under the present sense impression exception to hearsay rule is that the statement is more trustworthy if made contemporaneously with the event described. Browne v. State, 113 Nev. 305, 933 P.2d 187 (1997). A fifteen to 45 minute

lapse between event and statement is too long of a period to qualify as a present sense impression. Hilyer v. Howat Concrete Co., Inc., 578 F.2d 422, 426 n. 7 (D.C. Cir. 1978). A statement offered as a present sense impression is excluded in the absence of evidence sufficient to support a finding that the declarant personally perceived the matter. Hynes v. Coughlin, 79 F.3d 285, 294 (2d Cir. 1996).

There was no perception of an event or condition by the Wells Fargo employee; there was a relay of information contained in writing from the Wells Fargo employee to John. Therefore, this relay of previously documented information is not a present sense impression of the robbery event or the ATM event to justify an exception to the hearsay rule under NRS 51.085.

Even if the Court somehow decided that this relay of information could qualify as a present sense impression, it still fails. The statement by the Wells Fargo employee was not contemporaneous with the use of John's card. Browne, 113 Nev. 305, 933 P.2d 187 (1997). There was a lag between the robbery, the card allegedly being used, and John contacting Wells Fargo; therefore, the time period is too long. Howat Concrete Co., Inc., 578 F.2d 422, 426 n. 7 (D.C. Cir. 1978). The Wells Fargo employee did not make a statement while personally "perceiving an event or

condition," she merely looked at John's account statement from a call-center somewhere. Hynes, 79 F.3d 285, 294 (2d Cri. 1996). This reading off of a computer screen could have occurred at any time. John testified by a one word affirmative answer and the State asserted that the Wells Fargo employee told John that his card HAD BEEN used at a 7-11. (AA II, Jury Trial Transcript, May 17, 2011, 30, SLAU391). The Wells Fargo employee was reading the contents of a written document to John.

"In all criminal prosecutions the accused shall enjoy the right. . . to be confronted with the witnesses against him." Crawford v. Washington, 541 U.S. 36 (2004). The contents of the writing read to John by the Wells Fargo employee is a testimonial statement that John relayed through an affirmative answer to a leading question on direct. Because Appellant has no means to cross-examine the Wells Fargo employee, a Wells Fargo employee is available, and the Wells Fargo employee was never previously cross-examined by Appellant's counsel, this use of hearsay is a Crawford violation. When the Court allowed hearsay and the State to authenticate the video, they unconstitutionally prejudiced Appellant by relieving him of his ability for cross-examination of witnesses and documentary evidence.

**C. The video does not clearly depict Appellant.**

Finally, the State argues:

> Therefore, Ryan could properly testify that his card was used at a 7-Eleven at approximately 8:00 p.m. and that $300 was removed from his account. 2 AA 388 – 96. Any further connection between the tape and Ryan's testimony was for the jury to make from reasonable inferences; Ryan never asserted that the person on the tape was Appellant or even that Appellant was the one to use his card but merely that it was used at a 7-Eleven at 8:00 p.m. and money was taken. Id. Appellant was only charged with entering the 7-Eleven with the intent to use the card. 1 RA 39-47. Whether he successfully used the card was irrelevant. Appellant is clearly identifiable entering the 7-Eleven near his residence in heavy winter clothing in the middle of the summer, trying to partially conceal his face when he approached the ATM and attempted to use it. See, Security Video, State's Exhibit 112 at trial.

(Appellee's Answering Brief).

The State previously argued that the hearsay exceptions apply so John's testimony was appropriate. Now the State argues in the alternative that this was clearly Appellant in this video and the jury could connect the dots. Appellant pleads with the Court to view the video. The man depicted in the video is not "clearly Appellant;" it clearly depicts a black man. But when the prosecutor repeatedly tells the jury that John's card was the card being used in the video, that information sticks with the jury and prejudices Defendant. The State effectively gets the benefit of a document proving the transaction occurred without producing it.

Appellant respectfully asserts that if the State could produce such a

document, then they would have, and, therefore, the document does not exist. Appellant further asserts that allowing the State to unilaterally authenticate (except for a one word hearsay statement from John) the video prejudiced Appellant. Appellant pleads that the Court recognize the distinct possibility that John's ATM card was not being used at the time and place depicted in the video: (1) There are nine 7-11s on Charleston;[1] (2) John's memory was affected by the trauma and the 7 year gap; (3) The only authentication of the card being used in the video comes from hearsay and from the State; (3) the State never produced a document settling this whole matter; (4) A rational person who views this video will not think that the man is "clearly" Appellant. Appellant asserts that these factors and others cast serious doubt on whether or not John's card was being used at the time and location depicted in the video.

Appellant is entitled to a trial where the existence of this ATM transaction is either established by the State or the State concedes that the

[1] (1) 2877 E. CHARLESTON BLVD., #100A, LAS VEGAS – 89104;
(2) 4950 W. CHARLESTON BLVD., LAS VEGAS – 89102;
(3) 6950 W. CHARLESTON BLVD., LAS VEGAS – 89117;
(4) 2220 W. CHARLESTON BLVD., LAS VEGAS – 89102;
(5) 1001 E. CHARLESTON BLVD., LAS VEGAS – 89104;
(6) 7650 W. CHARLESTON BLVD., LAS VEGAS – 89117;
(7) 3051 E. CHARLESTON BLVD., LAS VEGAS – 89104;
(8) 4581 E. CHARLESTON BLVD., LAS VEGAS – 89104;
(9) 5700 W. CHARLESTON BLVD., LAS VEGAS – 89102.

transaction never took place.

## III. THE PROBATIVE VALUE OF THE VIDEO IS OUTWEIGHED BY PREJUDICE TO APPELLANT, CONFUSION OF THE ISSUES, AND MISLEADING THE JURY

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury. NRS 48.035(1).

The State argues:

> The video was relevant because it made the existence of the following facts more probable in the context of the Burglary charge: (1) that someone used Ryan John's bank card at approximately 8:00 p.m. at the specific 7-Eleven store depicted, (2) that the person was depicted on video for the jury to observe and determine if it was Appellant, and (3) that Ryan John's bank card was stolen in the crime. NRS 48.015.

(Appellee's Answereing Brief 37-38).

Appellant asserts that this video does not make (1) and (3) more probable. Without a document from Wells Fargo or the ATM company, we only have hearsay and the State authenticating that John's card was used at the time and place depicted in the video. If nothing admissible connects the card to the video, then the video does not make the existence of a specific person using a specific card more probable. The video shows a black man using an ATM machine. Save for a one word answer from John relaying a hearsay statement worded by the State and the State's repeated unilateral assurances to the jury, this video depicts Interdeep Judge's 7-11 at the time

and place that he testified to showing an unknown black man using an unknown card.

The video, without authentication, has its probative value outweighed by prejudice to Appellant, confusion of the issues, and misleading the jury. It prejudices the Appellant by allowing the State to unilaterally authenticate the video. It confuses the issues because the State argues in the alternative that either (1) they have a document or (2) since this is "clearly Appellant," then you can take the State at their word that this is the card being used. It misleads the jury because the jury has been led to believe by the State that the transaction shown is of John's Wells Fargo card, but the State never produced or could produce proof of this transaction.

The district court committed manifest error when it allowed this video into evidence without authentication because the video prejudiced Appellant, confused the issues, and misled the jury. The jury can't be expected to ignore the repeated assurances by the State that the card was used in the manner that the State ensured it was, nor can it be expected to call the State a liar and disregard the repeated assurances. The gatekeeper in a situation like this must be the district court, and the court committed manifest error by allowing this video into evidence under these conditions. Appellant requests that the Court grant him a new trial void of the taint of this inappropriate

video.

## IV. THE NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT RISE TO A CONSTITUTIONAL LEVEL AND WARRANT REVERSAL

The State first asserts that it is unclear which statements Appellant is referring to in its opening brief, then, amazingly, addresses each controversial statement brought by Appellant. (Appellee's Answering Brief 40).

### A. 7-11 comments

The prosecutor has a duty to refrain from stating facts in opening statement that he/she cannot prove at trial. Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991). If prosecutor overstates in his opening statement what he/she is able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith. Rice v. State, 113 Nev. 1300, 1309 P.2d 262, 270 (1997).

The prosecutors unilaterally authenticated the video with evidence that they didn't have. This is impermissible vouching by the prosecutor.

The State then argues that Appellant did not claim bad faith. Appellant brought prosecutorial misconduct as an issue; bad faith is presumed. Appellant asserted, and continues to assert, that the reason that no Wells Fargo record was produced is because no Wells Fargo record

exists. Appellant is in prison for life, and the evidence used against him would not have been allowed in a civil default prove-up. This prejudices Appellant. Appellant asserted, and continues to assert, bad faith by the State in regards to their handling of the authentication of the video.

**B. Other Instances of Misconduct**

Appellant does not wish to go tit for tat with the State on each instance of prosecutorial misconduct. Appellant believes that his Opening Brief made the necessary arguments on this issue. All of these statements crossed the line, and Appellant asserts that each instance entitles him to relief. Additionally, Appellant asserts that these instances create cumulative error.

The other thing that these instances of prosecutorial misconduct show is the vigor in which the State conducted itself in this case. The State repeatedly crossed the line with these statements, just like the State crossed the line by unilaterally authenticating the video and using it against Appellant.

## CONCLUSION

There was a miscarriage of justice here. Some or all of the identifications were unreliable and the unilateral authentication of the video by the State completely railroaded Appellant at trial. The Constitutional

deficiencies in this case are too enumerative and of too great of importance to allow the verdict stand. Each error demands relief, but, cumulatively, Appellant asserts that he is undoubtedly entitled to reversal of his verdict. For all of the above reasons, Appellant is respectfully requests that this Court order a new trial.

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains 4,385 words and is 20 pages.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 26th day of November, 2013.

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that I am an employee of GAMAGE & GAMAGE, and that I served a copy of the foregoing Appellant's Reply Brief to the parties identified below through the Courts electronic filing system addressed for delivery to:

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