IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, III

Appellant,

v.

Docket No. 54272

STATE OF NEVADA,

Respondent.
_____/

Direct Appeal from a Judgment of Conviction
Eighth Judicial District Court
The Honorable Valerie Adair, District Judge
District Court Case No. C212667/C241394

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction filed by Judge Valerie Adair of the Eighth Judicial District Court on June 25, 2009 in which a jury convicted Louis Hidalgo, III, of Count I, Conspiracy to Commit a battery with a deadly weapon or battery resulting in substantial bodily harm; Count II, Second degree murder with the use of a deadly weapon; Count III, Solicitation to commit murder; and Count IV, Solicitation to commit murder. This was the final judgment or verdict in Hidalgo's case. Pursuant to NRS 177.015(4), this Court has jurisdiction to hear this appeal. Hidalgo timely filed his Notice of Appeal on July 16, 2009. See NRAP 4(b)(1)(A).

STATEMENT OF ISSUES

I. The District Court's Instruction 40 to the Jury that the existence of the conspiracy and Little Lou's membership in it could be established by 'slight evidence' requires reversal.

II. The District Court erred when it failed to admit a recorded statement of Carroll, which exculpated Little Lou, for the truth of the matter asserted and as substantive evidence of innocence in violation of Chia v. Cambra, 360 F.3D 997 (9TH Cir. 2004), NRS 51.315, NRS 51.035(3)(b),(d).

III. The District Court erred when it denied the admission of the former testimony of Jayson Taoipu.

IV. Insufficient evidence existed to convict Little Lou because the State's case was entirely dependent upon the testimony of an accomplice.

V. The Prosecutor's intentional failure to memorialize Espindola's plea negotiation proffer requires reversal in this case.

CASE STATEMENT

This is a criminal appeal from a jury verdict convicting Louis Hidalgo, III, of Count I, Conspiracy to Commit a battery with a deadly weapon or battery resulting in substantial bodily harm and Count II, Second degree murder with the use of a deadly weapon. This appeal specifically does not challenge Count III, Solicitation to commit murder; and Count IV, Solicitation to commit murder. Count III and Count IV were specifically determined by the trial court to be a separate and unique conspiracy from Count I and Count II. This brief has common issues with the co-defendant/appellant Luis A. Hidlago Jr., Docket No. 54209. The common issues between Luis A. Hidalgo Jr., Docket No. 54209, and Luis Hidalgo, III are issues I, IV and V of this brief and issues A, B, and C in Luis Hidalgo Jr's opening brief, Docket No. 54209.

FACTUAL STATEMENT

Louis Hidalgo, Jr., "Mr. H," was the owner of a gentlemen's club, the Palomino Club, and an autobody shop named Simone's Autobody. AA, Vol.V.,932.[1] Each of Mr. H's businesses were located in Las Vegas, Nevada. Mr. H.'s girlfriend, Anabel Espindola, "Espindola," was the General Manager/Business Administrator of the Palomino Club. AA, Vol.V,p.932; Vol.VI, 1259-60. In fact, she ran every aspect of the club. AA, Vol.VIII,1803; Vol.IX,1911. Espindola was also the General Manager of Simone's Autobody. AA p.1259. Louis Hidaldgo, III, "Little Lou," was Mr. H's son. Little Lou assisted at the club doing

[1] AA is the abbreviation for Appellant's Appendix; Vol. is the abbreviation for Volume, which is followed by the page number.

menial jobs and played no part in making business decisions. AA, Vol.VI,1261; Vol.IX, 2004-06.

Espindola testified that on May 19, 2005 while at Simone's, she received a telephone call from Deangelo Carroll, "Carroll," an employee at the Palomino club, who stated that another employee, Timothy Hadland, "TJ," the murder victim in this case, was bad mouthing the Palomino club. AA, Vol.V, 942-43. She testified that after she got off of the telephone, Mr. H and Little Lou were present in her office and she told them what Carroll had stated to her. AA, Vol.V,944-46. She stated that upon receiving this information, Little Lou became very angry with Mr. H because Little Lou believed that Mr. H was not going to do anything to TJ for his actions. AA, Vol.V,946-47. Espindola testified that Little Lou entered into a verbal argument with Mr. H in which Little Lou stated that Mr. H would never be like Gilardi and Rizzolo (two strip club owners with prior legal troubles) because they take care of business. AA, Vol.V, 946-48. She further testified that Mr. H told Little Lou to mind his own business and that Little Lou then left the building. AA, Vol.V,948-49.

Mr. H, however, testified that this meeting between Mr. H, Little Lou, and Espindola never occurred. AA,Vol.IX,1926-27. Mr. H further stated that Little Lou never made any statement to him regarding Gilardi and Rizzolo. AA, Vol.IX,1927. Mr. H did state, however, that he learned of TJ's behavior from Carroll in Mr. H's office at the Palomino Club in the presence of Espindola. AA, Vol.IX,1928-30. Mr. H also testified that Little Lou was not present. AA, Vol.IX,1932. Mr. H testified that Mr. H did not think TJ's actions were a problem. AA, Vol.IX,1931. Mr. H testified that Carroll stated that maybe Carroll should talk to TJ and Espindola told Carroll to talk to him on his own. AA, Vol.IX,1931. Mr. H testified

that upon Carroll leaving his office, he told Carroll something to the effect of tell TJ to stop it or stop spreading shit. AA,Vol.IX,1932.

Espindola testified that after Little Lou left the office at the conclusion of the alleged argument between Mr. H and Little Lou, Little Lou left Simone's and she did not see him again on that night. AA,Vol.V,958; Vol.IV,1255. She further testified that she was with Mr. H for the duration of the evening of May 19, 2005 and Mr. H never spoke to Little Lou, she never spoke to Little Lou that night, and she never saw Mr. H and Little Lou together that night. AA, Vol.V,977; Vol.IV,1255. In addition, she testified that when Little Lou left Simone's after the alleged argument between him and Mr. H, no discussion or agreement was reached between Little Lou and Mr. H to speak to TJ about his bad mouthing the club, to threaten TJ, or to kill TJ. AA,Vol.VI,1255-56.

Espindola further testified that after she left Simone's on May 19, 2005, she went to the Palomino. AA, Vol.V,960. Once at the Palomino, Espindola stated that she and Mr. H were in Mr. H's office when Carroll came in the office and had a discussion which she did not hear because she was not paying attention. AA,Vol.V,966. Next, she testified that Mr. H and Carroll walked out of Mr. H's office and some time later Mr. H returned to his office with Pilar Handley, "PK," who worked with the club as an independent contractor regarding lighting, etc. AA, Vol.V,967-68;Vol.VIII, 1708.

Espindola testified that at this point Mr. H asked her to follow him to the kitchenette area of his office which she did. AA,Vol.V,968. While in the kitchenette area of Mr. H's office, Espindola testified that Mr. H told her to call Carroll and tell him to go to plan B. AA,Vol.V,969. Espindola stated that she called Carroll and told him to go to plan B and that

Carroll stated that "I'm already here," after which the telephone was disconnected. AA,Vol.V,972. She testified that she thought something bad was going to happen to TJ and she tried calling Carroll back but could not get connected. AA,Vol.V,975. She testified that she then went back into Mr. H's office and told Mr. H that she told Carroll to go to plan B but did not say anything else to Mr. H because he then walked out of the office with PK. AA,Vol.V,976.

She claimed that a while later Mr. H came back into the office and Carroll then knocked on the door of his office. AA,Vol.V,976-77. She claimed that she was present when Carroll came into Mr. H's office and that Carroll sat down and looked at Mr. H and said it's done. AA,Vol.V,977. Espindola testified that Mr. H then looked at her and said go get five out of the safe. AA,Vol.V,978. Throughout her testimony Espindola confirmed that Little Lou did not plan any action regarding TJ, did not participate in any action against TJ and did not pay regarding any action against TJ. AA,Vol.VI,1247,1251,1255.

Mr. H testified that he never asked or insinuated to anybody, including Carroll, to have TJ harmed. AA,Vol.IX,1934. He further testified that he never asked Espindola to call Carroll and tell him to go to plan B. AA,Vol.IX,1940. Mr. H testified that he learned that TJ was harmed when Carroll came to his office at the Palomino in the late hours of May 19, 2005 when Espindola was present. AA,Vol.IX,1935-36. While in Mr. H's office, Carroll, who was noticeably disturbed, said to Espindola, "Ms. Anabel, I fucked up, I fucked up" and that the "dude got out of the car and put the bullet in the guy's head." AA,Vol.IX,1936. Mr. H testified that he looked at Carroll and said, "What the fuck did you do?" AA,Vol.IX, 1936-37. He stated that Espindola stood up from the chair, put her hands on her face and said, "Oh my

god" several times and then called Carroll a stupid, stupid man. AA,Vol.IX,1937. Mr. H then stated that Carroll asked for money and stated that the shooter was a gang member. AA,Vol.IX,1937-38. The fact that the shooter was a gang member frightened Mr. H which prompted him to waive his hand for Espindola to get the cash. AA,Vol.IX,1938-39.

PK testified that on the evening of May 19, 2005, he met in Mr. H's office twice. AA,Vol.VIII,1725-26. The first time was with Mr. H, Espindola, and Little Lou regarding the firing of Carroll. AA,Vol.VIII,1780-81. At that meeting, he testified that Little Lou attempted to call Carroll to determine his whereabouts and the location of the club's limousine.[2] AA,Vol.VIII,1780-81. The second meeting was with Mr. H and Espindola in Mr. H's office at the Palomino around 11:00 pm. AA,Vol.VIII,1725. He stated that he never saw Mr. H and Espindola walk into the kitchenette area of his office. AA,Vol.VIII,1727. PK testified that after his meeting with Mr. H and Espindola around 11:00 pm, he saw Carroll, who looked disturbed, at the Palomino. AA,Vol.VIII,1757,1759. PK stated that Carroll stated that he needed to see Espindola and Mr. H because he "fucked up." AA,Vol.VIII,1759. PK also testified that Carroll was with a person named Kenneth Counts, who was determined to be the shooter of TJ, and that two African American young men were outside who were later determined to be Rontae Zone and Jayson Taoipu. AA,Vol.VIII,1786-87. PK testified that he never saw Carroll again that night and did not know where he went in the Palomino. AA,Vol.VIII,1760. PK further testified that when Carroll was looking for Mr. H and

[2] This is the only phone call throughout the night made by Little Lou to Carroll or any of the conspirators.

Espindola at the Palomino on May 19 he never told PK that he needed to speak to Little Lou. AA,Vol.VIII,1768.

Rontae Zone, a friend of Carroll, who assisted Carroll at his job at the Palomino by passing out fliers with Carroll to promote the Palomino testified on behalf of the State. AA,Vol.II,383-84. On the night of May 19, 2005, Zone was with Carroll and with his friend Jayson Taoipu. AA,Vol.II,384-85. Zone gave many statements in this case, each of which was different. AA,Vol.III,548. Zone testified that during the afternoon hours of May, 19, 2005, Carroll told Zone and Taoipu that "Little Lou was – said that Mr. H wanted someone killed;" however, Zone later stated that the word used was not "killed" but instead "dealt with." AA,Vol.II,391,394. On cross-examination, Zone admitted that he previously testified that the words came from Mr. H to Carroll instead of from Mr. H, to Little Lou, to Carroll. AA,Vol.III,547.

Zone further testified that Carroll told him that Little Lou had spoken about baseball bats and trash bags; however, no baseball bats and trash bags were ever attained. AA,Vol.,392,399. In addition, at a previous court proceeding (the murder trial of Kenneth Counts), Taoipu testified that *Anabel* (Espindola) was the person who commented on baseball bats and trash bags. AA, Vol.XI,2363. Zone further stated that he never personally spoke to Little Lou in person or otherwise and that everything Zone heard regarding statements of Little Lou came from Carroll, and Zone knew that Carroll told lies. AA,Vol.,542-43.

Later that day, Zone stated that they went out promoting in a white Astro van and subsequently picked up Kenneth Counts at his house and drove out to Lake Mead. AA,Vol.II,399-400,403. Zone stated that on the way to Lake Mead, Carroll communicated

with Little Lou; however, the call was about Little Lou telling Carroll to come back to work. AA,Vol.III,628,638. Zone also stated that they were going to meet up with TJ and that he was going to be killed; however, Carroll told TJ that we were coming to smoke marijuana with TJ. AA,Vol.II,405-06. Zone testified that he heard Carroll on the telephone with Espindola and Zone heard Espindola say go to plan B and that Carroll stated that "We're too far along, Ms. Anabel." AA,Vol.III,566. Zone testified that once they arrived at Lake Mead, they met TJ who came up to Carroll's window and engaged in a conversation with Carroll at which time Counts exited the van and shot TJ in the head. AA,Vol.II,412-14.

After the shooting, Zone testified that they drove back the Palomino and Carroll and Counts went inside the club. AA,Vol.II,417. When Counts exited the Palomino he got into a taxi cab. AA,Vol.II,418. Next, Carroll and Zone went to Carroll's house and then took the Astro van out and slashed and removed the tires and Carroll had new tires put on the van and had the van interior cleaned and washed. AA,Vol.II,420-21. Zone testified that they subsequently went to Simone's where Carroll spoke to Mr. H in the back room. AA,Vol.II,423,424,427. Zone also stated that Carroll told Zone and Taoipu that Counts was paid $6000 for the shooting, but that Zone did not learn of this amount or have any conversation regarding this payment until after the shooting of TJ. AA,Vol.II,426;Vol.III,509-10.

After the shooting death of TJ, the police wired Carroll, on two occasions, to go and speak to Mr. H at Simone's. AA,Vol.III,694-97,703,714-15. In an attempt to retrieve incriminating statements, the detectives told Carroll to tell various lies to whoever he spoke to at Simone's. AA,Vol.IV,841-42. On the recordings, the voices of Carroll, Espindola, and

Little Lou were heard. AA,Vol.III,727-29. Various statements of Carroll, Espindola, and Little Lou are heard on the recordings. Specifically, Carroll was heard on the recording saying that Little Lou had nothing to do with it (the murder of TJ). AA,Vol.I,93; Vol.IV,842. Detective McGrath testified that this statement of Carroll was not one of the false statements that he told Carroll to use. AA,Vol.V,842-43.

At trial, both sides had transcripts of the tapes prepared by experts. AA, Vol.III,614. For the first time, four years after the recordings were made, the State argued that a portion of the tape contained Little Lou saying something to the effect of, I told you to take care of TJ. AA,Vol.III,616-24. The Court noted during argument on this issue that it did not hear this statement being made by Little Lou**,** but over objection allowed the State to argue this new proposition. AA,Vol.III,617.

After the authorities heard the statements on the tapes, Little Lou and Espindola were arrested for the murder of TJ. AA,Vol.I,98. Mr. H was arrested in 2008. AA,Vol.I,1200.

ARGUMENT SUMMARY

The District Court committed structural error in giving Jury Instruction #40 because the Instructions fails to properly set forth the proof required to prove a conspiracy. The District Court erred when it failed to admit a prior recorded statement of Carroll stating that Little Lou had nothing to do with it (the murder of TJ) for the truth of the matter asserted and as substantive evidence. The District Court further erred when it failed to admit the prior testimony of Jayson Taoipu from a former trial, which contained exculpatory information, because the testimony met all of the requirements of NRS 51.325 to be admitted. Additionally, Taoipu's testimony was very probative of Little Lou's innocence. Moreover,

the failure to admit this evidence due to the fact that it would be prejudicial to Mr. H, Little Lou's co-defendant, created a conflict in the defenses of the defendants and violated Little Lou's due process rights to present the necessary evidence to demonstrate his innocence. The District Court also erred by allowing this case to go to the jury because 'accomplice' testimony was not independently corroborated. Finally, Little Lou's due process rights were violated by the State's deliberate failure to record its meetings with Espindola, and by the Court's actions of losing the notes of Detective Wildman which prevented Little Lou from fully presenting a defense.

ARGUMENTS

I. The District Court's Instruction 40 To The Jury That The Existence Of The Conspiracy And Little Lou's Membership In It Could Be Established By 'Slight Evidence' Requires Reversal.

A. Standard of Review

Whether a jury instruction accurately states applicable law is a legal question subject to *de novo* review. See Berry v. State, __ Nev. __, 212 P. 3d 1085, 1091 (2009). A district court's decision settling jury instructions is reviewed for abuse of discretion or judicial error. Judicial error occurs when the court reaches an incorrect result in the intentional exercise of the judicial function, that is, when a judge renders an incorrect decision in deciding a judicial question. See In re Humboldt River System (Marble), 77 Nev. 244, 248, 362, P. 2d 265, 267 (1961).

Jury instructions that tend to confuse or mislead the jury are erroneous. See Culverson v.State, 106 Nev. 484, 488, 797 P. 2d 238, 240 (1990) ("a juror should not be expected to be a legal expert. Jury instructions should be clear and unambiguous."); see also Rowland v.

State, 96 Nev. 300, 302, 608 P. 2d 500 (1980) ("Instructions …must be given clearly, simply and concisely, in order to avoid misleading the jury"). While structural error such as an unconstitutional burden of proof instruction is self-evident and needs no prejudice analysis, the trial transcript and and/or statement of evidence adduced at trial must be considered where an erroneous instruction is subject to a harmless error analysis. See Carver v. El-Sabawi, M.D., 121 Nev. 11, 14-15, 107 P. 3d 1283, 1285 (2005). The error here was structural, but the record before this Court mandates reversal under either analysis. The evidence against Little Lou for conspiracy to murder TJ was, at most, slight.

The opening language of Instruction #40 articulated the standard that the trial court must apply when deciding admissibility of the evidence. AA,Vol.I,47. Specifically, Jury Instruction #40 stated in pertinent part:

> Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to be a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy. This holds true, even if the statement was made by the co-conspirator prior to the time the defendant entered the conspiracy, so long as the co-conspirator was a member of the conspiracy at the time

AA,Vol.I,47.

In objecting, Defense counsel advised the court that instruction #40 did not deal with the substantive law of conspiracy that the jury must apply, but rather the admissibility of evidence - a matter that was the exclusive province of the trial judge. AA,Vol.X,2142-43.

B. The Beyond a Reasonable Doubt Standard of Proof is a Constitutional Imperative

The Due Process Clause of the Fifth Amendment of the United States Constitution "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." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970); Labastida v. State, 115 Nev. 298, 303, 989 P. 2d 443, 447(1999). A jury instruction that "creat[es] an artificial barrier to the consideration of relevant defense testimony putatively credible … reduce[s] the level of proof necessary for the Government to carry its burden [and] ... is plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354 (1972). When an instructional error consists of an inaccurate description of the burden of proof to be employed, it vitiates all of the jury's findings and violates the Sixth Amendment right to a trial by jury in addition to the Fifth Amendment Due Process clause. It is structural error in the constitution of the trial mechanism which defies harmless error standards and requires automatic reversal. See Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 2082 (1993).

C. Identical Issues, Separate Roles, Different Standards: Admissibility or Liability?

Throughout the jury trial, Little Lou's defense was that he never joined the conspiracy against TJ and had no prospective knowledge of any impending or intended harm to TJ. There was no dispute that Little Lou did not plan the offenses against TJ, did not participate in the offenses against TJ, and did not pay anyone to commit the offenses against TJ. AA,Vol.VI,1247,1251,1255;Vol.IV,842. Further, Little Lou was not at the scene of the offense or connected to the murder weapon. The State's case relied entirely on accomplice

testimony of purported co-conspirators, including out of court statements by Carroll to Zone, which were a chief component of and essential to the State's case.[3] The challenged instruction that directed the jury to employ a reduced burden of proof on the conspiracy theory was prejudicial.

It has been said that Nevada "jumped the gun" when it adopted the Preliminary Draft of the Federal Rules of Evidence. See Wright & Graham, Federal Practice & Procedure, §5051 (2nd ed.). No other state adopted the Preliminary Draft. No decisions exist interpreting the precise language of the Nevada statutes at issue herein: NRS 47.060, which deals with who initially determines admissibility[4], and NRS 47.070, which concerns the relative roles of the judge and jury when evidence requires additional facts to be proven in order to make the evidence relevant.[5] The judge sits as a fact finder under both provisions.

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[3] Despite making two surreptitious tape recordings of Espindola and Little Lou at the LVMPD's direction, Carroll did not testify at the trial. Both Zone and Espindola testified to Carroll's out of court statements. Zone's testimony against Little Lou was directly contradicted by Taoipu's testimony that the court incorrectly ruled was inadmissible. Espindola's testimony that Little Lou did not plan, participate, or pay regarding the alleged conspiracy exculpated Little Lou. See Argument III below.

[4] NRS 47.070 states that "[p]reliminary questions concerning … the admissibility of evidence shall be determined by the judge, subject to the provisions of NRS 47.070," and, 2. In making a determination the judge is not bound by the rules of evidence provisions of this Title except the provisions of chapter 49 of NRS with respect to privileges.

[5] 1. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
2. If under all the evidence upon the issue the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled.
3. If under all the evidence upon the issue the jury could not reasonably find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence.

Under the first, the court's ruling is final unless additional predicate facts are necessary to make the evidence relevant, in which case it is preliminary and triggers the second into action. The specific category of evidence at issue *sub judice* is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." NRS 51.035-3(e). Where an objection is made to such evidence at the time of its being offered, as it was in this case,[6] NRS 47.060 mandates that the judge alone makes the determination of its admissibility.

This Court has declined the opportunity to adopt the United States Supreme Court's holding in Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987) on two pertinent points. It has decided that "slight evidence" of the existence of a conspiracy and mutual membership in it of the declarant and the non-offering party is all that is necessary for the judge to admit what would otherwise be excluded hearsay, so long as the statement is made during the course and in furtherance of the conspiracy. See McDowell v. State, 103 Nev. 527, 529, 746 P. 2d 149, 150 (1987) (declining to adopt "preponderance of the evidence" standard).

This Court also requires that before an out-of-court statement by an alleged co-conspirator may be admitted into evidence against a defendant, the existence and membership of the conspiracy must be established by evidence independent of the statement itself. See Wood v State, 115 Nev 344, 349, 990 P.2d 786, 789 (1999); see also Carr v. State, 96 Nev. 238, 239, 607 P. 2d 114, 116 (1980). Thus, unlike Bourjaily, the out of court statements

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[6] A standing objection was allowed by the district court to all out of court statements by persons alleged to be coconspirators. See Hidalgo Jr's record on appeal at 13 ROA 2398, 2478-2488, 2715-2716.. 14 ROA 2493-2500.

themselves may not be considered by the judge in deciding whether NRS 51.035-3(e) conditions have been established.

This Court has never addressed: (1) the jury being instructed to apply the "slight evidence" standard where the judge's decision to admit the evidence requires resolution of the identical issues to be ultimately determined by the jury under a beyond a reasonable doubt standard; and, (2) whether, why or how the jury should be instructed in such an instance. This case presents those issues.

NRS 47.060, when read in light of McDowell, Wood and Carr, in its first paragraph, requires the judge to find that "slight evidence" of the existence of the conspiracy, the defendant's and declarant's membership in it and the statement being made in furtherance of it, is contained in the record, independent of the hearsay itself. All of that deals with the law of admissibility of the evidence. The judge is not concerned at that point as to sufficiency to convict. See Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 2778 (1987) ("The inquiry made by a court concerned with [admissibility] is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues"). At that juncture, the judge's use of the lower standard of proof does no violence to the beyond a reasonable doubt standard.

"Once a trial judge makes a preliminary determination under [NRS 47.060 & 47.070] that the requirements of [NRS 51.035-3(e)] have been satisfied, there is no reason to instruct the jury that it is required to make an identical determination independently of the court: whether such a statement can be considered at all is for the court alone to determine." See

United States v. Hagmann, 950 F. 2d 175, 181 n.11 (5th Cir. 1991), cert. denied 506 U.S. 835 (1992), rehearing denied 506 U.S. 982 (1992) (*bracketed material substituted for federal equivalents in original*). Simply stated, a jury cannot be expected to apply the "slight evidence" standard to the identical elements to which they must also apply the beyond a reasonable standard under the substantive law of conspiracy. And the law doesn't ask or demand it of the jury; only the judge.

As the charge to the jury herein invited finding Little Lou vicariously liable for the murder because of membership in the conspiracy by applying a constitutionally impermissible standard, the infectious instruction undermines confidence in the verdict. See Perez v. United States, 968 A.2d 39, 102 (D.C. Ct. App. 2009). Many courts have recognized the impropriety of instructing the jury as to the quantum of proof employed by the trial judge in admitting coconspirators statements.

In United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990)(*en banc*) the court addressed the mechanics of deciding the admissibility of such evidence. As here, the defendant conceded that a conspiracy existed, defending on the theory that she was not a member. Unlike the case *sub judice*, the defendant was at hand when the substantive crime occurred and uttered the word "kilo" in the presence of the cooperating witness. The court postulated that while that might be enough to support a conviction, "the case is much stronger with the two kinds of hearsay" that the prosecution introduced. Martinez de Ortiz, 907 F.2d at 631. It held "…the jury does not decide the hearsay question. The question for the jury is one of the substantive law of conspiracy. Conspirators, like agents, are mutual partners. Declarations by others count against the accused only if the accused has joined the conspiracy

personally….Unless her words and deeds place her among the conspirators, other persons statements are (substantively) irrelevant." Martinez de Ortiz, 907 F.2d at 632-33. It explained "the judge's decision is conclusive…the jury may not re-examine the question whether there is 'enough' evidence of the defendant's participation to allow the hearsay to be used." Martinez de Ortiz, 907 F.2d at 633. To do so allows the jury to second guess the judge's decision to admit the statements- to impermissibly sit in review of the judge's legal determination.

By presenting this issue to the jury, it unnecessarily confuses them as to the proper burden of proof of the conspiracy charge in the indictment. Once the judge rules that the prerequisites to NRS 51.035-3(e) have been met, the jury does not revisit the issue and can consider the coconspirator statements for all purposes in its determination as to whether there has been proof beyond a reasonable doubt that the defendant is guilty of conspiracy. See Martinez de Ortiz, 907 F.2d at 634-635. In other words, the statements are not "conditionally relevant," as to the membership in the conspiracy. See NRS 47.070.

In determining whether the alleged conspiracy existed or the defendant was a member, the jury can consider the actions and statements of all of the alleged participants that the judge admitted into evidence. See United States v. Stephenson, 53 F.3d 836, 847 (7th Cir. 1995). In United States v. Bell, 573 F.2d 1040 (8th Cir. 1978), the court held "[a]fter a ruling on the record that the out-of-court declaration is admissible (as a coconspirator's statement) the court may submit the case to the jury. The court should not charge the jury on the admissibility of the coconspirator's statement, but should, of course, instruct that the government is required to prove the ultimate guilt of the defendant beyond a reasonable doubt." 573 F.2d at 1044-1045.

See United States v. Ammar, 714 F.2d 238, 249 (3rd Cir. 1983) (once admitted, coconspirator statements should go to the jury without further instruction); see also United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979) (once admitted statements go to jury, judge should not describe to the jury the government's burden of proof on the preliminary question); see also People v. Vega, 413 Mich. 773, 780, 321 N.W.2d 675, 679 (1982) (setting forth that the trial judge must make determination of admissibility, not jury).

D. Vicarious Liability and Conditional Relevancy.

Coconspirator statements are, however, "conditionally relevant" under NRS 47.070 for other purposes. If the jury is satisfied beyond a reasonable doubt that the defendant was a member of the conspiracy, the statements can then be used to determine for which, if any, substantive offenses committed by co-conspirators the defendant may be held vicariously liable. See Martinez de Ortiz, 907 F.2d at 635. That is, the statements are only relevant as to the vicarious liability issue if the defendant has first been found to be a member of the conspiracy beyond a reasonable doubt. See United States v. Collins, 966 F.2d 1214, 1223 (7th Cir. 1992).

Nevada does not follow the doctrine of vicarious liability announced in Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 (1946), which makes one conspirator liable for a crime committed by another if it was foreseeable and committed in furtherance of the conspiracy. See Bolden v. State, 121 Nev. 908, 921-922, 124 P.3d 191, 199-200 (2005). For specific intent offenses, the accused must have the requisite statutory intent. For general intent offenses, if the offense was a reasonably foreseeable consequence of the object of the conspiracy, the defendant may be criminally liable for his co-conspirators acts even if he did

not intend the precise harm or result.[7] See Bolden, 121 Nev. at 923, 124 P.2d at 201; see also Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

By allowing the jury to consider the "slight evidence" standard for determining membership in the conspiracy, the challenged instruction undermines confidence in the verdict and mandates reversal. Here, the Information charged alternative substantive offenses as objects of the conspiracy. AA Vol.I,1-4 Some were specific intent and some were general intent offenses. The jury returned a verdict of guilty as to a conspiracy to commit battery with a deadly weapon[8] or with substantial bodily harm, both of which are general intent crimes.[9] AA,Vol.I,60-61. It was instructed that it could use either of them as the predicate for finding the defendant guilty of murder in the second degree. AA,Vol.I,30. This allowed the jury to find the predicate conspiracy upon less than a reasonable doubt standard and violated both the due process clause of the Fifth Amendment and the jury trial right of the Sixth Amendment. It deprived the jury of its essential deliberative tool - the applicable law upon which to

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[7] "We caution the State that this court will not hesitate to revisit the doctrine's applicability to general intent crimes if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy. " Bolden v. State, 121 Nev. at 923,124 P.3d at 201.

[8] The record is bereft of any evidence that Little Lou knew of any weapon being possessed or used by Carroll or anyone else. The State failed to prove that he had knowledge the armed offender was armed and had the ability to exercise control over the firearm. See Brooks v. State, ___ Nev. ___, 180 P.3d 657, 659 (Nev. 2008).

[9] Little Lou and Mr. H proposed a verdict form that separated battery with substantial bodily harm from battery with a deadly weapon. See Docket No. 54209, Luis A. Hidalgo's Record on Appeal at 24 ROA 4502-4504. Although recognizing the idea as "fine" pretrial, the judge rejected it without announcing her reasons, an independent, additional ground for reversal here. See Allstate Insurance Company v. Miller, __Nev. __, 212 P. 3d 318, 332-333 (Nev. 2009). At sentencing, the judge acknowledged that separating the crimes in the verdict form would have been better. Id. at 25 ROA 4627

evaluate the facts. The danger of confusion and erroneous conviction on the charges that were tied to the conspiracy exacerbates the gravity of the error. See People v. Duncan, 462 Mich. 47, 610 N.W.2d 551 (Mich. 2000).

The decision that "slight evidence" existed of Little Lou's membership in the conspiracy was already made before the jury received the case. The judge made it when she admitted the evidence. Yet, this finding cannot direct a guilty verdict as to a criminal charge no matter how clear the defendant's culpability. Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106 (1986). Nor does it cure the problem created by an erroneous or confusing instruction on burden of proof that the jury was also given a correct definition of reasonable doubt. See Collins v. State, 111 Nev. 56, 57-58, 888 P. 2d 926, 927 (1995). The essential connection to a beyond a reasonable doubt factual finding cannot be made where the instructional error consists of a "misdescription" of the burden of proof and the reviewing court can only engage in pure speculation. See Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 2078, 2082 (1993).

Under the circumstances here, the consequences of the erroneous instruction are unquantifiable and indeterminate, and therefore not subject to harmless error analysis. See Wegner v. State, 116 Nev. 1149, 14 P.3d 25, 29-30 (2000). Since the only issues that the jury needed to resolve to convict Little Lou of conspiracy and the general intent objects were the existence of the conspiracy and his membership in it - the same issues that the judge had to resolve to admit the coconspirator statements - the erroneous instruction left no additional facts that needed to be decided by the jury. Therefore, the jury made no other factual findings that can be said with requisite certainty to have been decided beyond a reasonable doubt. It is

structural error mandating reversal and remand. See Powell v. Galaza, 328 F.3d 558, 566 (9th Cir. 2003).

II. The District Court Erred When It Failed To Admit A Recorded Statement Of Carroll, Which Exculpated Little Lou, For The Truth Of The Matter Asserted And As Substantive Evidence Of Innocence In Violation Of Chia v. Cambra, 360 F.3D 997 (9TH Cir. 2004), NRS 51.315, and NRS 51.035(3)(b),(d).

A. Standard of Review

The standard of review regarding the admission of evidence is abuse of discretion and a harmless error analysis applies to hearsay errors. See Tabish v. State, 119 Nev. 293, 311, 72 P.3d 584, 595 (2003).

During Little Lou's trial, Little Lou moved to introduce the recorded statement made by Carroll as Carroll spoke to Espindola and Little Lou the day after the murder of TJ Hadland at Simone's autobody. AA,Vol.III,596-604. Specifically, Carroll was recorded saying to Little Lou in Espindola's presence **"**What are you worried about. You had nothing to do with this [death of the victim]." AA,Vol.I,93;Vol.IV,842 (emphasis added). Little Lou sought to introduce this statement for the truth of the matter asserted and as substantive evidence. AA,Vol.III,596-604.

The Court originally ruled that the Carroll statement could only be used to impeach Espindola and not as substantive evidence. AA,Vol.III,596-604. The trial court later ruled that the "statements made by Carroll in the tape when Carroll was acting as a police informant or agent or whatever we want to call him cannot be considered for the truth of the matter asserted." AA,Vol.III,596. The District Court's final improper ruling regarding Carroll's exculpatory statement came when the Court issued, over counsel's objection, Jury Instruction

#40 which stated, in relevant part, that the "statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted." AA, Vol.I,47. The District Court erred in prohibiting Carroll's exculpatory statement regarding Little Lou's innocence in the homicide of TJ from being admitted for the truth of the matter asserted and as substantive evidence of innocence. The Carroll statement exculpated Little Lou and was both reliable and crucial to the defense. The District Court's ruling denied Little Lou the opportunity to present a full and fair defense as promised by the Due Process Clause in the Fourteenth Amendment of the United States Constitution. This error requires a new trial.

B. Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004).

As recognized by the Ninth Circuit, "[t]he Constitution's guarantee of due process would ring hollow if a criminal defendant…were prevented from presenting reliable, material evidence of innocence at trial, when such evidence lies at the heart of his defense. Inherent within the Constitution's promise of due process lays the cardinal principle that no criminal defendant will be deprived of his liberty absent a full and fair opportunity to present evidence in his defense." Chia v. Cambra, 360 F.3d 997, 1005 (9th Cir. 2004).

In Chia, the defendant was convicted of being a conspirator in the murder of two undercover DEA agents. Chia, who was arrested near the shootout, maintained that he did not join the conspiracy and that his only involvement was in attempting to talk one of the shooters, his good friend Mr. Wang, out of the plot. See id. at 1000. Wang confirmed this information to authorities in four separate out-of-court interviews. See id. at 1001. In the third interview, he specifically told police that Chia did not join the conspiracy and that Chia

tried to talk him out of his involvement. See id. At Chia's trial, Wang invoked his right not to testify and was unavailable to the defense. See id. at 1002. When Chia attempted to introduce the exculpatory statements into evidence, the trial court excluded them as inadmissible hearsay. See id.

In Chia, the Ninth Circuit used a five-part test to analyze when an evidentiary ruling results in a due process violation. See id. at 1004. These factors include: "(1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense." Id. (citing to Miller v. Stagner, 757 F.2d 988, 994 (9th Cir. 1985)).

In analyzing the third statement made by Wang to police, the Ninth Circuit found Wang's statement should have been admitted into evidence under the five-part test: first, this was the only possible evidence of innocence that Chia had at his disposal; second, the statement was reliable as Wang inculpated himself (self-inculpatory statements are inherently reliable) while at the same time exculpating Chia; third, the jury was well suited to make the credibility evaluation of Wang's statement; fourth, since the other conspirators were killed in the shootout with DEA, Wang's statement was the best and only evidence on this point; and, fifth, the excluded evidence was the core of the attempted defense. See id. at 1004-1005.[10]

As the Chia Court quoted, "[s]tate rules [of evidence] are designed not to frustrate justice, but to promote it." Id. at 1004 (quoting Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir.

[10] The Chia Court also held that the other statements made by Wang should have been admitted under the five-part test. See Chia, 360 F.3d at 1005.

1983)). Since Wang's statements would have substantially bolstered Chia's claims of innocence, the California evidence rules must give way and the conviction was overturned. Id. at 1003.

In Little Lou's case, the trial court refused to admit Carroll's statement under Chia. AA,Vol.III,598-603. The five-part test pronounced in Chia demonstrates that the Court's ruling regarding Carroll's statement that Little Lou had nothing to do with it was in error.

The first prong of the five-part test deals with the "probative value of excluded evidence on a central issue." See Chia, 360 F.3d at 1004. Little Lou's defense at trial was that he did not know about or join a conspiracy to kill TJ. Carroll was at the core of the conspiracy. Carroll procured the gunman, drove the van to the scene of the homicide, lured the victim to the meeting, watched when TJ was shot in the head, and was later present when money was paid to the shooter. The police quickly linked Carroll to the homicide. After being arrested, the police had Carroll wear a hidden wire and sent him into Simone's Autobody to gather incriminating statements from Mr. H about the homicide. Instead, Carroll spoke to Espindola. When Little Lou made a comment, Carroll said to Little Lou, "What are you worried about. You had nothing to do with this [death of the victim]." AA,Vol.I,93. Little Lou had no other witness from whom to obtain this critical evidence. This statement is probative and, if believed, establishes that Little Lou was not a member of the conspiracy, which is the central issue in the case.

The second factor deals with the reliability of the statement. See Chia, 360 F.3d at 1004. Carroll's statement was reliable for many reasons: Carroll had every incentive to spread the blame on others and to make as many cases as possible for the police. His statement

regarding Little Lou; however, affirmed that Little Lou had no responsibility for the homicide. Further, the police prepared Carroll to go in to the meeting to gather incriminating evidence. While they did coach Carroll on how to best to gather evidence, the officer never instructed Carroll to make the statement that Little Lou was not involved in the crime. AA,Vol.IV,842-43. In this context, it makes no sense that Carroll would make this statement unless Little Lou was in fact not a member of the conspiracy. This statement bears sufficient indicia of reliability.

The third factor to consider in the five-part Chia analysis is whether the excluded evidence was capable of evaluation by the trier of fact. See Chia, 360 F.3d at 1004. Had the Carroll statement been admitted as substantive evidence, the jury would have weighed the prosecution theory against the exculpatory Carroll statement. As pointed out in Chia, this is a common task engaged in by juries and could have been engaged in by Little Lou's trial jury. See id. at 1005.

The fourth factor to consider in the five-part Chia analysis is whether it is the sole evidence on the issue or merely cumulative. See id. at 1004. The taped statement by Carroll was the sole evidence that Little Lou was not a member of the conspiracy. The other members of the conspiracy who were at the shooting did not have any interaction with Little Lou. The evidence was not cumulative.

The final factor to consider in the five-part Chia test was whether the excluded evidence constituted a major part of the attempted defense. See id. Similar to Chia, the attempted defense was that Little Lou did not know about or join a conspiracy to kill the

victim and was not guilty of the crimes that the State charged him with. The excluded evidence was the primary evidence regarding his innocence.

As demonstrated above, all five Chia factors support the admission of this critical evidence. It was erroneous for the trial judge to prohibit the jury from considering this evidence for the truth of the matter asserted and as evidence of innocence. This is reversible error. See Chia, 360 F.3d at 1005.

This Court recently dealt with the Chia test in Fields v. State, ___ Nev.___, 220 P.3d 709 (2010). Although the Court properly excluded the evidence in Fields, the Fields' reasoning supports the admission of the Carroll statement. In Fields, hearsay evidence of potential third party guilt was not allowed. The hearsay evidence was not reliable because the witness had been drunk, had a motive to fabricate evidence against the third party, did not come forward with the evidence until more than three years after the event, and the statement was not on tape. See id. at ____, 220 P.3d at 717-16. The reliability of the Carroll statement does not mirror the unreliability of the Fields statement. Instead, the reliability of the Carroll statement was similar to the statement in Chia.

Specifically, Carroll was lucid, police had prepared him to gather incriminating evidence, his only motivation was to record accurate information, the statement was made within days of the incident, and the statement was recorded. Furthermore, in Fields, the witnesses did not implicate themselves like Carroll did. In fact, Carroll placed himself in the heart of the conspiracy to kill the victim when he told Little Lou that Little Lou was not part of it. Throughout the taped conversation, Carroll acknowledged being involved in the homicide of the victim.

C. NRS 51.315

Furthermore, in addition to Chia, the Carroll statement should have been admitted as substantive evidence under NRS 51.315. This rule instructs that "a statement is not excluded by the hearsay rule if: (a) [i]ts nature and the special circumstances under which it was made offer strong assurances of accuracy; and (b) [t]he declarant is unavailable as a witness." NRS 51.315. A witness is unavailable if he invokes his Fifth Amendment right to remain silent. See Thomas v. State. 114 Nev. 1127, 967 P.2d 1111 (1998). Carroll was unavailable to the defense because his trial in this matter was still pending. For the reasons asserted in the reliability prong of Chia, the Carroll statement is cloaked in strong assurances of accuracy. See Johnstone v. State, 92 Nev. 241, 244, 548 P.2d 1362, 1363 (1976).

Further, the statement by Carroll was reliable, material, and would have substantially bolstered Little Lou's defense that he did not know about or join the conspiracy to commit homicide. It was error to prohibit the statement from being considered for the truth of the matter asserted under both the due process clause and the exception to the hearsay rule for unavailable witnesses found in NRS 51.315.

D. NRS 51.035(3)(b),(d)

The District Court ruled that the "statements made by Carroll in the tape when he was acting as a police informant or agent or whatever we want to call him cannot be considered for the truth of the matter asserted." AA,Vol.III,596. When instructing the jury on the Carroll statement, the District Court gave Instruction 40 which included the following:

> The statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and **may not be considered by you for the truth of the matter asserted**. They were only offered to

> give context to the statements made by the other individuals who are speaking, as or adoptive admissions or other circumstantial evidence in the case. An adoptive admission is a statement of which a listener has manifested his adoption or belief in its truth.

AA,Vol.I,47 (emphasis added).

The District Court erred in misapplying the agent admission doctrine. Such error was not harmless to Little Lou.

An admission by a party is not hearsay and is admissible for the truth of the matter asserted and as substantive evidence under NRS 51.035(3). See State Department of Motor Vehicles and Public Safety v. Kinkade, 107 Nev. 257, 261, 810 P.2d 1201, 1203 (1991). The party admission doctrine extends to statements and admissions made by the party's "agent or servant concerning a matter within the scope of his agency or employment, [and] made before the termination of the relationship." NRS 51.035(3)(d).[11] Statements and admissions by an informant, operating as an agent of the prosecution and within the scope of his agency, are admissible by the defense and against the prosecution under the agency doctrine as substantive evidence. See United States v Branham, 97 F.3d 835, 850-51 (6th Cir. 1996); State v. Worthen, 765 P.2d 839, 849 (Utah 1988).

After the evidence regarding the murder of TJ led law enforcement to Carroll, Carroll began cooperating with law enforcement and became an informant.[12] At the request of law

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[11] Like all parties involved in litigation, admissions by prosecutors or its agents are subject to the party opponent rule. See United States v. Bakshinian, 65 F.Supp 2d 1104, 1105-06 (D. Cal. 1999). No prosecutorial exception was created under Nev. Stat. Ann. § 51.035(3).

[12] At the point Carroll began assisting law enforcement, he had withdrawn from any alleged conspiracy regarding TJ Hadland and was acting as an agent of the prosecution. See U.S. v. Cella, 568 F.2d 1266, 1282 (1977).

enforcement, Carroll wore a body wire and was instructed on how to obtain inculpatory information. AA,Vol.IV,841-43. He then spoke to and recorded Espindola and Little Lou at the May 23, 2005 meeting. AA,Vol.IV,841-43. During this surreptitiously recorded meeting, Carroll stated to Little Lou, "[w]hat are you worried about. You had nothing to do with this [death of the victim]." AA,Vol.I,93; Vol.IV,842. At the time of this statement Carroll was an informant and a state agent, and he was operating within the scope of this agency.

During the trial, the prosecution played the recording to the jury, which included the statement made by Carroll that Little Lou had nothing to do with this crime. AA,Vol.IV,742-44,751-52. The prosecution objected to Little Lou's attempt to make use of the statement for the truth of the matter asserted. AA,Vol.III,603. The District Court refused to allow the Carroll statement to be used as substantive evidence under the party agent doctrine. AA,Vol.IV,596,603. This was error. The error is not harmless because this critically important evidence was not admitted through another source and the evidence was not cumulative. Further, the recorded statement of Carroll supported Little Lou's defense that Little Lou was not involved in the alleged conspiracy and subsequent death of TJ.

The District Court did allow the Carroll statement to be considered as an "adoptive admission" by Espindola.[13] AA,Vol.III,603. However, and critically, the trial judge instructed the jury that the statement "may not be considered by you for the truth of the matter

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[13] The court's theory of admissibility on this limited ground was that Espindola adopted the statement by Carroll through her silence. This ground for admissibility is inappropriate as the adopted admission would be a self-serving statement for her alleged co-conspirator, Little Lou. This is more appropriately admitted as impeachment of Espindola through a prior inconsistent statement under NRS 51.035 (2)(a).

asserted." AA,Vol.I,47; Vol.III,603. A properly admitted adoptive admission is regarded as non-hearsay and substantive evidence under NRS 51.035(3)(b). See Crowley v. State, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004) (prior inconsistent statement is non hearsay and is admitted both as impeachment and substantive evidence). Jury Instruction 40 instructs the jury that it may consider the Carroll statements as an adopted admission but may not consider it for the truth of the matter asserted. AA,Vol.I, p.47. This is an error under Nevada law. This error was not harmless as the evidence was not allowed to be considered as substantive evidence under any theory of admissibility and it was evidence that supported Little Lou's defense that Little Lou was not part of the alleged conspiracy and subsequent death of TJ. Little Lou's convictions must be reversed.

III. The Trial Court Erred In Denying The Admission Of The Former Testimony Of Jayson Taoipu.

A. Standard of Review

The standard of review regarding admission of an unavailable witness's prior testimony is a mixed issue of law and fact. See Hernandez v. State, 124 Nev. 60, 188 P.3d 1126, 1131 (2008). This court has on several occasions addressed admissibility of prior testimony pursuant to NRS 51.325 when the State attempts to admit testimony of unavailable witnesses. See Hernandez, 124 Nev. at ___, 188 P.3d at 1131-1135. This court, however, has never addressed the admissibility of prior testimony when the *Defendant* desires to admit the prior testimony, which includes exculpatory statements made by a witness, against the State. This issue, therefore, appears to be an issue of first impression for this Court.

B. The Former Testimony of Jayson Taoipu Should Have Been Admitted.

Little Lou sought to admit the former testimony of Jayson Taoipu, a witness at the previously held murder trial of Kenneth Counts who was the person who murdered TJ Hadland, against the State for the purposes of demonstrating Little Lou's innocence in the conspiracy to kill TJ Hadland. AA,Vol.IX,1881-90, 2068-73. The District Court erroneously denied the admission of Jayson Taoipu's former testimony.

NRS 51.325, regarding former testimony, states:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, is not inadmissible under the hearsay rule if:
> 1. The declarant is unavailable as a witness; and
> 2. If the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same.

NRS 51.325.

As stated, Jayson Taoipu testified, under oath, on behalf of the State at the Kenneth Counts murder trial. AA,Vol.XI,2325. At the Counts trial, Taoipu was specifically asked by the prosecutor:

Q All right. Going back, just kind of backtracking a little bit, did you ever hear any conversation about baseball bats or garbage bags?

A Yes, Sir.

Q Tell us what you heard, when you heard it, and who you heard it from.

A We heard it before we went to pick up KC. Carroll told us that he called Anabel and Anabel was talking about baseball bats and trash bags. AA,Vol.XI,2363.

At Little Lou's trial, which occurred subsequent to the Counts trial, another witness, Rontae Zone, testified on behalf of the State. At Little Lou's trial, Rontae Zone testified that Carroll said that Little Lou was the person who said to bring bats and bags down to the club. AA,Vol.II,392,399. Jayson Taoipu's testimony at the Count's trial exculpated Little Lou. Zone's testimony at Little Lou's trial inculpated Little Lou, and was completely contradictory to Taoipu's prior testimony at the Counts trial.

Further, Zone's testimony at Little Lou's trial was the only testimonial evidence presented by the State that arguably demonstrated Little Lou's participation in the conspiracy, prior to the killing of TJ Hadland. In fact, Espindola testified at length that Little Lou did not plan the events regarding TJ, he did not participate in the events leading to TJ's death, and he did not pay anybody for the death of TJ. AA,Vol.VI,1247,1251,1255. The Court, however, denied the admission of Taoipu's former testimony because it "opens the door to other statements that Jason Taoipu made in his trial testimony that indicate that Little Lou was involved and gave the order" and because it would be prejudicial to Mr. H. AA,Vol.IX,2072. The Court's ruling is legally unsound given that all of the prongs of NRS 51.325 regarding former testimony were met. Further, a trial court cannot make or second guess defense counsel's defense tactics.

The first prong of NRS 51.325 that establishes that former testimony is admissible is whether the declarant is unavailable as a witness. The Court properly ruled that Taoipu was unavailable as a witness. As stated in Hernandez, a witness may be unavailable if he or she is " '[a]bsent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his [or her] statement has exercised reasonable diligence but has been unable

to procure his [or her] attendance.'" Hernandez, 124 Nev. at ____, 188 P.3d at 1130-31. This Court has "interpreted the requirement that the State 'exercise reasonable diligence' to mean that the State must make reasonable efforts to procure a witness's attendance at trial before that witness may be declared unavailable." Id. The determination that reasonable diligence was exercised to procure a witness's attendance is based on a factual finding. Id. Further, "the touchstone of the analysis is the reasonableness of the efforts." Id. at ___, 188 P.3d at 1134.

In this case, the Court properly made the factual determination that Jayson Taoipu was unavailable for trial. AA,Vol.IX,2067-68. The Court based its findings on the affidavit of defense investigator Don Dibble, and the representations of counsel that prior to trial and throughout trial they attempted to contact Taoipu at his last known address, through his parents, his probation officer, and the jail once a warrant was issued, all to no avail. AA,Vol.IX,2067-68. The effort made to locate Taoipu before and during trial more than met the reasonableness requirements of Hernandez. See Hernandez, 124 Nev. at ____, 188 P.3d at 1135.

The second prong of NRS 51.325 states that "if the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same." NRS 51.325(2). Here, the proceedings were different in that Taoipu's testimony was given during the Counts trial which occurred prior to Little Lou's trial. Little Lou offered Taoipu's former testimony against the State at Little Lou's trial. Although the proceedings were different, the State was a party at both trials. In fact, the State was even represented by the same two prosecutors at the Counts

trial and at Little Lou's trial. In addition, the State asked Taoipu and Zone the same question regarding baseball bats and bags at the trials that each testified.

The issue surrounding Taoipu's testimony at the Counts trial, which was who was the maker of the statement to bring baseball bats and bags, is the same issue that was at hand in Little Lou's trial. The underlying issue regarding who was the maker of the statement regarding baseball bats and bags was to determine involvement and culpability of all the alleged players in this alleged conspiracy. Even if the issues were not exactly the same, NRS 51.325 only requires that the issues surrounding the former testimony be *substantially* the same. The requirements for admitting the former testimony of Taoipu, therefore, were met by Little Lou and the Court erred in denying the admission of this former testimony.

Although Little Lou met the requirements of NRS 51.325 to admit Taoipu's former testimony, the Court did not admit the evidence because it believed that Taoipu's statement opened the door to other inculpatory statements made by Taoipu against Little Lou. AA, Vol.X,2072. The Court further denied the admission of the former testimony on the basis that the admission of the entire former testimony of Taoipu, instead of the small portion sought by Little Lou, would prejudice Mr. H, the co-defendant. AA,Vol.X,2072. Although not clear from the record on appeal, if the Court was excluding the evidence based upon NRS 48.035(2) which states that "its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence," it made none of these determinations in ruling that the prior testimony of Taoipu was inadmissible at Little Lou's trial. Even if the Court was surmising that the admission of Taoipu's former testimony was more prejudicial than probative, the Court ruled that it was prejudicial to Little Lou's co-

defendant and to Little Lou, who was the person offering the evidence, instead of prejudicial against the State who the evidence was being offered against. AA,Vol.IX,2072.

This is not a sound basis to reject this evidence because it does not rest on legal analysis of the law, but on the beliefs of the Court that Little Lou, who was offering the evidence, would be prejudiced along with his co-defendant, Mr. H. The Court's stated basis for not allowing the testimony in essence put the Court into the defense's mind and tactics, which is an impermissible position. A party's right to present its own witnesses in order to establish a defense is a fundamental element of due process. See Washington v. Texas, 388 U.S. 14, 19 (1967).

Further, the Court's denial of the admission of Taoipu's testimony created a conflict between the defenses of Little Lou and Mr. H. In determining whether to admit the Taoipu former testimony, the State objected to admission of the relevant portion of the testimony on the grounds that the entire testimony of Taoipu should be admitted if the Court was inclined to admit any of it. AA,Vol.IX,2068-70. Mr. H, however, objected to the admission of the entire testimony of Taoipu because it would be prejudicial to him and he told the Court that if the entire transcript of Taoipu's former testimony was admitted he would move for a mistrial. AA,Vol.IX,2071. He did not object, however, to the admission of the small portion sought by Little Lou. AA,Vol.IX,2071.

The Court then denied the entire testimony of Taoipu stating that in addition to opening the door to other inculpatory statements about Little Lou, the admission of the entire former testimony of Taoipu was prejudicial to Mr. H. AA,Vol.IX,2072. This denial created a conflict between the defenses of Little Lou and Mr. H which was prejudicial to Little Lou and

violated Little Lou's due process rights by not allowing him to present a defense through contradicting the only testifying witness that stated that Little Lou was involved in the conspiracy against TJ Hadland.

IV. As The State's Case Was Entirely Dependent Upon The Testimony Of An Accomplice, Insufficient Evidence Existed To Convict Little Lou. [14]

A. Standard of Review

Historically, this Court engages in an independent review of the record to determine compliance with NRS 175.291. See Heglemeier v. State, 111 Nev. 1244, 1251, 903 P.2d 799, 804 (1995); see also Eckert v. State, 91 Nev. 183, 533 P.2d 468 (1975). No Nevada case succinctly articulates a discreet standard of review.

B. Little Lou's Convictions Must be Reversed as the Testimony of his "Accomplices" was Insufficiently Corroborated.

At trial, the State presented the testimony of two accomplice witnesses, Espindola and Zone, to prove that Little Lou conspired to harm TJ. Nevada's legislature deems accomplice testimony as inherently unreliable. See NRS 175.291. NRS 175.291 mandates that:

> A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in

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[14] Little Lou's state and federal constitutional rights to due process of law and equal protection were violated because there was insufficient evidence produced at his trial to convict him of the charges as the State failed to introduce sufficient evidence to corroborate the statements of his alleged accomplices. See U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21. Where a state statute imposes mandatory requirements for the protection of a defendant's rights, the statute creates an expectation protected by the Due Process Clause. See Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). Liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the laws of the States. See Ford v. Wainwright, 477 U.S. 399, 428 (1986). Here, because NRS 175.291 was not enforced, Little Lou's right to Due Process has been violated. See U.S. Const. amend. XIV.

> itself, and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

NRS 175.291

An accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant at the trial in the case in which the testimony of the accomplice is given." NRS 175.291; see also Cutler v. State, 93 Nev. 329, 566 P.2d 809 (1977). Clearly both Espindola and Zone were accomplices to the murder and conspiracy charged against Little Lou.[15] Thus, their testimony was required to be: (1) corroborated independently of other accomplices; and, (2) the corroborated evidence must have connected Little Lou to the commission of the charged offense. See NRS 175. 291. Both elements must be satisfied for a conviction to stand.

Accomplice testimony "ought to be received with suspicion, and with the very greatest of care and caution, and ought not be passed upon by the jury under the same rules governing other apparently credible witnesses." Crawford v. United States, 212 U.S. 183, 204 (1909). By enacting NRS 175. 291, the Nevada Legislature acknowledged " one who has participated criminally in a given criminal venture shall be deemed to have such character, and such motives, that his testimony alone shall not rise to the dignity of proof beyond a reasonable doubt." Austin v. State, 87 Nev. 731, 491 P.2d 724 (1971). The indelible principal that a

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[15] Although Zone was not charged, an examination of his testimony and the Carroll tapes indicate that this was more likely an exercise of prosecutorial discretion than an absence of evidence. Accomplice status is a question of fact. Rowland v. State, 118 Nev. 31, 41, 39 P. 3d 114, 120 (2002).

conviction cannot be had based on accomplice testimony alone has long been recognized by this Court. See State v. Carey, 34 Nev. 309, 122 P. 868 (1912) ("Unless there [is] corroborating evidence, it would be the duty of the jury to acquit for by the statute conviction cannot be had upon the uncorroborated testimony of an accomplice.") Corroborative evidence is not sufficient if it requires any of the accomplice's testimony to form the link between the defendant and the crime, or if it tends to connect the defendant with the perpetrators and not the crime. See Glossip v. State, 157 P. 3d 143, 152 (Ok. Cr. App. 2007).

The test for determining sufficiency of corroborating evidence requires that the accomplice testimony be removed and the remaining evidence examined to determine whether it provides an independent connection between the defendant and the crime charged. See People v. Morton, 139 Cal. 719 (Cal. 1903). This Court has often found that the remaining evidence was insufficient to convict the defendant.

In Eckert, the defendant was convicted of homicide after allegedly shooting the victim near a bar on Boulder highway. Eckert, 91 Nev. at 184-85, 533 P.2d at 469-70. During trial, an accomplice to the crime testified that Eckert threatened to shoot the victim for no reason, and then ordered the two accomplices to fire shots into the victim. Trial evidence revealed that two of the guns used to kill the victim were the same types of weapons that Eckert previously purchased. Eckert, 91 Nev. at 184, 533 P.2d at 469. Additionally, when Eckert purchased the weapons he signed a federal form for one of the guns which was later identified as the murder weapon. See id. Eckert was convicted of murder and on appeal he argued his conviction was based on uncorroborated accomplice testimony. Eckert, 91 Nev. at 185, 533 P.2d at 470. This Court determined that the following facts lacked sufficient corroborative

value: (1) Eckert purchased two of the weapons at a shooting range; (2) the victim was killed by three different weapons of the type in possession of the three defendants; and, (3) one of the weapons purchased by Eckert was identified as the murder weapon. This Court reversed the conviction finding that the "dangers are too great in view of the self-purposes to be served by the accomplice to suggest that the content of this record supply the needed corroboration to uphold the defendant's conviction." Eckert, 91 Nev. at 186, 533 P.2d at 470.

Similarly, in Heglemeier this Court found there was insufficient evidence to sustain a conviction based on accomplice testimony. See Heglemeier, 111 Nev. at 1245, 903 P.2d at 800. At Heglemeier's trial, in addition to accomplice testimony, the state presented strong evidence of Heglemeier's connection to the murder weapon. See Heglemeier, 111 Nev. at 1249, 903 P.2d at 802-03. Nonetheless, this Court reversed the conviction, finding that "[a]lthough the State did introduce some evidence that might be construed as tending to connect Heglemeier with the crime, we conclude that the evidence is insufficient, as a matter of law, to corroborate [the accomplice's] testimony." Heglemeier, 111 Nev. at 1251, 903 P.2d at 803-04.

Here, just as in Eckert and Heglemeier, it is clear that the non-accomplice evidence was insufficient corroboration to the testimony by the State's two accomplice witnesses, Zone and Espindola. Zone's testimony was composed of Zone retelling, through his drug addled memory, Carroll's statements, which would have been directly contradicted by Taoipu's testimony at the Counts trial had the District Court properly allowed admission of that testimony. Zone's statements were, therefore, unreliable.

Espindola's testimony exculpated Little Lou. Specifically, Espindola testified that after the alleged argument that Mr. H and Little Lou had on the evening hours before the death of TJ, she never spoke to or saw Little Lou again that night. AA Vol.V,977. She also testified that Little Lou did not plan, participate, or pay any money regarding the alleged conspiracy. AA,Vol.VI,1247,1251,1255.

The only possible corroborating fact presented by the State was in closing argument wherein it alleged that on the tape recording, Little Lou stated something to the effect of taking care of TJ. AA,Vol.III,614-17. This alleged statement by Little Lou regarding TJ, however, was not included in the State's transcript of the recording, which was prepared by experts, or in the defenses' transcript of the recording. AA,Vol.III, 614-18. Before the tape was played for the jury, the Court stated that it could not hear the part of the statement regarding TJ. AA,Vol.III,617. The Court, however, allowed the State to argue the statement in closing arguments. This alleged statement, at best, raises suspicions. "[W]here the connecting evidence shows no more than an opportunity to commit a crime, simply proves suspicion, or is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant, the evidence is to be deemed insufficient." Heglemeier, 111 Nev. at 1250-1251, 903 P.2d at 803-04.

The State failed to present any other evidence linking Little Lou to the crime. No rational motive was suggested; no fingerprints were found which could connect Little Lou to the events; no evidence was produced that Little Lou was ever aware that anything was going to be done to TJ and especially not that a weapon would be used or substantial bodily harm would occur to TJ. One telephone call was made by Little Lou to Carroll, which PK testified

was to locate Carroll and the club's limousine. AA,Vol.VIII,1780-81. Therefore, as in Eckert and Heglemeier, when the accomplice testimony of Zone is removed from this record, there is no legally sufficient evidence to connect Little Lou to these crimes and his convictions must be reversed.

V. The Prosecutor's Intentional Failure To Memorialize Espindola's Plea Negotiation Proffer Requires Reversal In This Case.

A. Standard of Review

Because this challenge is predicated upon federal and state constitutional provisions, it is susceptible to appellate review in the absence of contemporaneous objection or motion to strike. See Hardison v. State of Nevada, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968). It is reviewed as plain error to determine if it was prejudicial and affected substantial rights. Ramirez v. State, ___ Nev. ___, 235 P.3d 619, 624 (2010).

B. Espindola's Statements Were Not Memorialized for the Improper Purpose of Depriving Little Lou of the Ability to Utilize Them in Cross-examination.

"Due process requires the State to preserve material evidence." Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). The State's failure to preserve material evidence can lead to dismissal of the charges "if the defendant can show 'bad faith or connivance on the part of the government' or 'that he was prejudiced by the loss of the evidence.' " Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (quoting Howard v. State, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979)).

In Sheriff v. Acuna, this Court held that "[g]enerally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's

testimony is so tainted as to require its preclusion." 107 Nev. at 671, 819 P.2d at 201. (Emphasis added). In so doing, the Acuna Court defined "specific trial testimony" as "testimony that is essentially consistent with the information represented to be factually true during negotiations with the State." 107 Nev. at 669, 819 P.2d at 200 (Emphasis added). The Acuna Court insisted upon the scrupulous observation of certain constitutionally-mandated "established safeguards." In Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998), this Court thereafter held that the foregoing constitutional safeguards required by Acuna were satisfied in that the pretrial statements of the putative accomplice in that case were memorialized by tape recording; and were therefore demonstrably consistent with her subsequent trial testimony. [16]

Here, because none of Espindola's plea negotiation proffers, pretrial interviews and debriefings by the State were deliberately not recorded in any manner or to any extent whatsoever, this essential assessment of the constitutional propriety of her executory bargain with the prosecution was effectively placed beyond the reach of the "full[ ] cross-examin[ation]" required by Acuna. Little Lou was therefore denied his rights to due process of law and a fair trial as guaranteed by the Nevada and federal constitutions. See generally, Note, "Should Prosecutors Be Required To Record Their Pretrial Interviews With Accomplices And Snitches?" 74 Fordham L. Rev. 257 (October, 2005). Stated differently, the proffered testimony of a bargained for witness is part of the plea bargain - part of the *quid*

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[16] See AA,Vol.IV,799 re: why homicide detectives recorded Carroll, Zone and the first interview of Anabel:
Defense Counsel: "…if you want to have an accurate record of what somebody said, the best thing to do is record it?"
Detective Sean Michael McGrath: "Yes."

pro quo - and must be memorialized for the safeguards contemplated by Acuna and Leslie to provide the fodder for proper cross-examination and meaningful confrontation.

Where, as here, it is clear that the State has conspicuously deviated from an otherwise routine practice and procedure[17] and deliberately refrained from making any record whatsoever memorializing its pretrial interviews with and debriefings of Espindola, it is reasonable to infer that the State's intention to thereby purposefully frustrate the "full cross-examination" mandated by Acuna as an essential prerequisite to the admissibility of accomplice testimony pursuant to an executory plea agreement. This conclusion is supported by the prosecutor not only announcing that no recording was made of the plea negotiation debriefing but asserting a work product privilege for any notes that were taken at it and persisting in that assertion throughout. See Docket No. 54209, Luis A. Hidlago Jr's Record on Appeal at 3 ROA 563-566.

Absent a record memorializing the pretrial statements of the witness during the course and conduct of plea negotiations with the State, counsel for the accused cannot effectively and "fully cross-examine" percipient witnesses - including the putative accomplice herself - with respect to whether or not, she (1) "persuasively professe[d] to have truthful information of value and a willingness to accurately relate such information at trial;" or (2) "bargained for

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[17] Carroll, Zone and Espindola all were accomplices and were all videotaped during their initial interrogations in May 2005. Moreover, defense counsels' demands for recordings and/or notes of the plea negotiations proffer were repeatedly denied. See Docket No. 54209, Luis A. Hidlago Jr's Record on Appeal at 3 ROA 559, 563-566; 9 ROA 1729-1731; Notwithstanding her saying "I'll make a copy so I don't lose them,", the notes were lost by the court and are not available for this Court's review. See Docket No. 54209, Luis A. Hidlago Jr's Record on Appeal at 3 ROA 5669; 9 ROA 3507-3509; 25 ROA 4668-4672.

specific trial testimony . . . that is essentially consistent with the information represented to be factually true during negotiations with the State," as contemplated by the due process safeguards prescribed in Acuna. Such a maneuver must be stopped before it becomes an ingrained practice. Not to reverse is to reduce Acuna's safeguards to platitudes.

CONCLUSION

For the above stated reasons. The verdict against Louis Hidalgo III must be reversed and a new trial granted on counts I and II.

Dated this 3rd day of February, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular 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 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 3rd day of February, 2011.

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