

17-27488

TABLE OF CONTENTS

	<u>PAGE</u>
I JURISDICTIONAL STATEMENT	1
A. BASIS FOR APPELLATE JURISDICTION	1
B. FILING DATES ESTABLISHING TIMELINESS OF APPEAL.....	1
C. ASSERTION OF FINAL ORDER OR JUDGMENT.....	1
II ROUTING STATEMENT	1
III STATEMENT OF ISSUES.....	2
IV STATEMENT OF THE CASE	2
A. NATURE OF THE CASE.....	2
B. COURSE OF PROCEEDINGS.....	3
C. DISPOSITION BY THE COURT BELOW	3
V NOTE TO THE COURT	4
VI STATEMENT OF RELEVANT FACTS	4
VII SUMMARY OF ARGUMENT	8
VIII ARGUMENT	10
A. IMPROPER ADMISSION OF TESTIMONY RE CELL PHONES ...	10
1. TESTIMONY WAS EXPERT NOT LAY.....	13
2. ADMISSION PREJUDICED LAGUNA	16
3. (a) Verdict Would Have Been Different.....	16
(b) Prosecution Acted In Bad Faith.....	16
B. IMPROPER ADMISSION OF HEARSAY/CONFRONTATION	17
C. VERDICT NOT SUPPORTED BY ADMISSIBLE EVIDENCE	22

TABLE OF CONTENTS
(continued)

	<u>PAGE</u>
IX CONCLUSION.....	26
X CERTIFICATE OF COMPLIANCE	27
XI CERTIFICATE OF SERVICE.....	28

TABLE OF AUTHORITIES

NEVADA CASES

PAGE

<i>Burnside v. State</i> , 131 Nev.Adv.Op. 40 (2015).....	13
<i>Cheatham v. State</i> , 104 Nev. 500 (1988).....	24
<i>Franco v. State</i> , 109 Nev. 1229 (1993).....	17, 21, 22
<i>Heglemeier v. State</i> , 111 Nev. 1244 (1995).....	24
<i>LaPena v. State</i> , 96 Nev. 43 (1980).....	24
<i>Pete v. Nevada</i> , 2017 WL 2813957 (6-27-17).....	10, 13

OUT-OF-STATE CASES

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	22
<i>Collins v. State</i> , 172 So.3d 724 (Miss. 2015)	15
<i>Idaho v. Wright</i> , 110 S.Ct. 3139 (1990)	21
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980)	17
<i>State v. Johnson</i> , 238 W.Va. 580 (2017).....	15

TABLE OF AUTHORITIES (continued)

OUT-OF-STATE CASES

PAGE

<i>State v. Payne</i> , 440 Md. 680 (2014).....	15
<i>United States v. Evans</i> , 892 F.Supp.2d 949 (N.D.Ill. 2012).....	15
<i>United States v. Shipsey</i> , 363 F.3d 962 (9 th Cir. 2004)	22
<i>Wilder v. State</i> , 191 Md.App. 319 (2010)	13

RULES AND STATUTES

NRAP 4.....	1
NRAP 17.....	1
NRS 175.291.....	2, 23
NRS 177.015.....	1
NRS 193.165.....	3
NRS 193.330.....	3
NRS 199.480.....	3
NRS 200.010.....	3
NRS 200.030.....	3
NRS 200.280.....	3
NRS 200.380.....	3
NRS 205.060.....	3
NRS 205.067.....	3

I

JURISDICTIONAL STATEMENT

A. BASIS FOR APPELLATE JURISDICTION

NRAP 4(b); NRS 177.015(3)

B. FILING DATES ESTABLISHING TIMELINESS OF APPEAL

12-02-16: Judgment of Conviction filed¹

12-09-16: Notice of Appeal filed²

C. ASSERTION OF FINAL ORDER OR JUDGMENT

This appeal is from a judgment of conviction.

II

ROUTING STATEMENT

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

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....

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....

¹ LA/21/5182.

² LA/21/5185.

III

STATEMENT OF ISSUES

ISSUE NO. 1: Whether LAGUNA'S 5th and 14th amendment rights to due process and a fair trial were violated amounting to prejudicial error and requiring reversal of his convictions where improper testimony regarding cell phone towers was admitted through an undesignated expert posing as a lay person.

ISSUE NO. 2: Whether LAGUNA'S 5th 6th, and 14th amendment rights to due process, a fair trial, and to confront witnesses against him were violated amounting to prejudicial error and requiring reversal of his convictions where improper hearsay testimony regarding a cell phone app used by an unavailable witness was introduced through a police detective.

ISSUE NO. 3: Whether LAGUNA'S 5th and 14th amendment rights to due process and a fair trial were violated amounting to prejudicial error and requiring reversal of his convictions where his convictions were not supported the evidence, since his convictions were solely predicated on uncorroborated accomplice testimony, which was admitted in violation of NRS 175.291.

IV

STATEMENT OF THE CASE³

A. NATURE OF THE CASE

This is a case of trial by ambush through testimony of an undesignated expert witness, admission of improper hearsay evidence, and admission of uncorroborated accomplice testimony, in connection with a home invasion by people that LAGUNA knew, resulting in the death of an occupant of the home who LAGUNA did not know.

³ "LA" shall at all times herein refer to LAGUNA's Appendix filed herewith.

There was absolutely no evidence linking LAGUNA to the crime in question (outside accomplice testimony) other than cell phone testimony improperly admitted which showed that a cell phone sometimes used by LAGUNA was purportedly near the crime scene at the time of the crime. Even if properly admitted, however, this only proved the location of a cell phone, and not the location of LAGUNA.

B. COURSE OF PROCEEDINGS

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

C. DISPOSITION BY THE COURT BELOW⁴

COUNT	CONVICTION	SENTENCE
1	Conspiracy to commit robbery (199.480, 200.380)	28-72 mos
2	Burglary w/use (205.060)	48-150 mos
3	Home invasion w/use (205.067)	66-180 mos
4	Attempted robbery w/use from Larsen(193.165, 193.330, 200.280)	96-240 mos
5	Attempted robbery w/use from Gibson(193.165, 193.330, 200.280)	96-240 mos
6	Second Degree Murder w/use (193.165, 200.010, 200.030)	10-life + 36-240
7	Attempted Murder w/use (193.330, 200.010, 200.030)	168-480 mos

All counts to run concurrent, except Count 7 which is to run consecutive to Count 6. LAGUNA will not be eligible for parole until he has served 24 years in prison.

....

....

....

⁴ Taken from the Second Superseding Indictment (LA/5/1055) and the Judgment Of Conviction (LA/21/5182).

V

NOTE TO THE COURT

Almost all of the witnesses in this case go by nicknames as well as their real given names. Throughout the 5,000+ pages of testimony and evidence which comprises the Appendix, these names are used interchangeably. For purposes of clarity, LAGUNA will always refer to the person by their last name. Attached as an addendum to this Opening Brief is a chart which shows which nickname goes with which person, that person's relationship to others in this case, and the cell phone number associated with that person.

VI

STATEMENT OF RELEVANT FACTS

Summer Larsen and Joey Larsen were married but separated. There was animosity between the two and Summer had broken into Joey's house on two occasions and stolen money and other items.⁵ Shortly before September 21, 2014,⁶ Ashley Hall was riding in the car with Summer when she overheard Summer talking to two men in the car⁷ about her plan to rob Joey again.⁸ Ashley Hall got in touch with Tracy Rowe who lived down the street from Joey's father, Steve

⁵ LA/11/2634, 14/3328, 14/3340, 14/3343.

⁶ LA/19/4667, 19/4671.

⁷ LA/19/4674,

⁸ LA/11/2641, 11/2644, 19/4658.

Larsen,⁹ to warn Joey of the impending robbery.¹⁰ Steve Larsen was on his way to Joey's house to pick him up to get him and his friend (Monty Gibson) out of the house, when he got a call from Joey stating that there had been an attempted robbery and a shoot-out.¹¹

Murphy who was a good friend of Summer's, told Jorge Mendoza about the planned robbery.¹² Police believed that Murphy was the one who planned the whole thing.¹³ Jorge Mendoza was married to David Murphy's cousin, Amanda, so police believe that connection is how Mendoza got involved in the scheme.¹⁴ Murphy drove Figueroa and Mendoza and a disputed third person to Joey's house to commit the home invasion/robbery¹⁵ about 8:00 p.m. on September 21, 2014. Figueroa had a .38 revolver with him.¹⁶ Mendoza had a 9 mm rifle.¹⁷ Because Joey Larsen had been warned by his father about the impending robbery, he was ready, and when Figueroa knocked down the front door, Joey Larsen started shooting. A bullet hit Figueroa in the face and he went down. He got back up and was turning around trying to leave when he bumped into Mendoza. At that point

⁹ LA/14/3303.

¹⁰ LA/14/3312-3313, 14/3345.

¹¹ LA/14/3348, 14/3350.

¹² LA/18/4425.

¹³ LA/2/413.

¹⁴ LA/2/414.

¹⁵ LA/19/4482.

¹⁶ LA/19/4488.

¹⁷ LA/19/4487.

Figueroa got shot a second time in his side. Mendoza also turned around to run and got shot¹⁸ in the femur which put him down on the ground unable to walk.¹⁹ Mendoza returned fire and shot Monty Gibson (Joey Larsen's visiting friend)²⁰ who was trying to put the door back in place, killing him.²¹

Figueroa ran down the street and hid out behind some bushes in a neighbor's yard. He was not discovered by police on September 21st. He was picked up by his sister the following day and eventually taken to a hospital in California for treatment. Mendoza was trying to get away by scooting on his butt down the street with his rifle sitting on his lap.²² He eventually made it to an open vehicle and got inside to hide.²³ One of the neighbors told police where he was and he was apprehended at the scene.²⁴

Gabriel Sotelo told police in an October 16, 2014 statement that Figueroa kicked down the door, Mendoza was in the middle, and Barrientos was in the back.²⁵ Sotelo said that his mother called him and asked why he had implicated Barrientos.²⁶ Barrientos was her nephew.²⁷ When defense counsel tried to talk to

¹⁸ LA/19/4493.

¹⁹ LA/19/4494.

²⁰ LA/19/4500.

²¹ LA/19/4529, 19/4555, 19/4567.

²² LA/9/2186, 12/2933, 12/2937.

²³ LA/19/4504.

²⁴ LA/18/4318, 19/4505.

²⁵ LA/1/117.

²⁶ LA/20/4745.

Sotelo before trial, Sotelo told them that Detective Jensen had instructed Sotelo not to talk to the defense.²⁸ Apparently, Detective Jensen and Gabriel Sotelo had some type of non-business relationship which Sotelo bragged about, but Detective Jensen denied.²⁹ Eventually, Sotelo told police that Barrientos had been lying to him about being involved in the incident in order to get “street cred” for girls.³⁰

Gabriel Sotelo testified at trial that Figueroa told Gabriel Sotelo that Figueroa, Manny Barrientos (Sotelo’s cousin), and a chick tried to rob someone and that Figueroa got shot in the face and that “his boy” (Mendoza) got caught when the police found him in a car.³¹ Police originally believed that the fourth person in the car was Manny Barrientos,³² but Figueroa eventually disclaimed that and said it was Joey Laguna.³³ Figueroa and Barrientos were long-time friends.³⁴ Metro detectives never talked to Barrientos even though they had been told that Barrientos was involved and initially believed that.³⁵ Moreover, the police knew

²⁷ LA/1/99, 1/106, 1/107, 16/3849-3850, 16/3884, 20/4722.

²⁸ LA/20/4778.

²⁹ LA/20/4779.

³⁰ LA/20/4747.

³¹ LA/20/4772, 20/4775.

³² LA/16/3868.

³³ LA/16/3884-3885.

³⁴ LA/20/4783.

³⁵ LA/18/4234, 18/4290.

that Laguna had corneal transplants and could not see well – hardly a recipe for participating in a nighttime robbery with guns.³⁶

VII

SUMMARY OF ARGUMENT

Laguna was convicted because a detective with expertise in interpreting cell phone records was allowed to testify as an expert witness (in lay witness clothing) about very technical cell phone data, using a personal program he had used to chart azimuths, longitude and latitude to conclude that Laguna's cell phone was in the area of the crime at the time it occurred. Since the witness was touted as a lay witness and never designated as an expert, the defense was blindsided as to what his testimony would be and had no opportunity to have its own expert examine and comment on the findings.

In order to corroborate the timeline set forth by Figueroa (who received a plea deal before trial), a metro detective was allowed to testify that the night of the incident, he was told by Mendoza's wife (Amanda) that she had used a cell phone app to locate Mendoza's phone and that when Amanda showed the app she used to the detective, it took him to the street in front of Laguna's house. Amanda never testified, and the app locator information was never preserved. Laguna contends that the information that Amanda told to the detective was inadmissible hearsay,

³⁶ LA/18/4298-4299.

and that because Amanda could not be forced to testify at trial (as the wife of Mendoza, a co-defendant), Laguna was denied his right to cross examine Amanda and thereby confront a witness against him. Alternatively, this was also a ground for severance of Mendoza from the trial of Murphy and Laguna.

Laguna did not participate in the home invasion incident, and has at all times denied any involvement whatsoever. The testimony of Sotelo indicated that the fourth person involved was Manny Barrientos, not Laguna. That testimony was ultimately changed based on the urgings of Sotelo's mother (Barrientos' aunt) and Detective Jensen. There was absolutely no forensic or eyewitness testimony tying Laguna to the incident. In fact, there was no forensic or eyewitness testimony tying anyone to the incident except Figueroa and Mendoza. Yet, both of these accomplices were allowed to testify against Murphy and Laguna despite no admissible corroborating testimony or evidence to suggest involvement by either Murphy or Laguna. Moreover, even if the cell phone testimony was admissible, that could only possibly establish the location of Laguna's phone, and not the location of Laguna, himself, at the time of the incident. It is not known what car was used to take Mendoza and Figueroa to the scene, but it was known that Laguna knew Figueroa and Murphy, and it is entirely possible that he inadvertently left his phone in the vehicle that was used for the robbery. Accordingly, that information was not corroborative and did not justify the admission of accomplice testimony.

VIII

ARGUMENT

A. IMPROPER ADMISSION OF TESTIMONY RE CELL PHONES

(Standard of Review: Abuse of Discretion³⁷)

Officer Christopher Gandy was assigned to the technical detail of the Las Vegas Metropolitan Police Department. The unit he was assigned to was called TASS, short for Technical And Surveillance Section.³⁸ His primary responsibility was doing phone intercepts and processing court orders for phone intercepts. He would get phone records from cell phone companies and then load those documents into their computer systems and analyze the documents.³⁹ The program he would use to analyze the phone records was called PenLink.⁴⁰ In order to get accurate results, they would have to (1) determine the phone tower location for the times being analyzed, and also (2) be able to adjust the time on the call detail records (which might be listed as Greenwich Mean Time) to the time zone where the cell towers being analyzed were located.⁴¹ Detective Gandy did some initial work for the District Attorney right around the time of the crime including analysis

³⁷ *Pete v. Nevada*, 2017 WL 2813957, at 1 (6-27-17).

³⁸ LA/15/3589.

³⁹ LA/15/3535.

⁴⁰ LA/15/3621-3622.

⁴¹ LA/15/3603.

using Pen Link.⁴² Detective Gandy was never designated as an expert witness, and that analysis was never provided to the defense. The defense objected to Detective Gandy testifying regarding the phone records and his analysis of them because he had not been designated as an expert witness,⁴³ and because his analysis had never been provided to the defense. The defense also objected to exhibits showing cell tower hits for various phones.⁴⁴

As I come into court today, I had no idea that evidence existed, none. The only hit around the close time from of my client's I thought was after the 911 calls because that's the information I was provided.⁴⁵

The district attorney argued that no opinion testimony was being offered, that what was being offered was merely a summary of what was taken from the demonstrative evidence (phone records) that had already been provided.⁴⁶ He went on further to try to further convince the court that the testimony was merely lay opinion, by stating:

Just so that the Court is aware, in State's Exhibit No. 275, if you were to go to LAC 24599, and then go to cell number 62768, you would find the GPS location for that to be 36.15858197 and – well, that's the latitude. And the longitude is negative 115.314884, which happens to be the southwest corner of Charleston and Hualapai which is the exact same GPS location for tower 456 from cricket, which has also been previously provided to the defense, as well as the exact same location of AT&T tower 36995/30403.⁴⁷

⁴² LA/15/3597.

⁴³ LA/15/3522-3523.

⁴⁴ LA/15/3523-3524, 15/3531, 15/3563, 3574.

⁴⁵ LA/15/3523-3524.

⁴⁶ LA/15/3526.

⁴⁷ LA/15/3531.

Contrary to the state's position that Detective Gandy's testimony was mere lay testimony, Detective Gandy admitted that, "...some of the reports that they run for us are **based on engineering documents** and such things that **aren't really designed for a person that doesn't have some expertise to read easily**. So we have to look very closely at the information once we get it and determine whether the times are correct on that information. And when I say correct, they can be in different type (sic) zones, depending on where the phone companies are at, how their networks are set up and such things.....**And those are the things we have to look at very closely before we take those records and then give them to the detectives, or if the detectives get them directly, to help the detectives figure out that this is what's going on with these records and these were the times of these records.**"⁴⁸

The court overruled the defense objection to admission of Detective Gandy's testimony, stating, "...your objection's overruled. I think that it is summary of the information that's already been admitted in front of the jury, and the purpose of this witness is to summarize the evidence that's already been presented..but certainly insofar as interpreting some of this evidence and walking them through it, that I consider to be more in the nature of a summary than expert testimony, until I

⁴⁸ LA/15/3539-3540.

hear him he say he has an opinion about something.”⁴⁹ Thereafter, the court slipped and admitted that the testimony was expert testimony, but still allowed it.⁵⁰

In the recent case of *Pete v. Nevada*, this Court stated that, “[t]o warrant reversal for the improper admission of expert opinion testimony, Pete must show: (1) the opinion testimony was expert, not lay; (2) its admission prejudiced him; and (3)(a) had the testimony been excluded or Pete been given proper advance notice, it is likely that a different verdict would have resulted, or (b) the prosecution acted in bad faith.”

1. Testimony Was Expert Not Lay

This Court in *Burnside v. State*,⁵¹ held that a detective’s testimony regarding a map showing cell phone sites which was created from cell phone records and cell site information did not constitute expert testimony. However, it held that custodian testimony regarding how cell phone signals are transmitted from cell sites and that generally a cell phone transmits from the cell site with the strongest signal, did constitute expert testimony. It cited for support to *Wilder v. State*,⁵² where a Maryland court concluded that testimony regarding functions of cell phone towers, derivative tracking and techniques of location and/or plotting origins of cell phone calls using cell phone records did constitute expert testimony. In this

⁴⁹ LA/15/3532.

⁵⁰ LA/19/4614.

⁵¹ *Burnside v. State*, 131 Nev.Adv.Op. 40 (2015).

⁵² *Wilder v. State*, 191 Md.App. 319 (2010).

case, Gandy did testify regarding these matters:

...the phone will connect to the tower that it has the best signal to. So if there's an obstruction between the closest tower and the phone, there is a possibility for the phone then to connect to a tower that may be physically farther than that closest tower because it's getting a better radio signal to – to the other tower.⁵³

Yes. The phone will attempt to give its best location, which could be a very good location or it could be a worse even location than the cell tower itself. It can be variable.....⁵⁴

The 300 is what we call the azimuth or the direction of the – that that radio is – is facing, the center of that radio is facing or the panel that's up on the – the cell tower. So you have a 360 degrees, and so it's 300 – 300 degrees which 0 or 360, which we would be due north. 300 degrees would then put you 60 degrees off to the west. So that would be like north, northwest for 300 degrees is the way that that – the center of that antenna is facing.⁵⁵

...[T]hese numbers come from engineering documents from the phone company. They don't come from documents that are created specifically for law enforcement or specifically for anyone then to decipher these things except for engineers.⁵⁶

....So, if you look at a cell tower that has three sides, it will have three – three facing antennas on it each doing 120 degrees equaling 360 for an entire circle. So these – where it says 65 beam width, that's the optimal signal strength, but that antenna will go out to 120 to its sides.⁵⁷

The Maryland court further held that reports generated by forensic software was generally not within the ken of the average lay person, and therefore testimony regarding such required specialized knowledge and experience of an expert

⁵³ LA/15/3543-3544.

⁵⁴ LA/15/3545.

⁵⁵ LA/15/3551-3552.

⁵⁶ LA/15/3552.

⁵⁷ LA/15/3553.

witness.⁵⁸ In this case, as stated above, Detective Gandy used a specialized program not even available to the district attorney called PenLink to analyze the cell phone data.⁵⁹

A federal court sitting in Illinois held that determining how a cell phone connects to a tower in its network with the strongest signal, constituted technical expertise requiring expert testimony.⁶⁰ Likewise, a West Virginia court held that a witness must be qualified as an expert in order to present evidence of cell phone historical cell site data showing a caller was in a specific location at a specific time.⁶¹ And, a Mississippi court stated:

Thus, while the technology underlying cell identification is not extremely difficult to understand, **utilizing cell identification to locate a person does require specialized knowledge regarding such technology**—namely, knowledge regarding the various antennas on cell sites and the cell site coverage range and how those interact to determine the entire area in which a cell phone user might have been located while making a cell phone call. Illustrating that cell identification requires specialized knowledge are the facts that Detective Sims had to take a sixteen-hour course on how to use cellular technology in law enforcement and that he used specialized software acquired at this course to determine the locations of Collins and Jenkins on the night of Jenkins's murder.⁶² (emphasis added)

⁵⁸ *State v. Payne*, 440 Md. 680, 702 (2014).

⁵⁹ LA/15/3667.

⁶⁰ *United States v. Evans*, 892 F.Supp.2d 949, 953 (N.D.Ill. 2012).

⁶¹ *State v. Johnson*, 238 W.VA. 580 (2017).

⁶² *Collins v. State*, 172 So.3d 724, 741 (Miss. 2015).

Detective Gandy's testimony covered 140 pages of trial transcript.⁶³ 87 pages of exhibits created by Detective Gandy were admitted over objection.⁶⁴ Many of these exhibits were based on records that were illegible to the average juror over the age of 40 without a magnifying glass.⁶⁵

2. Admission Prejudiced Laguna

Other than the inadmissible accomplice testimony, the only thing that connected Laguna to the crime in question were the cell phone records which suggested that his cell phone was in the area of the crime scene at the time the crime was committed.

3. (a) Verdict Would Have Been Different

Without the cell phone records, there was no corroborative evidence tying Laguna to the crime scene, and the accomplice testimony would have had to be excluded. Without the accomplice testimony and the cell phone records, there was nothing tying Laguna to the crime.

(b) Prosecution Acted In Bad Faith

One has to ask why the state didn't simply designate Detective Gandy as an expert witness. Further, one has to ask why the state did not provide the

⁶³ LA/15/3534-3674.

⁶⁴ LA/16/3723-3810.

⁶⁵ LA/13/3083-3119, 13/3127-3129, 13/3198-3213.

defense with the information generated by Detective Gandy at the time he generated it which was close to the time of the crime.⁶⁶ The answer seems clear. The state wanted to ambush the defense at trial with information unknown to the defense. It wanted to avoid the possibility of the defense retaining its own expert to refute Detective Gandy's conclusions. This constituted bad faith on the part of the state, and resulted in the conviction of an innocent man.

B. IMPROPER ADMISSION OF HEARSAY/CONFRONTATION

(Standard of Review: harmless error)⁶⁷

An out-of-court statement offered at trial to prove the truth of the matter asserted in the statement is hearsay, and is inadmissible unless it falls within one of the recognized exceptions to the hearsay exclusionary rule. NRS 51.035, 51.065. In addition, in a criminal trial, the statement of a non-testifying hearsay declarant is only admissible under the Confrontation Clause if it bears adequate "indicia of reliability."⁶⁸

Jorge Mendoza's wife was Amanda, who in turn is David Murphy's cousin.⁶⁹ On the night of the incident, Amanda became worried when her husband had not returned home by 9:00. According to Amanda's mother with whom she

⁶⁶ LA/15/3597.

⁶⁷ *Franco v. State*, 109 Nev. 1229, 1236-1236 (1993).

⁶⁸ *Franco v. State*, 109 Nev. 1229, 1236-1237 (1993); *Ohio v. Roberts*, 448 U.S. 56, 66-67 (1980).

⁶⁹ LA/2/414.

lived, Amanda had a cell phone app which allowed her to locate Jorge Mendoza's phone. On the night in question, she used that app to find Jorge's phone, thinking that if she went to that location she would find Jorge. She asked Murphy to drive her there. Murphy came to Amanda's house between 9:00 and 10:00 the night of the incident and Amanda left with him, apparently to go find Jorge. Amanda returned with Jorge's car. Amanda's mother did not know where Amanda and Murphy went to find the car.⁷⁰ Neither Murphy nor Amanda testified at trial. Murphy was a co-defendant, and Amanda was the wife of a co-defendant (Jorge Mendoza).

Detective Williams interviewed Mendoza at the hospital where he was being treated for a gunshot wound to his leg.⁷¹ He told police that he had been carjacked.⁷² Detective Williams then went to Mendoza's home about 2:00 am on September 22, 2014, to interview Amanda. Jorge's car was there.⁷³ Detective Williams then testified that he looked at the app Amanda had on her phone that she purportedly used to go find Jorge's car, that he went to that location on Lucky Horseshoe Court, which was later determined to be the street in front of Laguna's house.⁷⁴ They did

⁷⁰ LA/12/2769, 13/2772, 14/3415.

⁷¹ LA/14/3412-3413.

⁷² LA/15/3487.

⁷³ LA/14/3415.

⁷⁴ LA/14/3426.

not find Jorge's phone at that location.⁷⁵ Detective Williams also testified that he later pinged off Jorge's phone and was directed to the same location where, again, he did not locate Jorge's phone.⁷⁶ The relevance of this testimony is to corroborate the testimony of Figueroa and Jorge Mendoza (purported accomplices) to the effect that Mendoza, Figueroa, Murphy, and Laguna all met up at Laguna's house at 7:00pm and then took Murphy's car to the scene, leaving Mendoza's car at Laguna's house.⁷⁷

The defense objected to the testimony of Detective Williams regarding what he saw on Amanda's cell phone as it constituted inadmissible hearsay.⁷⁸ It was inherently unreliable testimony, as Detective Williams could have said that the iPhone app which Amanda showed him showed any address. Without Amanda at trial testify, there was no way to cross examine her, and evidence was therefore being offered by the state against Laguna with no right to confront the witness against him. The witness was Amanda and her statement to Officer Williams that a place shown on her iPhone app was the place that she went to find Jorge's car. The court overruled the defense objections⁷⁹ and allowed Officer Williams to identify on a map the location he claimed to get off the iPhone app which

⁷⁵ LA/14/3427.

⁷⁶ LA/14/3428.

⁷⁷ LA/15/3706, 19/4478, 19/4479.

⁷⁸ LA/14/3425, 14/3429-3430.

⁷⁹ LA/14/3426, 14/3445.

happened to be the very street where Laguna lived.⁸⁰ Jorge Mendoza's phone was never located.⁸¹

Detective Barry Jensen admitted that there were no reports indicating that Detective Williams drove to a location near Laguna's house where Jorge's car was allegedly parked at some point.⁸² Detective Williams, however, told Detective Jensen that Amanda told him (Williams) that she found Jorge's car near Lucky Horseshoe Street.⁸³ Detective Jensen's testimony constituted double hearsay – what Detective Williams told Jensen that Amanda Mendoza said.

Amanda was apparently unavailable as a witness to be cross-examined because of the spousal privilege given that Jorge Mendoza was a co-defendant in the criminal case.

The United States Supreme Court stated that “....general hearsay exceptions are not “firmly rooted” for the purposes of Confrontation Clause analysis.... Therefore, hearsay statements of a non-testifying declarant, even when properly admitted under the general exception, will violate the Confrontation Clause unless they also possess particularized guarantees of trustworthiness such that

⁸⁰ LA/14/3426-3427.

⁸¹ LA/18/4285.

⁸² LA/18/4286.

⁸³ LA/18/4286.

“adversarial testing would add little to their reliability.”⁸⁴ In *Franco*, this court held that admission of hearsay testimony which violated the Confrontation Clause was not harmless beyond a reasonable doubt where there was very little physical evidence or eyewitness testimony placing [the defendant] at the scene.⁸⁵

The situation here is the same as in *Franco*. There was no physical evidence tying Laguna to the scene, except for inadmissible cell phone testimony (discussed above). There was no eyewitness testimony tying Laguna to the scene except for inadmissible uncorroborated accomplice testimony (discussed below). Figueroa and Mendoza claimed that Murphy drove them to the scene and that Laguna was also in the car. They asserted that after the shooting started, Laguna ran to the car where Murphy was and got in and they drove away. However, not one of three neighbor eyewitnesses who observed the incident testified to seeing a car pick anyone up.⁸⁶

The testimony of Detective Williams regarding the purported location of Jorge Mendoza’s car per Amanda’s statement regarding her cell phone app should not have been admitted because it was inadmissible hearsay and its admission

⁸⁴ *Idaho v. Wright*, 110 S.Ct. 3139, 3147-3149 (1990); *Franco v. State*, 109 Nev. 1229, 1240 (1993).

⁸⁵ *Franco, supra*, at 1240-1241.

⁸⁶ LA/9/2178-2193 (Gene Walker testimony); LA/12/2929-2940 (Roger Day testimony); LA/12/2956-2968 (Renee Salgado testimony).

violated Laguna's right to confront witnesses against him since neither Murphy (5th Amendment right against incrimination) nor Amanda (spousal privilege) could be compelled to testify at trial. Additionally, Officer Jensen's testimony about what Officer Williams told him about what Amanda Mendoza said to Williams should have been excluded as double hearsay and also violative of the Confrontation Clause. As this Court held in *Franco*, the error in admitting this evidence was not harmless given the lack of any admissible physical or eyewitness evidence tying Laguna to this crime. Accordingly, Laguna's convictions should be reversed and the matter remanded for a new trial.

C. VERDICT NOT SUPPORTED BY ADMISSIBLE EVIDENCE

(Standard of Review: de novo)

Claims of convictions which are supported by insufficient evidence are reviewed de novo.⁸⁷ "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged".⁸⁸

"1. A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the

⁸⁷ *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004).

⁸⁸ *Apprendi v. New Jersey*, 530 U.S. 466, 477 (U.S. 2000).

commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.”⁸⁹

The trial court ruled that both Mendoza and Figueroa were accomplices, and subject to the accomplice rule.⁹⁰

The defense objected to the accomplice testimony.⁹¹ However, the court ruled that the testimony could be heard by the jury – that it was admissible even if it could not be used to convict the accused.⁹²

As Laguna has argued above, the cell phone testimony of Officer Gandy placing Laguna’s cell phone in the vicinity of the crime at the time it was committed should not have been admitted because it was improper expert testimony offered by Gandy who had not been designated as an expert witness. In addition, Detectives Williams and Jensen should not have been allowed to testify to the purported location of Mendoza’s car (at Laguna’s house) as that testimony was unreliable hearsay testimony which also violated Laguna’s right to confront witnesses (Amanda Mendoza and David Murphy) against him. Without those two

⁸⁹ NRS. 175.291.

⁹⁰ LA/19/4614, 20/4924.

⁹¹ LA/6/1317.

⁹² LA/6/1318-1319.

pieces of evidence, there was no evidence to corroborate the testimony of purported accomplices Mendoza (co-defendant) and Figueroa (plea deal) that Laguna was present at the time of the crime.

However, even if that questionable evidence is determined by this Court to have been properly admitted, it is still not sufficiently corroborative to justify admission of the Mendoza and Figueroa testimony against Laguna. The cell phone and Amanda evidence merely casts suspicion on Laguna. This Court has held that is not enough to corroborate the admission of accomplice testimony.⁹³ In *Heglemeier*, this Court held that "...where 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.'"⁹⁴ In this case, the existence of Laguna's cell phone at the crime scene is not evidence that he was there. Even if did show that, "[a]n accomplice's testimony is not sufficiently corroborated merely by showing that the defendant was near the scene of the crime at the time the accomplice testified that they committed the crime in concert."⁹⁵ And, evidence of Mendoza's car at Laguna's house is not evidence of anything other than that Mendoza may have visited Laguna sometime the day of

⁹³ *LaPena v. State*, 96 Nev. 43, 47 (1980).

⁹⁴ *Heglemeier v. State*, 111 Nev. 1244, 1250-51 (1995).

⁹⁵ *Cheatham v. State*, 104 Nev. 500, 505 (1988).

September 21, 2014. It is not indicative that Laguna ever even left his house that day. After all, it is undisputed that Jorge Mendoza was married to Murphy's cousin, Amanda. Moreover, Laguna was good friends with both Murphy and Figueroa. Mendoza admitted to knowing Laguna.⁹⁶ So, there was nothing unusual about the four of them being together at Laguna's house.

Even more suggestive that Laguna DID NOT participate in this crime is the fact that he has had corneal transplants which were failing him at the time of the incident.⁹⁷ The Court even noticed at time of trial that Laguna was having a hard time seeing. His attorney advised that he recently had a corneal transplant and that he was doing his best, but he could only see the papers if he held them close to his face.⁹⁸ It makes no sense that a blind man would participate in a robbery/home invasion at night.

The only way that Laguna could have possibly been convicted of these crimes was if the jury considered the accomplice testimony. That testimony should not have been considered by the jury since it was not properly corroborated. As a result, Laguna's convictions should be reversed and the matter remanded for a new trial.

....

⁹⁶ LA/2/414, 15/3688, 18/4420, 18/4421, 19/4514.

⁹⁷ LA/5/1158, 21/5168.

⁹⁸ LA/15/3721.

IX

CONCLUSION

Laguna's convictions should be reversed and the matter remanded for a new trial because the only evidence admitted to corroborate the accomplice testimony of Figueroa and Mendoza, was improperly admitted. The cell phone testimony constituted expert testimony, but it was admitted through a lay witness who had never been designated as an expert witness. The Amanda iPhone app information was admitted through two officers who testified to what Amanda supposedly told them about her cell phone app. Not only was that testimony inadmissible hearsay, the unavailability of Amanda for trial deprived Laguna of his 6th Amendment right to confront witnesses against him. However, even if the expert testimony and Amanda testimony is deemed admissible, it did not sufficiently corroborate the testimony of Figueroa or Mendoza such that their testimony should have been considered by the jury, under the accomplice rule.

Respectfully submitted,

Dated this 13th day of August, 2017.

A handwritten signature in black ink, appearing to read 'Sandra L. Stewart', written over a horizontal line.


SANDRA L. STEWART, Esq.
Attorney for Appellant

X

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this opening brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it either does not exceed 30 pages or it contains 6,426 words.

DATED: August 13, 2017


SANDRA L. STEWART, Esq.
Appellate Counsel for
JOSEPH LAGUNA

XI

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

APPELLANT'S APPENDIX

by mailing a copy on April 5, 2017 via first class mail, postage thereon fully prepaid, to the following:

JOSEPH LAGUNA
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INDIAN SPRINGS, NV 89070

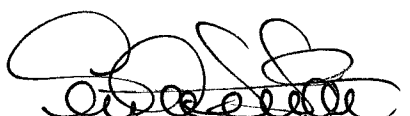
and by mailing a copy on August 14, 2017 via first class mail, postage thereon fully prepaid, to the following:

STEVEN B. WOLFSON, ESQ. (w/CD of Appendix)
CLARK COUNTY DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NV 89155-2212

I further certify that I served a copy of the:

APPELLANT'S OPENING BRIEF

by mailing a copy on August 14, 2017 via first class mail, postage thereon fully prepaid, to Messrs. Laguna and Wolfson at the addresses listed above.


SANDRA L. STEWART

LAGUNA RELATIONSHIP CHART

NAME	NICKNAME	RELATIONSHIP	PHONE NUMBER	PAGE NUMBER
BARRIENTOS, EMANUEL	MANNY	VISITED FIGUEROA WITH GABRIEL SOTELO AFTER SHOOTING. SOTELO IS BARRIENTOS' COUSIN	702-542-8981	103, 3849-3850, 3851, 4722
FIGUEROA, ROBERT		ACCOMPLICE	702-241-1051 702-504-1148	2999, 3843, 4098, 4092-4093
GIBSON, MONTY	CALI	VICTIM WHO GOT KILLED		3356
LAGUNA, JOEY	MATONE	GOOD FRIENDS WITH DAVID MURPHY, WAS CELL MATE WITH ROBERT FIGUEROA IN PRISON; LIVES AT 3668 LUCKY HORSESHOE COURT.	702-762-1584	414, 482, 4103, 4125, 4128
LAMB, MIKE	CORNBREAD	DAVID MURPHY'S BROTHER. THEY LIVED TOGETHER.		2642, 4117
LARSEN, JOEY		VICTIM OF HOME INVASION, MARRIED TO SUMMER LARSEN		2633
LARSEN, SUMMER		MARRIED TO JOEY LARSEN	702-883-7781 702-366-1640	2631, 2639, 2640, 2653, 3312, 4257
MEAD, ROBERT	TWISTED	FRIEND OF SUMMER LARSEN, DATING SUMMER'S FRIEND ASHLEY HALL		2640, 2641, 2754, 2758, 4111
MENDOZA, AMANDA		MENDOZA'S WIFE; DAVID MURPHY'S COUSIN	702-750-8111 702-286-3557	2786, 414, 3122, 3414, 4082
MENDOZA, JORGE	ORKO	ACCOMPLICE, MARRIED TO AMANDA (DAVID MURPHY'S COUSIN); KNOWS LAGUNA, LIVES AT 1219 WESTLUND DRIVE	702-666-4948	117, 2786, 2761, 2765, 2776, 3126, 3414, 4234, 4389, 4420, 4421, 4519
MURPHY, DAVID	DOUGH-BOY	GREW UP WITH SUMMER AND JOEY LARSEN, AMANDA MENDOZA'S COUSIN, LIVES DOWN STREET FROM STEVE LARSEN AT 6637 DELPHINIUM.	702-542-1558	414, 2514-2615, 2631, 2643, 3130, 2780, 4113, 4118
ROWE, CLINT	WHITE SNOOP	DRUG DEALER SUMMER LARSEN OWED MONEY TO.		2754, 2699, 2707
SOTELO, GABRIEL	BAM-BAM	WITH MANNY BARRIENTOS AFTER SHOOTING, BARRIENTOS IS SOTELO'S COUSIN	702-337-0892	99, 106, 107, 3849-3850, 3884, 4722

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