IN THE SUPREME COURT OF THE STATE OF NEVADA



ROBERT GUERRINA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 71444

# RESPONDENT'S ANSWERING BRIEF

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

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## ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because it is an appeal from a Judgment of Conviction based upon a jury verdict for a Category A felony. NRAP 17(b)(2).

## STATEMENT OF THE ISSUE(S)

1. Whether the district court abused its discretion by denying Appellant's untimely request to represent himself, when doing so would have resulted in the trial being delayed.
2. Whether, when viewed in the light most favorable to the prosecution, the evidence was sufficient to support the jury's finding of guilt for Kidnapping, a Deadly Weapon enhancement, and Coercion.
3. Whether Appellant's rights were violated regarding preservation of video footage that was not material or exculpatory, and where Appellant fails to establish any prejudice.

## STATEMENT OF THE CASE

On August 17, 2015, the State filed an Information charging Appellant Robert Guerrina ("Appellant") with Count 1 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060 – NOC 50426); Count 2 – First Degree Kidnapping with Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055); Count 3 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165 – NOC 50138); and Count 4 – Coercion (Category B Felony – NRS 207.190 – NOC 53159). 1 AA 057.

On October 7, 2015, Appellant field a Motion to Dismiss Counsel and Appointment of Alternate Counsel. 1 AA 064-67. New counsel confirmed on November 5, 2015. 1 AA 068.

On November 20, 2105, Appellant filed his first Motion to Continue. 1 AA 086. At a hearing on the motion, he asked the court to set a date in March or April of 2016. 1 AA 094. The district court set trial for March 7, 2016. On February 22, 2016, two weeks before the trial was to begin, Appellant filed his second Motion to Continue. 1 AA 101. The district court vacated the March 7, 2016 trial date and set trial for July 25, 2015. 1 AA 116.

On July 1, 2016, Appellant filed a Motion of Waiver and/or Dismissal of Counsel requesting to represent himself. 1 AA 204. At a hearing on July 14, 2016 (11 days before trial was scheduled to begin), Appellant told the district court that,

if the motion were granted, he would need an unspecified extra amount of time to prepare for trial. 2 AA 239, 240. The district court denied the motion. 2 AA 241.

Appellant's jury trial began on August 1, 2016. 2 AA 264. On August 4, 2016, the jury returned a verdict of guilty on all counts. 5 AA 1019. On September 27, 2016, Appellant was sentenced as follows: COUNT 1 – to a minimum of 24 months and a maximum of 84 months; as to COUNT 2 – to a minimum of 60 months and a maximum of 180 months, plus a consecutive term of a minimum of 24 months and a maximum of 60 months for use of a deadly weapon, Count 2 concurrent with Count 1; as to COUNT 3 – to a minimum of 36 months and a maximum of 96 months, plus a consecutive term of a minimum of 36 months and a maximum of 96 months for use of a deadly weapon, Count 3 concurrent with Count 2; as to COUNT 4 – to a minimum of 12 months and a maximum of 36 months, concurrent with Count 3; for an aggregate sentence to a minimum of 84 months and a maximum of 240 months in the Nevada Department of Corrections, with 435 days credit for time served. 5 AA 1071.

The Judgment of Conviction was filed on September 29, 2016. 5 AA 1071. On the same day, Appellant filed a Notice of Appeal. 5 AA 1075. Appellant's Opening Brief ("AOB") was filed on April 10, 2017. The State responds herein.

## STATEMENT OF THE FACTS

On the morning of July 13, 2015, Ana Cuevas, an employee at Fast Bucks, located at 709 East Horizon Drive, #140, Henderson, NV 89015, arrived for work. Because she was the manager, she was usually responsible for opening the store. She parked her car in the lot and got out of the car. The parking lot was in view of a nearby McDonald's; she saw a man initially approach but then act like he was going to the McDonald's. 3 AA 606. As she walked to the front door to unlock it, the man walked up to her carrying what looked like a switchblade knife. 3 AA 607-08. He told Ana to open the door. 3 AA 608-09, 610. The man forced Ana into the store with him and locked the door behind him.[1] 3 AA 611, 612.

When the man approached her outside the building, Ana recognized him as Appellant, a former manager at the same store. 3 AA 614, 638-39; 4 AA 672. They had worked together and attended a training session together. 4 AA 682. She kept this information to herself, however, because she was afraid Appellant would hurt her. 3 AA 615-16. Appellant ordered her inside the store and told her to get the money. 3 AA 616. The money was stored in a filing cabinet in a back room. 3 AA 617-18. The back office had two windows, but they did not open, and the windows

[1] Money from the previous day was kept in the store overnight and deposited in the bank in the morning because, by the time the store closed, the bank was no longer open. The Monday morning deposit tended to be the largest of the week because it included money collected on both Friday and Saturday.

were blocked by boxes that Ana would have had to move before she could even get to the windows. 3 AA 622-23; see 3 AA 578.

Up to this point, Appellant had stayed near the front door, where the security camera did not have coverage. 3 AA 616; 4 AA 657. As Ana came out of the back room with the money, she saw Appellant take out a spray can from the bag that he was carrying and spray the security camera. 3 AA 619. After she handed over the money (over $1,000), Appellant took her wallet and cell phone. AA 624-25. Appellant told her to disconnect the office phone and throw it on the floor. 3 AA 627.

Before he left, Appellant took something out of his bag and poured a liquid that was later identified as bleach on the floor where he was standing. 3 AA 631. Ana did not know what the substance was, but was afraid that it was dangerous; thus, it prevented her from moving toward the door. 3 AA 630. Appellant took the keys and locked the door behind him, locking Ana inside the store. 3 AA 628.

After Appellant locked her in the store, Ana called 911 and reported that she had been robbed. When police arrived, they found Ana locked inside the store. 4 AA 711. Police officers had to pick the lock. 4 AA 711. When the police found Ana, she was upset; she looked shaken and had been crying. 4 AA 712. Ana told the police that she had recognized Appellant and gave them his name. 4 AA 712-13. Police subsequently showed her a photograph of Appellant obtained from the Department

of Motor Vehicles, and Ana confirmed that it was the same man who had robbed her. 4 AA 715.

Police contacted Appellant's ex-wife, Michele, who told them that Appellant was staying at a Motel 6 somewhere in Las Vegas. 4 AA 716. Police found this Motel 6 and confirmed that it was where Appellant had been staying by viewing video surveillance of Appellant leaving the motel on the day of the robbery. 4 AA 719, 721. However, Appellant was no longer there; he had left that particular Motel 6 on the day of the robbery, before his check-out date, and never returned. 4 AA 721. Eight days after the robbery, police located Appellant at a Budget Suites. 4 AA 723-27.

In June 2015, Appellant was unemployed. 5 AA 870. Appellant and Michele had recently divorced. In the week before the robbery, Appellant repeatedly texted Michele asking her for money. 5 AA 877-81. After the robbery, Appellant suddenly had money for new clothes and shoes; when police found and arrested Appellant, he was wearing brand-new clothes and shoes and had a new backpack with a new cell phone. 4 AA 727-28.

## SUMMARY OF THE ARGUMENT

First, the district court did not abuse its discretion by denying Appellant's request for self-representation. This Court has held that denial of a motion for self-representation is not an abuse of discretion if the motion is untimely or made for the

purposes of delay. Appellant's request was untimely and granting it would have necessitated another continuance of the trial. Appellant delayed until three weeks before trial to file the motion, but offered no reasonable cause for the delay. Therefore, this claim should be denied.

Second, the evidence was not insufficient to support Appellant's convictions for Kidnapping, Coercion, and the deadly weapon enhancement. There was substantial evidence introduced at trial to support the guilty verdict, including but not limited to, that when Appellant forced Ana into the store, he substantially increased the risk of harm to her. The jury also heard that Appellant had a switchblade knife and forced Ana to give him over $1,000. Ana testified that she only did so because she was afraid of him and the knife. When viewed in the light most favorable to the prosecution, any reasonable juror would have found Appellant guilty of these crimes. Therefore, this claim should be denied.

Finally, the State did not improperly fail to preserve the Motel 6 video footage. The evidence that Appellant claims should have been preserved—video of Appellant leaving his motel on the day of the robbery—is not material nor is it exculpatory. Additionally, the State did not act in bad faith regarding this video. Appellant also fails to meet his burden of showing that he was prejudiced. Therefore, this claim should be denied.

## ARGUMENT

### I. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO REPRESENT HIMSELF

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." However, a defendant can waive the right to counsel and, if he chooses to represent himself, he must satisfy the court that his waiver of the right to counsel is knowing and voluntary. Faretta v. California, 422 U.S. 806, 818-19, 835, 95 S. Ct. 2525 (1975); Vanisi v. State, 117 Nev. 330, 337-38, 22 P.3d 1164, 1169-70 (2001). In assessing a waiver of the right to counsel, the inquiry is whether the defendant can knowingly and voluntarily waive his right to counsel, not whether the defendant can competently represent himself. Tanksley v. State, 113 Nev. 997, 1000-01, 946 P.2d 148, 150 (1997). A defendant's technical knowledge is not relevant to the inquiry and a request for self-representation may not be denied solely because the defendant lacks legal skills. Id.

The ability to waive the right to counsel is not absolute. A request may be denied if the request is equivocal, the defendant abuses his right by disrupting the judicial process, or the defendant is incompetent to waive his right to counsel. Id. The district courts also have the discretion to deny a defendant's request to represent themselves if the request is untimely. See O'Neill v. State, 123 Nev. 9, 18, 153 P.3d 38, 44 (2007) (affirming denial of self-representation request due to untimeliness of

request); see also Vanisi, 117 Nev. at 338, 22 P.3d at 1170 ("A court may also deny a request for self-representation if the request is untimely, equivocal, or made solely for purposes of delay or if the defendant is disruptive."). A district court should be permitted, in its discretion, to deny a request for self-representation on the ground of untimeliness alone, if the request is not made within a reasonable time before commencement of trial or hearing and there is no showing of reasonable cause for the lateness of the request. Lyons v. State, 106 Nev. 438, 445-46, 796 P.2d 210, 214 (1990)

In this case, the district court denied Appellant's request for self-representation because the request was untimely and would have resulted in delay. As required, the district court specified the rationale for denying Appellant's request, noting that it was untimely and that constantly appointing new attorneys absent some showing from Appellant would lead to unnecessary extensions:

> THE COURT: Okay. Well, sir, I am denying your Pro Per Motion of Waiver and/or Dismissal of counsel and to represent yourself, we're getting too soon to the trial. You should have thought about this earlier. And he is the second lawyer that I've appointed and I'm not gonna get into the business of appointing lawyer, after lawyer, after lawyer, okay?

2 AA 239-40.

In Lyons, the defendant made an untimely request to represent himself. Although the request in Lyons was made later than the request in this case (on the first day of trial), the consequences of the untimely request were the same. Lyons

had already been represented by multiple attorneys but kept finding fault with them. Here, Appellant was represented by at least two attorneys, but was dissatisfied with both. Lyons' request would have resulted in a delay of the trial, as it would have here. Finally, Lyons had no good reason or reasonable cause for making the untimely request. Similarly, Appellant offers no explanation for why his request for self-representation could not have been made earlier.

Instead of offering a showing of reasonable cause to explain the lateness of his request, Appellant argues that Nevada law—allowing for a finding of untimeliness if it would result in a delay—violates Faretta. In doing so, Appellant advocates an overly literal interpretation of Faretta where any request for self-representation should be entertained as timely as long as it is made "weeks" before the start of trial.[2] However, contrary to Appellant's interpretation of Marshall v.

[2] In Faretta, the United States Supreme Court did not specify how many weeks before trial a request should be made, although there was likely a time component to the request, given that the Court cited the fact that Faretta's request was made "weeks before trial." Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975). In fact, Faretta's request was made so far ahead of trial that "several weeks" passed from the time that Faretta filed his motion to when the trial court held a hearing to inquire into Faretta's ability to conduct his own defense, and the hearing was still held before trial. Faretta, 422 U.S. at 807-08, 95 S. Ct. at 2527-28. Nothing in Faretta suggests that a defendant has the right to have a request to represent himself entertained when it would cause extensive delays. In fact, the critical time aspect in Faretta seemed to be that Faretta had sufficient time before trial to prepare an adequate defense, had the trial court granted his request. Here, in contrast, Appellant did not have sufficient time to craft a defense, and would have needed a continuance for an unspecified amount of time. Nothing in Faretta, or any other controlling case,

Taylor, 395 F.3d 1058, 12061 (9th Cir. Cal. 2005), the Ninth Circuit has not—nor has any other court—adopted a test under which a request for self-representation is timely so long as it is made more than one week before the start of trial. Instead, the inquiry into whether a request for self-representation is timely is fact-specific. "'Faretta does not articulate a specific time frame pursuant to which a claim for self-representation qualifies as timely,' nor does it preclude a consideration of factors other than the number of weeks before trial a self-representation motion was made." Faultry v. Allison, 623 F. App'x 315, 316 (9th Cir. 2015) (internal citations omitted).

Moreover, trial in this case had already been continued when the district court appointed new counsel after Appellant complained about appointment of the Public Defender's Office. 2 AA 236. In particular, Appellant claimed that the Public Defender's Office did not communicate well and had not turned materials over to him. 1 AA 070-71. On October 29, 2015, following Appellant's request for new counsel, the district court appointed Edward Hughes, Esq., as counsel. 1 AA 072. However, the district court made it clear that Appellant could not keep changing attorneys until he found the perfect counsel. 1 AA 072. This exchange occurred on October 29, 2015, eight months before Appellant filed his request for self-representation.

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requires a court to entertain a request for self-representation when it would cause unreasonable delays and violate court rules, as it would have in this case.

Mr. Hughes confirmed as counsel on November 5, 2015. 1 AA 084. Appellant then requested two continuances, which led to months-long delays in the start of trial. 1 AA 084, 086, 113. Following the second request for continuance on March 3, 2016, the district court set a calendar call date of July 21, 2016, and a trial date of July 25, 2016. 1 AA 113.

Nevertheless, despite several months during which he could have requested to represent himself, Appellant waited until July 1, 2016, to request that he be allowed to represent himself. At that time, he demanded yet another continuance so that he could prepare himself. In particular, Appellant told the district court that, if the district court granted his motion, he would need more time to prepare for trial:

> THE COURT: Okay. I'm not continuing the trial, sir.
> THE DEFENDANT: Unfortunately if I do get granted the pro se I would need a continuance just to prepare, do the research, as well as, you know, go over some of my files. I still don't have my entire discovery and I've been in custody for approximately a year.

2 AA 237. Thus, allowing Appellant to represent himself so close to the trial would have caused even more delay.

The district court has no obligation to entertain multiple requests for a continuance when doing so would cause unreasonable delays. See, e.g., Ex parte Tramner, 35 Nev. 56, 78, 126 P. 337, 345 (1912) ("a continuance in a criminal case is within the discretion of the court, and unless there is an abuse of its discretion its actions will be sustained.") Thus, the district court did not abuse its discretion in

denying Appellant's request for self-representation. Therefore, this claim should be denied.

## II. THE EVIDENCE WAS NOT INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION

Appellant claims that there was insufficient evidence to support his convictions for Kidnapping, the Deadly Weapon enhancement, and coercion. This claim fails.

### A. **Standard of review**

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing 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." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 1280, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380; see Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (holding that it is the function of the jury to weigh the credibility of the identifying witnesses). In all criminal proceedings, a jury's verdict will not be disturbed upon appeal if there is evidence to support it. Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972). The evidence cannot be weighed by an appellate court. Id. The Court is not required to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S. Ct. at 2789. This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S. Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (*citing* Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976).

B. **Appellant's conviction for Kidnapping**

Under NRS 200.310, First Degree Kidnapping occurs where a person "willfully seizes, confines … conceals, kidnaps or carries away a person by any means whatsoever … for the purpose of … robbery upon or from the person…" In order to sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint has to 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. Mendoza v. State, 122 Nev. 267, 269, 130 P.3d 176, 177 (2006). The Nevada Supreme Court has clarified:

> [W]here the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associate offense, i.e., robbery . . . or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged, dual convictions under the kidnapping and robbery statutes are proper. Also . . . dual culpability is permitted where the movement, seizure or restraint stands alone with independent significance from the underlying charge.

Mendoza, 122 Nev. at 274-75 130 P.3d at 1780-81.

In Gonzales, the Nevada Court of Appeals considered a case in which the defendants entered through an open garage door and accosted the victim at gunpoint. Gonzales v. State, 131 Nev. ___, ___ 354 P.3d 654, 656 (Nev. Ct. App. 2015). They

then forced her to enter her home. Id. Once inside the home, they continued to move her around. Id. at __, 354 P.3d at 656-57. The Nevada Court of Appeals found that the victim's "movement substantially exceeded that necessary to complete the robbery and/or substantially increased the harm to her," and highlighted the significance of moving the victim from the open garage to the interior of the house:

> The jury could have found that, by moving [the victim] from a public place into a private one, [the defendant] substantially increased the risk of harm to [her], because had [the victim] been detained in the open garage while her residence was ransacked, she might have been seen by passersby who could have called police, she might have had a chance to cry out to her neighbors for help, and she might even have found an easier opportunity to escape while her house was being searched room by room. But these opportunities were diminished once she was removed from public view. Furthermore, moving [the victim] from the open garage into the secluded interior of the locked house, and then throughout the house, may have psychologically emboldened the defendant to escalate the violence of the crime, as well as to extend the length of time over which it took place, once [the victim's] fate was less likely to be witnessed by her neighbors

Id. at ___, 354 P.3d at 665.

In this case, the jury heard that Appellant came up to Ana outside the store, while she had her keys and was unlocking the door, and forced her inside against her will. 3 AA 607-12. The movement was in excess of what was necessary to complete the robbery because Appellant could have taken Ana's keys and unlocked the door himself. Because he was a former manager at that Fast Bucks location, he likely

knew where the money was kept inside the store and, therefore, did not need Ana to retrieve the money for him. 4 AA 672, 673. While outside in the parking lot, Ana was in the open and in view of a nearby McDonald's and therefore had a higher likelihood of escape. Taking her inside the store not only removed her from view, but made it significantly less likely that someone could hear her if she screamed for help. It also made it impossible for her to run away. The store did not have a backdoor and the windows in the back office did not open. 3 AA 622-23.

Ana also was afraid to call for help, because she was cognizant that she was trapped in a confined space with Appellant. 3 AA 625. Although the back room had windows, the windows were sealed shut and did not open. 3 AA 622-23. Ana would have had to break the windows in order to escape. 4 AA 655. Additionally, there were boxes blocking the path to the windows, making it difficult to even reach them. 3 AA 623. Moving Ana into the store significantly increased the risk to her, as she was now not even visible to anyone who might pass in front of the office, where there was still the possibility that she could signal for help if someone saw her.

When viewed in the light most favorable to the prosecution, a reasonable juror could have found Appellant guilty of both kidnapping and robbery. Therefore, this claim should be denied.

C. **The deadly weapon enhancement**

Appellant was found guilty of burglary while in possession a deadly weapon, kidnapping with a deadly weapon, and robbery with a deadly weapon. Appellant asserts that the evidence was insufficient for the jury to find that he possessed a deadly weapon during these crimes.

Under NRS 205.060, a person convicted of burglary who has in his or her possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure or upon leaving the structure, is guilty of a category B felony. The deadly weapon enhancements for kidnapping and robbery are governed by NRS 193.165, which defines a deadly weapon as "any weapon, device, instrument, material or substance which … is readily capable of causing substantial bodily harm or death."

In this case, Ana testified that Appellant had a switchblade knife in his hand when he approached her in the parking lot:

> THE WITNESS: He was carrying a bag, a plastic bag, and he had a knife, a folding knife on him.
> MS. LAVELL: And where was the folding knife?
> THE WITNESS: In his hand?
> MS. LAVELL: Which hand, if you remember?
> THE WITNESS: I don't remember.
> MS. LAVELL: Was the blade exposed or closed?
> THE WITNESS: It was closed.
> MS. LAVELL: How do you know it was a folding knife?
> THE WITNESS: I'm familiar with what they look like.

3 AA 610.

Ana also testified that she did not want to go into the store with Appellant, but was afraid he would hurt her with the knife if she did not:

> MS. LAVELL: Did you want to go in there at that point?
> THE WITNESS: No, not with him.
> MS. LAVELL: Okay. Why?
> THE WITNESS: Because I was scared that he was going to hurt me.
> MS. LAVELL: Why were you scared that he was going to hurt you?
> THE WITNESS: Because he had a knife on him.

3 AA 611-12.

In spite of this evidence, Appellant argues that there was no evidence that he had a deadly weapon.[3] To support this argument, Appellant relies only upon Smith v. State, No. 60029, 2014 Nev. Unpub. LEXIS 387 (Mar. 12, 2014), an unpublished opinion from 2014. Such reliance is improper. Although recent amendments to the Nevada Rules of Appellate Procedure allow for citation to unpublished orders, the amendments apply only to orders entered on or after January 1, 2016. NRAP

[3] At trial, Appellant argued that the object could have been a corkscrew rather than a switchblade. However, Ana testified that she saw a knife and that she recognized the handle as belonging to a switchblade. 3 AA 607-08. It is the role of the jury, not the Court, to weigh conflicting evidence and determine the credibility of witnesses, and the jury in this case determined that Ana's testimony was credible. Rose v. State, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007). (And, as the State argued at trial, a corkscrew could still be a deadly weapon because it could cause substantial bodily harm. See NRS 193.165(6)(b) (defining a deadly weapon as "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death").

36(c)(3). Unpublished orders issued before January 1, 2016 may not be regarded as precedent or cited as legal authority. Id. As the Smith order was entered before January 1, 2016, it is not persuasive. MB Am., Inc. v. Alaska Pac. Leasing Co., 367 P.3d 1286, 1292 n.1 (Nev. 2016).

Even assuming, arguendo, that citation to Smith were appropriate, Smith is easily distinguished from this case. In Smith, the witness did not see the defendant with a knife or any other weapon in Smith's hand as he took money from a register. Smith was chased into the parking lot, where an asset protection specialist confronted him. Smith threatened to cut the specialist with a knife if he did not back off. However, the asset protection specialist could not see Smith's hand because it was held behind his back, and only assumed that Smith had a knife because of the statement he made. When Smith was arrested immediately following the confrontation in the parking lot, he did not have a knife in his hand or on his person. Thus, there was no evidence that Smith had a dangerous weapon on his person when he committed the robbery. Here, in contrast, there was unequivocal testimony that Appellant had a weapon. The victim, Ana, saw a switchblade knife in Appellant's hand. 3 AA 607-08. Additionally, that Appellant did not have a knife on his person when he was arrested is not dispositive here because, unlike in Smith, Appellant was not arrested immediately at the scene of the crime. Rather, Appellant was arrested over one week later, after he had gone back to his residence and had multiple

opportunities to get rid of the knife. 4 AA 719-27. For example, Appellant had time to buy new clothes and a new backpack, which he had with him when he was arrested.4 AA 727-28.

When viewed in the light most favorable to the prosecution, there was sufficient evidence for any rational trier of fact to find the essential elements of a deadly weapon enhancement beyond a reasonable doubt. Therefore, this claim should be denied.

D. **Appellant's conviction for Coercion.**

NRS 207.190(1)(a) provides, in pertinent part, that it is unlawful to "[u]se violence or inflict injury" in order to "compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing."

Here, Ana had the right to move toward the door to attempt to escape after Appellant locked her in following the robbery. However, Appellant poured a liquid on the floor inside the store. 3 AA 631. Ana believed that the liquid was dangerous, and she was therefore afraid to move toward the door after Appellant left. 3 AA 630. When the police arrived at the scene, they also did not know what the liquid was and it was only after testing was conducted that it was identified as bleach. 1 AA 003; 4 AA 712. Ana testified that Appellant's actions prevented from moving toward the door. 3 AA 630.

Additionally, Ana had the right to call police. However, Appellant ordered Ana to disconnect the office phone and throw it on the ground while he held the knife. 3 AA 627. When Ana was forced to disconnect the phone, she was prevented from calling the police. Ana testified that she was in fear and in shock. 3 AA 611-12. Ana testified that Appellant's actions prevented her from calling for help. 3 Aa 623. Although Ana eventually reassembled the phone, Appellant's actions nonetheless constituted coercion because Ana had the right to call the police immediately.

When viewed in the light most favorable to the prosecution, a reasonable juror could have found beyond a reasonable doubt that Appellant was guilty of coercion. Therefore, this claim should be denied

## III. THE STATE DID NOT IMPROPERLY FAIL TO PRESERVE EXCULPATORY EVIDENCE

Appellant alleges that his due process rights were violated when the State did not preserve video of him leaving a Motel 6 on the day of the robbery. In particular, Appellant alleges that police viewed video surveillance at Motel 6, but did not impound or copy it.

The Nevada Supreme Court has held that "police officers generally have no duty to collect all potential evidence from a crime scene." Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998). However, "this rule is not absolute." Id. The Nevada Supreme Court has consistently held that "to establish a due process violation

resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed. Sheriff v. Warner, 112 Nev. 1234, 1239-1240 (1996) (emphasis added); see Daniels, 114 Nev. at 261.

The Nevada Supreme Court has described bad faith as police action taken specifically for the purpose of making evidence unavailable to the defense. Warner, 112 Nev. at 1240. The term bad faith is defined as, "generally implying or involving 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, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Black's Law Dictionary, 139 (6th 1990). The Nevada Supreme Court has continually suggested that specific facts have to be presented in order to constitute a finding of bad faith on behalf of the State. See generally State v. Hall, 105 Nev. 7, 768 P.2d 349 9 (Nev. 1989); Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (Nev. 1998); Warner, 112 Nev. at 1234 (1996).

First and foremost, Appellant was known to the victim so identification was not an issue in this case. Additionally, the officer who viewed the video testified

under oath that there was no conflict in times that would suggest an alibi. 4 AA 731. Therefore, the State received no benefit by not impounding the video.

Next, the burden of demonstrating prejudice from the State's alleged loss or destruction of evidence is the defendant's. Warner, 112 Nev. at 1240. The Nevada Supreme Court has held that this requires "some showing that it could be reasonably anticipated that evidence sought would be exculpatory and material to defendant's defense. It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence, nor is it sufficient for the defendant to show only that examination of the evidence would be helpful in preparing his defense." Warner, 112 Nev. at 1240.

Appellant's argument that the Motel 6 video was material and exculpatory fails. For evidence to be material there must be a "reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Daniels, 114 Nev. at 267. In this case, the video would have changed nothing about the outcome of the proceedings. The video was not material for purposes of identification because the victim recognized Appellant as a former coworker. The timestamp on the video did not provide an alibi for the robbery. Thus, the video would not have been material to establishing an alibi or for purposes of identification. As such, Appellant fails to establish any material purpose the video could have served.

Further, the record also contradicts Appellant's argument that the video would have been exculpatory. Appellant ignores that Ana clearly identified Appellant, a former co-worker, in her 911 call and gave police his name before she ever saw a photograph of him. Once Ana was shown a photograph, she immediately identified Appellant as the man who had robbed her. It was this identification that led police to Motel 6 where officers, along with the motel manager, viewed the video and saw that Appellant had returned to the Motel 6 on the date of the incident, but had left that evening and not returned, even though he had paid to stay the night. 4 AA 721. The officer who viewed the testified that there was no conflict with the time of the robbery that would have provided an alibi. 4 AA 731.

"Mere assertions by defense counsel that an examination of the evidence will potentially reveal exculpatory evidence does not constitute a sufficient showing of prejudice." Warner, 112 Nev. at 1240. Appellant does not assert that the video would show him returning to the motel at the same time the crime was being committed. Rather, he simply supposes it might have shown this. Additionally, he simply supposes he may have been wearing clothes on the video, different than those described by the victim. Relying on a hoped-for outcome, without any showing (or even allegation) that the timestamp of the video would make it impossible for him to have robbed the store, is insufficient. See Warner, 112 Nev. at 1240. Given eyewitness testimony by the victim of the robbery—a former co-worker who

identified him almost immediately—Appellant cannot seriously argue that he was prejudiced by the alleged failure to preserve the video, especially when the timestamp of the video did not provide an alibi. There is nothing to support Appellant's conclusory assertion that the results of the trial would have been different based on the video.

For these reasons, Appellant fails to show that the video was material or exculpatory, or that he was prejudiced by the failure to preserve it. Therefore, this claim should be denied.

## CONCLUSION

Based on the foregoing, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 9th day of August, 2017.

Respectfully submitted,

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## 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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,400 words and does not exceed 30 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 9th day of August, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 9, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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