IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT GUERRINA Appellant, vs. STATE OF NEVADA, Respondent.	)	SUPREME COURT NO. 71444 **APPEAL** DISTRICT COURT NO. C-308561

FILED

APR 10 2017

ELIZABETH A. BROWN
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APPELLANT'S OPENING BRIEF

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SECONDARY AUTHORITY

I[1]

JURISDICTIONAL STATEMENT

A. BASIS FOR APPELLATE JURISDICTION

NRAP 4(b); NRS 177.015(3)

B. FILING DATES ESTABLISHING TIMELINESS OF APPEAL

09-29-16: Judgment of Conviction filed[2]

09-29-16: Notice of Appeal filed[3]

C. ASSERTION OF FINAL ORDER OR JUDGMENT

This appeal is from a judgment of conviction.

II

ROUTING STATEMENT

This case is a direct appeal from a judgment of conviction based on a jury verdict that involves convictions for offenses that are Category A and B felonies. As such, this case is not within those categories presumptively assigned to the Court of Appeals under NRAP 17(b).

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1 Hereafter GA shall refer to Guerrina Appendix.

2 GA/5/1071.

3 GA/5/1075.

III

STATEMENT OF ISSUES

ISSUE NO. 1: Whether GUERRINA's 6th amendment right to represent himself was violated requiring reversal of his conviction where such request was denied as untimely even though it was made several weeks before trial began.

ISSUE NO. 2: Whether GUERRINA's 5th and 14th amendment rights to due process and a fair trial were violated amounting to prejudicial error and requiring reversal of his conviction for kidnapping where the conviction was not supported by the evidence because the movement of the victim was incidental to the robbery.

ISSUE NO. 3: Whether GUERRINA's 5th and 14th amendment rights to due process and a fair trial were violated amounting to prejudicial error and requiring reversal of his enhancement convictions for use of a deadly weapon where there was no evidence that GUERRINA had a deadly weapon.

ISSUE NO. 4: Whether GUERRINA's 5th and 14th amendment rights to due process and a fair trial were violated amounting to prejudicial error and requiring reversal of his coercion conviction where the conviction was not supported by the evidence.

ISSUE NO. 5: Whether GUERRINA's 5th and 14th amendment rights to due process and a fair trial were violated amounting to prejudicial error and requiring reversal of his convictions where exculpatory evidence was not preserved by the state.

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IV

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a case of mistaken identity where the victim believed that she was robbed by a man who had been a co-worker at Fast Bucks, where she was working when the store was robbed on July 13, 2015.[4] She concluded that something white the man was carrying at the time of the robbery was a knife, although she never saw a knife blade, and was never threatened with the object. The man stood at the entrance door to the store and directed the victim to retrieve all money in the store and bring it back to him. He then poured some bleach on the floor in front of the door, left with the money and locked the door from the outside, whereupon the victim used the store telephone to call 9-1-1 for help.

B. COURSE OF PROCEEDINGS

Please see the Appendix table of contents which is sorted chronologically.

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[4] GA/1/598.

C. DISPOSITION BY THE COURT BELOW[5]

COUNT	CHARGE	SENTENCE
1	Burglary w/use	2-7 yrs
2	First degree kidnapping w/use	5-15 plus 2-5 consec
3	Robbery w/use	3-8 plus 3-8 consec
4	Coercion	1-3

All counts to run concurrent. Guerrina will not be eligible for parole until he has served at least seven years in prison.

V

STATEMENT OF RELEVANT FACTS

Cuevas (victim) was robbed by a man when she went to work at Fast Bucks to get the previous day's money to deposit at the bank before the store opened for business.[6] When she arrived, a man approached her and took the keys to the store from her and went inside with her. He stood inside the store near the front door and directed Cuevas to get the money for him. He was holding something white in his hand, which Cuevas assumed was a knife, though the perpetrator never threatened her with it and she never saw a knife blade. Cuevas went to the back of the store by herself, retrieved the money and took it to the man still standing at the door. After she gave him the money, he told her to unplug the phone and throw it

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[5] Taken from the Information (GA/1/57) and the Judgment Of Conviction (GA/5/1071).

[6] GA/1/600.

on the floor which she did. He then dumped some liquid on the floor between Cuevas and the door, after which he exited the store and locked the door from the outside, locking Cuevas inside the store. Cuevas plugged the phone back in and called 9-1-1.

Cuevas began working at Fast Bucks on December 19, 2014.[7] She first met Guerrina who also worked at Fast Bucks at a manager's meeting the end of December, 2014.[8] She saw him again at another manager's meeting several months later.[9] She had only seen Guerrina those two times.[10] She never worked with him at a Fast Bucks location.[11] The robbery occurred on July 13, 2015.[12] Cuevas did not tell the 9-1-1 operator that she knew the perpetrator.[13] Later, she told police that Guerrina was the perpetrator and the police showed her his driver's license photo which she positively identified.

The state added a coercion charge because the perpetrator ordered Cuevas to unplug a telephone and throw it on the ground, concluding that the reason for doing that was to prevent Cuevas from calling for help.[14] However, the evidence

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7 GA/1/44.
8 GA/1/44.
9 GA/1/45.
10 GA/1/49.
11 GA/1/43-44.
12 GA/1/126.
13 GA/1/45.
14 GA/1/52.

showed that all Fast Bucks stores also have a phone in the back area of the store. Guerrina, as a former employee of Fast Bucks knew that.

Guerrina was living at a Motel 6 on the date of the incident. Police reviewed video surveillance which showed Guerrina at the Motel 6 on that date, but failed to impound or obtain a copy of that video.[15] The defense moved to dismiss the charges against Guerrina because the state failed to preserve that evidence. The state argued that it could produce the manager of the Motel 6 who would testify that the time when Mr. Guerrina was seen on the tape was not the time that the robbery was occurring at the Fast Bucks store.[16] That witness was never provided. The motion to dismiss was denied.[17]

On July 1, 2016, Guerrina filed a motion to dismiss his attorney and to represent himself,[18] because he did not feel that his attorney was doing things that needed to be done.[19] He said he would need a continuance of the trial in order to contact witnesses that were out of state, and conduct other research and investigation.[20] The court denied the motion, stating that it was too close to trial and she was not going to continue the trial.[21] At the time of that hearing on July

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15 GA/1/126.
16 GA/1/186.
17 GA/1/127.
18 GA/1/204.
19 GA/2/239.
20 GA/2/237-239.
21 GA/2/237, 239-240.

14, 2016, the trial was scheduled to begin on July 25, 2016.[22] Five days later on July 19, 2016, Guerrina's counsel (Mr. Hughes) was not present for an important motion on admission of jail calls.[23] The court characterized the motion he had filed as "a little bit vague."[24] The attorney standing in for Guerrina's attorney (Mr. Brower) stated that he believed "Mr. Hughes would rather have been here to argue this himself."[25] Two days later on July 21, 2016, Mr. Hughes was still out of the jurisdiction and Mr. Brower again stood in for calendar call.[26] However, the state was having to explain the defense position regarding placing the case in overflow to the calendar call hearing.[27]

> MS. LAVELL: Your Honor, it's my understanding – and Mr. Brower was at a bit of a disadvantage because Mr. Hughes is in fact the attorney of record and the trial attorney where he is out of the jurisdiction currently. Mr. Brower had indicated at the last – when we were here the last time on the motion that this would not be overflow eligible however he subsequently he spoke to Mr. Hughes who now is not making that argument.[28]

Mr. Brower admitted that he was at a disadvantage.[29] However, he did once again raise Guerrina's desire to represent himself, which the court ignored.[30] As

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22 GA/2/240.
23 GA/2/245
24 GA/2/245.
25 GA/2/247.
26 GA/2/254.
27 GA/2/254-255.
28 GA/2/255.
29 GA/2/257.

the court was discussing trial setting, Mr. Brower advised that Mr. Hughes was going to be out of the jurisdiction until the following Tuesday (July 26, 2016), so that the trial could not possibly start on Monday (as scheduled) because he would not be arriving until 11:00 p.m. Monday night – the night before trial was to commence in a serious felony case.[31] Mr. Hughes was out of the jurisdiction from at least July 19th, and was not scheduled to return by July 25th, the date he knew when he left the jurisdiction that trial was scheduled to commence in Guerrina's case.

On July 21, 2016, the case was sent to overflow.[32] Trial commenced on August 1, 2016,[33] a full month after Guerrina first moved to dismiss his attorney and represent himself.

VI

SUMMARY OF ARGUMENT

Guerrina had a Constitutional right to represent himself at trial, and it was reversible error for the court to deny him that request which was made four weeks before trial began.

The kidnapping count should be dismissed because movement of the victim was incidental to the robbery.

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30 GA/2/257.
31 GA/2/257.
32 GA/2/258.
33 GA/2/262.

All deadly weapon enhancements should be reversed because there was no credible evidence that the perpetrator had a knife or other deadly weapon.

The coercion charge based on the perpetrator telling the victim to throw a telephone on the floor should be dismissed because there was another telephone in the back of the store, and if one believes that Guerrina was the perpetrator, then one has to also believe that he knew about the second phone since he had been an employee of Fast Bucks and knew the layouts of the stores.

The entire case should be dismissed because the state failed to preserve critical exculpatory evidence.

VII

ARGUMENT

A. GUERRINA DENIED RIGHT TO REPRESENT HIMSELF

(Standard of Review: Abuse of Discretion[34])

Guerrina felt that his attorney (Hughes) was not adequately representing his interests, and brought a motion to dismiss Hughes and represent himself. This motion was brought three weeks before trial was scheduled to begin,[35] and four weeks before trial actually commenced.[36] The stated reason was that counsel was

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34 *United States v. Kaczynski,* 239 F.3d 1108, 1116 (9th Cir. 2001).

35 GA/1/204; GA2/233.

36 GA/2/262.

ineffective,[37] he and his attorney had disagreements regarding trial strategy,[38] discovery had not been completed,[39] and witnesses had not been interviewed.[40] These concerns were somewhat born out by the fact that Hughes was out of the country the entire week before trial was to commence, and was not even due to return by the scheduled trial date.[41] The only way his stand-in attorney could even reach him was via text messaging because he was out of the country.[42] The Court denied the motion as untimely because Guerrina also requested a trial continuance to complete the work which had not been done by his attorney.[43] No representation was made by the state that a delay of the trial would in any way jeopardize its case.[44] All witnesses called by the state were local with the exception of Guerrina's ex-wife, who appeared by telephone from Florida.[45]

"The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged."[46] The United States Supreme Court has stated that **a**

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37 GA/1/205.
38 GA/2/237.
39 GA/2/233.
40 GA/2/238
41 GA/2/251, 254-259.
42 GA/2/257.
43 GA/2/239, 242.
44 GA/2/237-238.
45 GA/3/596; GA/4/665; GA/4/708; GA/4/828; GA/4/857, 864.
46 *Faretta v. Cal.*, 422 U.S. 806, 817-818 (U.S. 1975).

request to self-represent is timely if made weeks before trial.[47] (Emphasis added)

The Ninth Circuit has acknowledged this timing rule:

> Thus, after *Moore*, we know that *Faretta* clearly established some timing element, but we still do not know the precise contours of that element. At most, we know that *Faretta* requests made **"weeks before trial" are timely.**[48] (Emphasis added)

The Federal District court for Nevada has acknowledged that rule:

> "Because the Supreme Court has not clearly established when a *Faretta* request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request **'weeks before trial' is timely.**" *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005).[49] (Emphasis added)

This Court in *Lyons* has seemingly departed from the Supreme Court rule by holding that a request to self-represent must be made in sufficient time before trial so that a trial continuance would not be necessary.[50] This would mean that a request to self represent made **weeks before trial** would not have to be granted if such request would require a continuance of the trial. Such an interpretation would be in direct conflict with the United States Supreme Court holding in *Faretta* as followed by both the Ninth Circuit Court of Appeals and the Nevada Federal District Court.

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47 *Faretta, supra,* at 835.

48 *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. Cal. 2005).

49 *Clark v. Neven*, 171 F. Supp. 3d 1045, 1052 (D. Nev. 2016)

50 *Lyons v. State*, 106 Nev. 438, 445-446 (Nev. 1990).

However, a difference between *Lyons* and the case at bar is that in *Lyons* the request to self-represent was made the day of trial, whereas in this case Guerrina brought his motion to self represent four weeks before trial commenced. The only way to square *Lyons* with the rule set forth by the United States Supreme Court is to limit it to the facts of that case, where the request was made the day of trial. It cannot be applied to the case at bar where the request was made "weeks before trial," regardless of whether or not a continuance was requested. As a matter of law, pursuant to the United States Supreme Court's holding in *Faretta*, the request was timely because it was made **weeks before trial** commenced.

Accordingly, the failure of the trial court to grant Guerrina's request was a denial of Guerrina's Sixth Amendment right to represent himself and constituted reversible error as a matter of law, requiring this Court to reverse Guerrina's convictions and remand this matter to the district court for a new trial.

B. KIDNAPING COUNT NOT SUPPORTED BY THE EVIDENCE

(Standard of Review: de novo)[51]

The United States and Nevada Constitutions both require that the state show ***beyond a reasonable doubt*** that a person has committed a crime in order to

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[51] *United States v. Shipsey,* 363 F.3d 962, 971 n.8 (9th Cir. 2004); *United States v. Naghani,* 361 F.3d 1255, 1261 (9th Cir. 2004); *United States v. Odom,* 329 F.3d 1032, 1034 (9th Cir. 2003).

achieve a conviction.[52] This Court is imbued with the power to review the evidence in order to determine whether the state has satisfied its burden.[53]

The standard of review on appeal of a criminal conviction based on insufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[54]

In this case, Guerrina was convicted of both robbery and kidnapping. This Court has held that "...to sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion. [55]

The Information asserts that the underlying offense to the kidnaping was robbery.[56] NRS 200.380 defines robbery as "... the unlawful taking of personal property from the person of another, or in the person's presence, against his or her

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52 *Jackson v. Virginia,* 443 U.S. 307 (1979); *Oriegel-Condido v. State,* 114 Nev. 378, 382 (1998); *Carl v. State,* 100 Nev. 164, 165 (1984).

53 *State v. VanWinkle,* 6 Nev. 340, 350 (1871).

54 *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) [conviction of a crime without sufficient evidence that each element has been proven beyond a reasonable doubt violates the Due Process Clause of the Fourteenth Amendment]. n8

55 *Mendoza v. State*, 122 Nev. 267, 275 (2006).

56 GA/1/53.

will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to: (a) Obtain or retain possession of the property; (b) Prevent or overcome resistance to the taking; or (c) Facilitate escape." In this case, all acts undertaken by the perpetrator were in furtherance of the robbery, and did not create a greater risk of harm to Cuevas than necessary to complete the act of robbery and escape from the scene.

In order to get into the building, the perpetrator had to get the keys from Cuevas, and in order to get the money from the store, he had to instruct Cuevas to obtain the money for him.[57] Those acts had no independent significance from the underlying crime and did not create any greater risk of harm to Cuevas. There was no allegation that the perpetrator ever even touched Cuevas. And, in directing her away from him to where the money was located in the back of the store while he stood waiting in the front of the store,[58] she was actually moving away from the danger toward a window through which she could have escaped. The perpetrator stood in the same place at all times, and Cuevas brought the money to him after she obtained it from the back of the store.[59]

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57 GA/3/608, 612.
58 GA/3/616-619.
59 GA/3/623-624.

The perpetrator then committed the additional acts of pouring bleach on the floor in front of the door, directing Cuevas to unplug the phone, and then locking the door after he left the scene. These acts were also done in furtherance of the robbery in order to "facilitate escape." They did not increase any risk of harm to Cuevas because (1) there was a window in the back of the store through which she could have escaped so she was not trapped inside the store, (2) the bleach was not toxic as it was lying on the floor, and (3) there were two phones in the store, one of which Cuevas actually used to call 9-1-1.

For the foregoing reasons, Guerrina's conviction for kidnaping must be reversed as a matter of law based on the facts of the case, without remand on that count.

C. NO DEADLY WEAPON

(Standard of Review: de novo[60])

Claims of convictions which are supported by insufficient evidence are reviewed de novo.[61] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged".[62]

Guerrina was convicted of burglary while in possession of a deadly weapon,

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60 *United States v. Erskine,* 355 F.3d 1161, 1166 (9th Cir. 2004).

61 *United States v. Shipsey,* 363 F.3d 962, 971 n.8 (9th Cir. 2004).

62 *Apprendi v. New Jersey*, 530 U.S. 466, 477 (U.S. 2000).

kidnapping with use of a deadly weapon, and robbery with use of a deadly weapon.[63] The deadly weapon in question was purported to be a knife. However, there was no evidence that Guerrina ever had a knife. Cuevas said that she saw the perpetrator carrying something with a white handle, about three inches long. He never threatened her with the object he was holding in his hand.[64] She said "there was no blade."[65] She admitted that she was not sure that it was actually a knife that he was holding.[66] It could have been a folding comb.[67] It could have been a corkscrew.[68] It could have simply been a piece of white plastic. No knife was ever found among Guerrina's belongings.[69]

In *Smith v. State*, this Court held in an unpublished decision that where no knife was actually seen by a potential victim and no knife was found when the assailant was arrested, there was insufficient evidence to sustain deadly weapon enhancements.[70] The actual testimony as cited by this Court in that case was:

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63 GA/5/1071.
64 GA/3/611.
65 GA/3/648.
66 GA/4/650.
67 GA/4/650.
68 GA/4/649.
69 GA/4/746.
70 *Smith v. State*, 2014 Nev. Unpub. Lexis 387, 4-5, 2014 WL 989701 (Nev. 2014).

> He further testified that, although it appeared Smith had something in his hand when he was tampering with the cash register, he did not see Smith with a knife or any sort of weapon. Mr. Pochowski also testified that, after he chased Smith into the parking lot, Smith confronted him, took up a fighting stance, and threatened to cut Mr. Pochowski with a knife if he did not back off. Mr. Pochowski testified that Smith appeared to have something in his right hand and he presumed it was a knife based on Smith's stance and statement, but he could not fully see Smith's hand or identify what the object was because Smith had his hand angled behind his back. No other person testified that they observed Smith with a knife or other weapon. And officers testified that, upon Smith's arrest, no **knife** or **deadly weapon** was found.[71]

In the case at bar, Cuevas admitted that she never saw a knife and did not know if the perpetrator actually had a knife. All she saw was a white piece of plastic in the assailant's hand which she assumed was a knife. She never said that he threatened her with it, and admitted it may not have even been a knife. Accordingly, the deadly weapon enhancements must be reversed because they are not supported by the evidence in this case.

D. NO COERCION

(Standard of Review: de novo[72])

Claims of convictions which are supported by insufficient evidence are reviewed de novo.[73] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

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71 *Smith, supra,* at 4-5.

72 *United States v. Erskine,* 355 F.3d 1161, 1166 (9th Cir. 2004).

73 *United States v. Shipsey,* 363 F.3d 962, 971 n.8 (9th Cir. 2004).

constitute the crime with which he is charged".[74]

Guerrina was convicted of coercion by ordering Cuevas to "place the office phone on the floor thereby delaying her ability to immediately call for help and/or pouring a liquid in front of the door to delay her ability to immediately leave the premises."[75] Analyzing each of these acts separately, it becomes obvious that neither one constituted coercion.

As to the telephone, there was a second phone in the store that Cuevas could have used to call for help.[76] Cuevas admitted she knew about that phone, and actually used it to talk to a co-worker after the perpetrator left.[77] Moreover, after the perpetrator left, Cuevas simply plugged in the phone that she had been instructed to place on the floor, and used it to call for help.[78]

As to the liquid, before leaving the store, the perpetrator poured some liquid on the floor in front of the door,[79] presumably to keep the victim from approaching the front door, giving him more time for an escape. However, the purpose could not have been to trap the victim in the store, because there were windows in the back of the store through which Cuevas could have escaped.[80] Cuevas admitted

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74 *Apprendi v. New Jersey*, 530 U.S. 466, 477 (U.S. 2000).
75 GA/1/58; G/5/1071.
76 GA/3/628.
77 GA/3/632-633.
78 GA/3/631.
79 GA/3/628.
80 GA/3/621.

that she could have gotten out through those windows.[81] The substance that the perpetrator poured on the floor in front of the door was bleach which was completely harmless and posed no threat to Cuevas. The police at the scene without even taking a sample of the liquid determined that it was harmless and of no evidentiary value.[82] They thought it was "...chlorine or bleach, something nondangerous."[83]

As to the acts pled in the information which the state charged as constituting coercion, the evidence did not support the conviction as to those acts, and the conviction for coercion must therefore be reversed.

E. EXCULPATORY EVIDENCE NOT PRESERVED

(Standard of Review: de novo[84])

Claims of convictions which are supported by insufficient evidence are reviewed de novo.[85] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged".[86]

On the date of the incident, Guerrina was staying at a Motel 6. The police went there and reviewed video surveillance that showed Guerrina returning to the

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81 GA/3/629.
82 GA/4/855.
83 GA/4/712.
84 *United States v. Erskine,* 355 F.3d 1161, 1166 (9th Cir. 2004).
85 *United States v. Shipsey,* 363 F.3d 962, 971 n.8 (9th Cir. 2004).
86 *Apprendi v. New Jersey*, 530 U.S. 466, 477 (U.S. 2000).

motel the date of the incident.[87] The police officer did not impound or obtain a copy of the surveillance video.[88] This would have shown the time of day that he was returning[89] and could have completely exonerated him if it would have been impossible for him to be at the Motel 6 at the time he was there and to have also committed the robbery at the Fast Bucks. The defense brought a motion to dismiss the case for failure of the state to preserve this evidence.[90] The state argued at the hearing on the motion to dismiss that it could produce the detective who reviewed the video and he would be able to testify that Guerrina was seen ***returning*** to the Motel 6 after the robbery at the Fast Bucks, but not the time.[91] The trial court denied the motion because it felt it was not an alibi issue, and because it apparently assumed that the Motel 6 manager would be able to testify as to the crucial details of the video tape.[92]

The information given by the state to the trial court at the time of the hearing on the motion to dismiss was incorrect. In fact, the video tape showed Guerrina ***leaving*** the Motel 6, not returning.[93] Moreover, the officer did not testify whether he saw him leaving the Motel 6 before or after the robbery. If, as the state argued

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87 GA/1/183-184.
88 GA/1/126, 153.
89 GA/1/185.
90 GA/1/123.
91 GA/1/186.
92 GA/1/190.
93 GA/4/731.

at the hearing on the motion to dismiss, the tape showed Guerrina after the robbery, and it showed him leaving the Motel 6, the logical conclusion would be that he was at the Motel 6 while the robbery was being committed, and the Motel 6 videotape would have proven that and completely exonerated Guerrina.

The Court felt it was not an alibi issue because the victim had identified Guerrina as the perpetrator to the police.[94] However, that identification was severely tainted and questionable. Cuevas said he was a co-worker she had briefly met two or three times before,[95] and she then identified him from a driver's license ID that the police showed her rather than a formal photo lineup.[96] She claimed that she saw him in passing as they were changing shifts and then a second time, briefly, at a manager's meeting.[97] The most recent time she claimed to have seen him was six months before the robbery.[98] She didn't recall ever speaking with him prior to the robbery, and did not recognize his voice.[99] So, contrary to the trial court's conclusion that the video tape did not present an alibi issue, that was not correct, given the many problems with the witness identification that were actually uncovered during trial.

In *State v. Daniels*, this Court adopted a two-part test for situations where

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94 GA/3/637.
95 GA/3/638-639.
96 GA/4/713-715.
97 GA/3/639.
98 GA/3/64642.
99 GA/3/643-644.

the state fails to gather evidence in a criminal proceeding. **First**, the evidence must be material meaning that it could change the outcome of the trial. **Second**, if the failure to gather evidence constituted *gross negligence* then the remedy is a presumption that the evidence would have been unfavorable to the state; if the failure to gather evidence constituted *bad faith* then the remedy is dismissal.[100]

The videotape was certainly material to the case because it would have shown the exact distance from the robbery that Guerrina was at an exact time. Guerrina contends this would have afforded him an absolute alibi defense to the charged offenses.

The defense contends that in this case the failure to preserve the Motel 6 videotape amounted to bad faith. Bad faith is defined as actual or constructive fraud or a design to mislead or deceive another or a neglect or refusal to fulfill some duty or some contractual obligation.[101] It seems axiomatic that if the videotape had been helpful to the state, that it would have been preserved. The very fact that the officer asked to view it but then did not preserve it to bolster the state's case, does more than suggest that the officer felt it would hurt the state's case.

At a minimum, the failure to preserve the videotape was gross negligence.

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100 *State v. Daniels,* 114 Nev. 261, 267 (1998).

101 Black's Law Dictionary, 139 (6th 1990); *State v. Hall,* 105 Nev. 7 (1989); *Sheriff, Clark County v. Warrner*, 112 Nev. 1234 (1996).

In *Randolph v. State*, this Court held that gross negligence in preserving evidence would be found where the significance of the evidence was so obvious that it was gross negligence not to impound it.[102] Here, we have evidence which showed the exact time that Guerrina was at a different location on the very date of the robbery he is accused of committing. This was extremely significant, not only to show whether or not it was physically possible for Guerrina to have committed the crime given the distance between the Fast Bucks that was robbed and the Motel 6 where he was seen on camera, but also to show whether or not the clothing he was wearing matched with the clothing described by Cuevas to have been worn by the assailant – gloves, a hat and sunglasses.[103]

For the foregoing reasons, the Court committed reversible error in failing to either dismiss the charges or instruct the jury that the failure to preserve the evidence created a presumption that the videotape evidence would have been favorable to the defense, i.e., established that Guerrina was at the Motel 6 at a time which made it impossible for him to have committed the robbery at the Fast Bucks.

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102 *Randolph v. State,* 117 Nev. 970, 987 (2001).

103 GA/3/634.

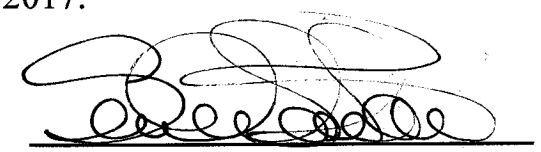
VIII

CONCLUSION

GUERRINA's convictions should be reversed because (1) he was denied his Constitutional right to represent himself, (2) the movement of the victim was incidental to the robbery, (3) there was no evidence that the perpetrator had a deadly weapon, (4) there was no evidence of coercion, and (5) exculpatory evidence was not preserved by the police.

Respectfully submitted,

Dated this 21st day of March, 2017.



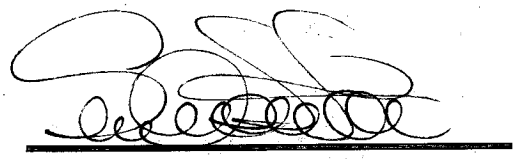
SANDRA L. STEWART, Esq.
Attorney for Appellant

IX

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this opening 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 N.R.A.P. 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 of 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. I further 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 Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it either does not exceed 30 pages or it contains or it contains only 5,871 words.

DATED: March 21, 2017



SANDRA L. STEWART, Esq.
Appellate Counsel for
ROBERT GUERRINA

X

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

OPENING BRIEF AND APPELLANT'S APPENDIX

by mailing a copy on March 22, 2017 via first class mail, postage thereon fully prepaid, to the following:

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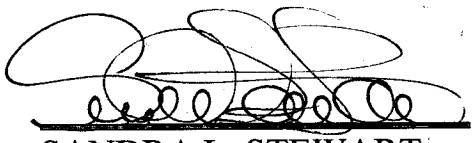

SANDRA L. STEWART