IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO GARCIA, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 64221

APPELLANT'S REPLY BRIEF

(Direct Appeal from Judgment of Conviction – Jury Verdict)

ROSS GOODMAN, ESQ.
Nevada Bar No. 007722
Goodman Law Firm
520 S. 4th Street
Las Vegas, NV 89101
(702) 384-5563

Attorney for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the District Attorney
200 South Third Street - 7th Floor
Las Vegas, NV 89155
(702) 671-2750

CATHERINE CORTEZ-MASTO, ESQ.
Attorney General
Nevada Bar No. 003926
555 E. Washington Ave., #3900
Las Vegas, NV 89101
(702) 486-3420

Attorneys for Respondent

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I. CORRECTION OF MATERIAL FACTS INCORRECTLY REPRESENTED IN THE ANSWERING BRIEF

The State in its Answering Brief makes two obviously incorrect statements of fact that are material to the averments of error by the Appellant, Evaristo Garcia (hereinafter "Evaristo").

A. THERE WERE NOT OTHER PEOPLE IN THE JURY BOX WHEN MS. GAMBOA SAW THE DEFENDANT NOR DID SHE IDENTIFY HIM WHILE SITTING IN THE JURY BOX WITH OTHER DEFENDANTS.

Foremost, the State claims at multiple points in its Answering Brief that Melissa Gamboa was able to identify Evaristo at the preliminary hearing under circumstances that were lacking in the indicia of improper and excludable suggestiveness. Specifically, the State indicates "Gamboa's pre-trial identification of Appellant was not unduly prejudicial because she identified Appellant while he was sitting in the jury box with other defendants." (Answering Brief, page 12).

Unsurprisingly, this "fact" is not in the Statement of Facts, nor is there a record citation. Later in the brief, the State suggests "The court *found* that the preliminary hearing identification was not unduly suggestive because Gamboa first recognized Appellant while he was sitting in the jury box with other in-custody defendants, nobody talked to her about who he was, and there was a reliable basis for the identification based on her statement to police that she saw him, could identify him, and described what he was wearing." (Answering Brief, Page 20). This time, the State cited Volume II of the Appellants Appendix, Page 253 for this proposition; however, a reading of the citation offers no such support because it is patently incorrect.

First, the trial court only indicated as the record supports that after Ms. Gamboa had already testified under oath that the only person who was in custody was the shooter, she later testified on re-direct that she also recognized Evaristo while he was in the jury box awaiting the case to be called moments earlier. Secondly, it has *never* been established that there were "other in-custody defendants" in the jury box and the Court never ruled that there were other in-custody defendants in the jury box. The Answering Brief just presents that salient and vital fact as true when, in fact, there is no evidence whatsoever in the record.

It seems a review of what happened at the preliminary hearing is appropriate. Ms. Gamboa did indeed testify at the preliminary hearing that

occurred almost three years after the incident. (I AA 60). The entire direct examination concerning identity of the shooter was boiled down to two questions: what was he wearing on the day in question (A: grey hoodie) and do you see him here in court (A: "He's in custody, wearing blue"). (I AA 63). Ms. Gamboa also mentioned the very quick and sudden timeframe when her brother was unexpectedly shot. (I AA 62-64). There is no mention of seeing Evaristo in the jury box or identifying him with other people around.

On cross-examination, Ms. Gamboa admitted that the description of Evaristo that she had given the police almost three years earlier, and closer in time to the shooting did not match the description of Evaristo Garcia. (I AA 66). She also claimed that she had not seen a picture of Evaristo Garcia in the interim. (I AA 66). There was no evidence that she had ever met Evaristo Garcia or knew what he looked like prior to the shooting.

On redirect examination, the State established that *prior* to Ms. Gamboa's testimony that Ms. Gamboa had entered into the courtroom and she had also "recognized" Evaristo in the front row of the jury box. I AA 66. This was the only thing established by the State. In sum, the State asked in addition to just identifying Evaristo at counsel table, did you also recognize him earlier when he was sitting in the jury box; and after she had already identified him at counsel table, she said yes.

Of important note, there is no indication whatsoever in the record that there was anyone but Evaristo Garcia in the courtroom in blue or in custody.

B. THERE WAS NEVER A FINDING THAT "PUROS LOCOS" WAS A GANG AND THE STATE NEVER HAD RELIABLE INFORMATION THAT EVARISTO GARCIA WAS IN A GANG

In its Answering Brief, the State indicates "There was also no prosecutorial misconduct regarding the State's decision to bring a gang enhancement since it was supported by the facts and was correctly withdrawn after an adverse ruling." (Answering Brief, page 13). The State also suggests that there should be no finding of prejudice since "The gang enhancement was a viable charge until Appellant successfully argued that the State should be precluded from calling a gang expert to testify. (Answering Brief page 28 citing VII AA 1361). A careful reading of that citation, however, reveals that the trial court made no ruling on the "viability" of the gang enhancement, only that the gang expert as it related tot eh Puros Locos was stricken and that the State had some ambiguous concern about proceeding. VII AA 1361. The State continues in its Answering Brief, "the district court found that the State had proceeded in good faith and that the loss of the enhancement was due to changes in the testimony of witnesses and new information not available to the State when the case was charged." (Answering Brief, pages 28-29, citing VII AA 1353-57). And while it is true that the trial court

did not find bad faith,[1] and it did comment that witnesses often "flip flop" – there was never a finding or showing that "new information" was not available to the State or what evidence the State relied upon to proceed in the first place.

The State seems to suggest in its Answering Brief that the Writ submitted by counsel provided cover for the State to proceed, though the individual averments do not rise to level of establishing Puros Locos as a gang, nor is there any mention of the so-called gang's common activities of felonious activity. (See Answering Brief, page 28, citing RA 114). Indeed, and to the extent it was not made clear in the Opening Brief, Evaristo is averring that the State never had a sufficient basis to proceed with the gang enhancement and that the trial court was in error in denying his early efforts to preclude this specious and highly prejudicial suggestion. The State attempts a second time to salvage its position by calling Puros Locos a gang, to wit: "Based on discovery, the State had reason to believe that Appellant shot Victor as a result of a gang dispute between Brown Pride and Puros Locos. Statements from Harper led the State to believe that Calvillo, Appellant, Lopez, Garcia, and Salvador Garcia were in Puros Locos. RA 69. At the preliminary hearing Harper testified that they were going to fight Brown Pride. RA 7. In a

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[1] A review of the record, however, shows that it was bad faith since there was no possible way the State could establish a gang, let alone a gang enhancement, as such and to the extent the district court ruled this was not done in the bad faith, the

recorded statement on March 30, 2006, Lopez also stated that Appellant ran with Puros Locos and was a member of a gang. RA 68." (Answering Brief, page 29). But again, calling it a "gang" does not make it a gang under the law. The State is in error after it was exposed that Puros Locos is not a gang, and that Evaristo Garcia is not a gang member from still making this argument. Indeed, all "gang" references in the Answering Brief as it relates to Puros Locos or Evaristo Garcia as quantums of proof or good faith should be stricken as they are unsupported by the record.

II. REPLY TO EACH ISSUE RAISED IN OPENING BRIEF

A. THERE WAS AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN A VERDICT OF GUILT FOR SECOND DEGREE MURDER.

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief, but would add that the State does not attempt to distinguish the deficiencies and the contradictions that so overwhelmed the State's case at trial, that a conviction cannot hold. Instead, the State recites numerous facts that are undisputed (the shooter wore a grey hoodie) and heavilt relies on the discredited and insufficient accomplice testimony of Jonathan Harper and Edshel Calvillo. (Answering Brief, page 15). It is agreed that numerous witnesses identified the shooter as wearing a grey hoodie and one of the witnesses,

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Appellant avers that this Court has the record to determine whether there was a bad faith basis to proceed given the known facts.

Betty Graves, testified that she stared directly into the face of the boy she attributed as the shooter, and yet she did not identify Evaristo as being that boy. (VI AA 1095-1098).

Clearly, the State chooses to ignore the quantum of evidence that makes this anything but a strong case supporting a finding of reasonable doubt. The State, again, does not attempt to counter the contradictions that Harper's testimony was wrought with, or the incredulity of Calvillo's testimony. Once the improper gang references and the weak, prior identification of Melissa Gamboa is removed all that remains is Evaristo's fingerprint on the weapon, when even the State's witnesses acknowledged that many people touched that gun. . (V AA 878, VI AA 1024, VII AA 1282). In the end, the State has done little to support uncertain references and fail to establish reasonable doubt in support that 16 year old Evaristo Garcia shot anyone. Woodall v. State**,** 97 Nev. 235, 236, 627 P.2d 402 (1981).

B. THE DISTRICT COURT ERRED IN ALLOWING A PRIOR SUGGESTIVE IN-COURT IDENTIFICATION WHEN THE WITNESS FAILED TO IDENTIFY THE DEFENDANT AT TRIAL

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief, but would add that after the State's incorrect factual averment is corrected, it is clear that their application of Perry v. New Hampshire, ___ U.S. ___, ___, 132 S.Ct. 716, 720 (2012) is misplaced.

In sum, there is ample support for the exclusion of Melissa Gamboa weak, suggestive, prior identification of Evaristo at the preliminary hearing when she was unable to identify him at trial. Melissa Gamboa had only seen the shooter for a fleeting; she had never seen Evaristo Garcia before that night and was only able to identify him in custody in a courtroom almost three years later despite admitting that Evaristo did not fit the description of the shooter. The State suggests that cross-examination was a sufficient remedy, but this is typically true in the caselaw cited, when there is an identification. Here, the Defense had no ability to cross-examine her on why she made the bad identification in the first place because she was not endorsing it; the State was. In other words, there is no cross-examination that will sufficiently relieve the prejudice of the State's suggestion by introduction that the current lack of identification is in error, but a prior one (despite its suggestiveness) was accurate. The Defense cannot cross-examine a void – here, Ms. Gamboa was not holding on to the prior identification in ways subject to cross-examination, but the State was able to offer it anyway despite its obvious legal inadequacies. Both the State and the Defense offer Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and Baker v. State, 88 Nev. 369, 498 P.2d 1310 (1972)) for the test as to whether "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken

identification that (the defendant is) denied due process of law." No argument by the State's Answering Brief alters analysis of these facts in favor of the defense.

C. THE DISTRICT COURT ERRED BY ALLOWING AN INCOMPETENT WITNESS TO TESTIFY.

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief, but would add that the Witness' ability to go "toe-to-toe" with the Defense Counsel (Answering Brief, page 22) is belied by the testimony of Dr. Norton Roitman (IX AA 1760-1766) which was not even addressed by the State in its Answering Brief.

D. THE DISTRICT COURT ERRED IN ALLOWING A MATERIAL WITNESS WARRANT TO ISSUE ENGENDERING SYMPATHY AND/OR CREDIBILITY FOR A STATE'S WITNESS.

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief but would add that the record is devoid of the reasons why a Material Witness warrant was necessary and to the extent that this Court finds it necessary to make its full analysis, Evaristo would suggest that pursuant to **NRAP 10(c)**, the matter could be submitted to the district court to be settled.

E. IT WAS PROSECUTORIAL MISCONDUCT TO PROCEED WITH A PREJUDICIAL GANG ENHANCEMENT ONLY TO DROP IT MIDTRIAL.

Evaristo hereby incorporates by reference his legal argument on this Issue set forth in the Appellant's Opening Brief but would add that the proper factual

analysis of the record as set forth above reveals that there was never a good-faith belief that the State could prove that Puros Locos was a gang, let alone that the gang enhancement was proper or that Evaristo Garcia was in the gang. The trial court acknowledged this when it said "I don't think legally, as a matter of law, that it's even close to what is in the definition." (VII AA 1357). It is of no moment that the trial court gave "cover" to the State in suggesting that the State did not act in bad faith, the record is clear. The State never makes a sufficient record establishing these facts irrespective of the specious and improper gang expert they tried to hoist upon the jury. Further, the trial court continually makes special note of the prejudice, to wit: "At this point, I'm going to stop any *further* prejudice…." (VII AA 1357)(emphasis added). Indeed, during the vast and comprehensive analysis of its ruling, the trial court repeatedly states that there is no evidence of a gang, no evidence that Evaristo Garcia is in a gang, and prejudice. (VII AA 1356-1361). In sum, the State cannot point to any actual evidence of any of this. There was no "new information"; there were no facts, and yet the State proceeded any how to the absolute prejudice and detriment of a fair trial.

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CONCLUSION

As a result of the error at the trial admixed with prosecutorial misconduct, the convictions must be reversed.

DATED this 8th day of December, 2014.

/s/: Ross Goodman

ROSS GOODMAN, ESQ.
Nevada Bar No. 007722
520 S. 4th Street
Las Vegas, NV 89101
(702) 384-5563

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 2007 in 14 point Times New Roman type style; or

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains no more than 7,000 words, and does not exceed 11 pages. And in fact contains 3050 words and is 10 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 8th day of December, 2014.

/s/: Ross Goodman
ROSS GOODMAN, ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 8th day of December, 2014, the foregoing **APPELLANT'S REPLY BRIEF** was served upon the appropriate parties hereto via the Supreme Court's notification system in accordance to the Master Service List.

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 South Third Street - 7th Floor
Las Vegas, NV 89155
Attorney for Respondent

CATHERINE CORTEZ MASTO, ESQ.
Nevada Attorney General
Nevada Bar No. 003986
555 E. Washington Ave., #3900
Las Vegas, NV 89101

/s/: Ross Goodman
ROSS GOODMAN, ESQ.

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