

IN THE SUPREME COURT OF THE STATE OF NEVADA

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JOSEPH LAGUNA)	SUPREME COURT NO. 71939
)	
Appellant,)	
)	
vs.)	APPEAL
)	
STATE OF NEVADA,)	
)	
Respondent.)	DISTRICT COURT NO. C-15-303991-5
)	
)	

APPELLANT'S REPLY BRIEF

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LAGUNA offers the following by way of reply to the State's Answering Brief filed on September 13, 2017.

I

FACTUAL DISCREPANCIES

The following assertions made by the state are not supported by the portions of the record cited by the state or any other portions which LAGUNA is able to locate.

Mendoza, following Laguna's directions, then drove to Robert Figueroa's...house.... 18 LA 4428-29.¹

The wording here is misleading, implying that Laguna was directing the operation. In fact, the testimony was that they drove from Laguna's house to pick up Figueroa and that they knew how to get to Figueroa's house because Laguna knew where he lived.

The group then proceeded back to Laguna's house, where they engaged in further discussions about trying again, or robbing somewhere else. 18 LA 4440²

That was not the testimony. The testimony was that "they" gathered in the driveway and were smoking marijuana. However, Laguna was not smoking marijuana, which suggests that he might not have even been part of the conversation in the driveway. Be that as it may, the discussion in the driveway

¹ Ans.Brff./3.

² Ans.Brff./3.

centered around **Figueroa's** disappointment over the abandonment of the prior purported planned robbery, and **Figueroa's statements** that they should make another attempt to rob the drug dealer (previously abandoned robbery), "or somewhere else." The Court felt that the decision to undertake the second robbery was "made solely through Mr. Murphy..."³

...Laguna was to stay outside and provide cover in case someone unexpectedly appeared. 19 LA 4485⁴

The testimony was actually that Laguna would "be there in case anyone else come out (sic) of any surprising spot or something." There was no testimony that Laguna was to provide cover as opposed to warning.⁵

Murphy later drove Mendoza's wife to Laguna's house so that she could retrieve Mendoza's car. 12 LA 2771-73; 15 LA 3511; 18 LA 4286⁶

The testimony at 2771-73 was by the mother (Estavillo) of Mendoza's wife (Amanda). Estavillo testified that Murphy picked up Amanda and took her to get her car. She did not say where they went to get the car. The testimony at 3511 is by Detective Williams, whose testimony has been challenged as hearsay and violative of the Confrontation Clause because it is testimony about what Amanda

³ LA/21:5162.

⁴ Ans.Brff./4.

⁵ LAGUNA would note that all this testimony is from the accomplices, which testimony LAGUNA asserts was improperly admitted in the first place.

⁶ Ans.Brff./5.

communicated to Williams about where she went to pick up the car. The testimony at 4286 is by Detective Jensen, which testimony has been challenged as double hearsay and violative of the Confrontation Clause because it was testimony about what Officer Williams told Officer Jensen about what Amanda had communicated to Williams.⁷

Mendoza's neighbor had earlier testified that Murphy came by to take Amanda Mendoza to the car. 12 LA 2762-72.⁸

No neighbor of Mendoza testified in this trial. The testimony referred to is the testimony of Amanda's (Mendoza's wife) mother (Michelle Estavillo), with whom Mendoza and Amanda resided.⁹ The cited statement in the Answering Brief is misleading because it suggests that an independent third party neighbor witness also told police that Amanda went with Murphy to retrieve her car. That is not true.

Amanda Mendoza's neighbor had seen her access an app that provided a location to Mendoza's phone. 14 LA 3410-12¹⁰

Again, this refers to the non-existent neighbor. The cited pages, once again, refer to Detective Williams' testimony. All of his testimony relating to what Amanda conveyed to him about the whereabouts of the Mendoza car has been

⁷ Op.Brf./17-22.

⁸ Ans.Brf./19.

⁹ LA/12/2760-2761.

¹⁰ Ans.Brf./19.

challenged as violative of the hearsay and Confrontation Clause rules. However, there is no testimony at the cited pages about Amanda Mendoza or conversations with a Mendoza neighbor.¹¹ There is no reference to a telephone app that provided a location to Mendoza's phone.

Were Murphy not part of the robbery, he would have no reason to know where the vehicle was shortly after the robbery.¹²

There was never any testimony or even an inference that Murphy knew where Mendoza's car was located when he took Amanda to retrieve it. The testimony from Amanda's mother was that Amanda had pinged Mendoza's phone and through a locator app on her phone, she located the phone, and told Murphy to drive to that location. Amanda's mother did not where that location was.

According to Williams, Amanda communicated that location to him by showing him the locator app on her phone. Williams' testimony about that communication has been challenged as inadmissible hearsay and also violative of the Confrontation Clause. Neither Amanda nor Murphy testified at trial, so there was no competent admissible evidence of where the two drove that night to pick up Mendoza's car, and there was no opportunity by LAGUNA to confront either Murphy or Amanda.

....

¹¹ Once again, no neighbor of Mendoza's ever testified in this trial.

¹² Ans.Brff./19.

II

ARGUMENT ISSUES

A. IMPROPER ADMISSION OF TESTIMONY RE CELL PHONES

The state is arguing that Detective Gandy was properly and timely designated as an expert witness. The defense disputes this.

The state filed an expert witness designation on August 15, 2016 which did not designate Detective Gandy as an expert witness.¹³ The state filed a third supplemental notice of expert witnesses on August 22, 2016 which listed Detective Gandy as an expert witness to testify regarding “how cellular phones work, how phones interact with towers, and the interpretation of that information.” The notice indicated that the substance of his testimony will be or had been provided in the discovery.¹⁴ The defense objected to any testimony by Detective Gandy which indicated where cell phones were actually located at a given time, because the defense had not been provided any information in the discovery other than raw cell phone records from the cell phone companies which it contended could not be used by a lay person to pinpoint the location of cell phones without expert testimony.¹⁵ At trial, the state offered into evidence Exhibits 315 through 324¹⁶ which Detective

¹³ LA/5/1217-1220.

¹⁴ LA/15/3521-3522.

¹⁵ LA/15/3521.

¹⁶ LA/16:3723-3810

Gandy had prepared and which pinpointed where the various defendants' cell phones were at various times on the date when the shooting occurred. The defense had not received those exhibits prior to September 23, 2016 (Day 10 of trial).¹⁷ The defense objected to admission of those exhibits and Detective Gandy's testimony about them because they were outside the stated scope of his testimony as stated in his expert witness designation.

Let me just state for the record that those exhibits that they're intending to admit through this expert we had not seen before today.¹⁸

The state argued that this was not expert opinion testimony that was being offered.¹⁹

There is no opinion testimony being admitted, so I don't know what the basis of the objection is.²⁰

Now, on appeal, the state is arguing that Detective Gandy was a properly noticed expert witness and it can't figure out what all the fuss is about. It claims that "at no point was Officer Gandy's *testimony* challenged at trial on the basis of being an unnoticed expert."²¹ Then, the state admits that it argued at trial "that the cell phone records, from which the maps were created, had been previously disclosed and that Officer Gandy's testimony regarding those maps was not expert

¹⁷ LA/15:3523.

¹⁸ LA//15:3527.

¹⁹ LA/15:3526.

²⁰ LA/15:3526.

²¹ Ans.Br./9.

testimony.²² So, from one side of its mouth, it argues that Detective Gandy was a properly noticed expert witness, but then out of the other side of its mouth argues that Detective Gandy was not offering expert testimony.

The bottom line is that Detective Gandy was a designated expert witness who was testifying outside the scope of his designation in his admitted capacity as a lay witness to information which pinpointed phone locations which the defense contended was expert testimony and required a properly designated expert witness on that issue with discovery relating to that issue and his opinions on that issue to have been produced to the defense before Day 10 of trial. The substance of those arguments are set forth in detail in the Appendix at Volume 15, Pages 3519-3534. The court ruled that “...I consider to be more in the nature of a summary than expert testimony...”²³

Legal arguments as to why this testimony and the exhibits should have been excluded are set forth in LAGUNA’s Opening Brief and will not be reiterated here.

B. IMPROPER ADMISSION OF HEARSAY/CONFRONTATION

The state argues that Detective Williams’ testimony about what he saw on Amanda Mendoza’s phone is not hearsay because it did not constitute a statement

²² Ans.Brff./9, ft. 44.

²³ LA/15:3532.

Amanda made to him and the information was not offered for the truth of the matter stated.²⁴

The state admits that hearsay may include a nonverbal statement.²⁵ Amanda told Detective Williams that she went to pick up Mendoza's car and when he asked her where she went to pick it up, she pointed to a locator app on her phone which showed a map of where she had picked up the car. The actual words between Detective Williams and Amanda were objected to as hearsay,²⁶ but a map showing the location Amanda pointed out on her iPhone app to Detective Williams was admitted over objection as Exhibit 314.²⁷ Her pointing to the map on her iPhone was her nonverbal response to Detective Williams' question. The question, itself, can be gleaned from the testimony of Amanda's mother who said that Amanda used an iPhone locator app to find out where Mendoza's phone and car were, together with Detective Williams' testimony that he was surprised that Mendoza's car was at his home (by the time Williams arrived) because he knew that Mendoza had been picked up at the scene and taken to the hospital.

....

....

²⁴ Ans.Brff./10.

²⁵ Ans.Brff./11.

²⁶ LA/14:3417.

²⁷ LA/14:3425-3426.

A.Well, we were surprised it [Mendoza's car] was there [at Mendoza's house], for one, and we asked her [Amanda] why it was there and how long it had been there... (parentheticals added)²⁸

Q. Without telling us what she said, at some point does she show you an iPhone app of some sort that had a location on it?

A. Yes.²⁹

Amanda showing Detective Williams her iPhone locator app in response to his question about where she picked up the car was a nonverbal response to that question. Detective Williams admitted that he went to the location Amanda had shown him on the app, and that location was depicted on a map (Exh. 314) which was admitted over hearsay objection. That location shown on Exh. 314 is on Lucky Horseshoe Court, the same street that Laguna lived on.³⁰ And, Detective Jensen admitted that Amanda had communicated to Detective Williams that she found the car near the Lucky Horseshoe address.³¹

That whole line of questioning and Detective Williams' testimony about the location where Amanda indicated she had picked up the car was offered for the truth of the matter stated – that Amanda did, in fact, pick up Mendoza's car at Laguna's residence. That corroborated the accomplice testimony and expert testimony about the cell phones that they all met up at Laguna's house and then

²⁸ LA/14:3417.

²⁹ LA/14:3417.

³⁰ LA/14:3426; LA/5:1098.

³¹ LA/18:4286.

Murphy drove Mendoza's car to the robbery scene. It also corroborated the cell phone evidence which showed that Murphy drove Laguna from the scene back to Laguna's house, left off Mendoza's car, and picked up his own (Murphy's) car to drive himself home, and then later that night drove Amanda to Laguna's house.³²

This was all hearsay evidence which should have been excluded.

C. VERDICT NOT SUPPORTED BY ADMISSIBLE EVIDENCE

The state adds nothing new to the argument that the convictions are not supported by the evidence except to refer to the non-accomplice testimony which LAGUNA is challenging. If that evidence is deemed to have been improperly admitted, then the accomplice testimony was also improperly admitted as discussed in LAGUNA's Opening Brief. The state has demonstrated no unchallenged evidence independent of the accomplice testimony which would tend to prove that LAGUNA participated in the crimes of which he has been convicted. Moreover, the state has not even addressed LAGUNA's contention that even if all the evidence was properly admitted, nothing proves that LAGUNA was near the scene of the crime at the time it was committed – only that his phone was. Accordingly, LAGUNA's argument on that issue, since unchallenged, should be adopted and the convictions against LAGUNA reversed.

....

³² Ans.Br./18.

III

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 only evidence independent of the accomplice testimony was (1) evidence through an improperly designated expert witness that Laguna's phone was at the crime scene at or about the time of the crime, and (2) evidence admitted through improper hearsay and violative of LAGUNA's 6th Amendment right to confront witnesses against him, that Murphy took Amanda to Laguna's house to pick up Mendoza's car after the robbery.

The cell phone testimony constituted improper expert testimony, because it was admitted through a witness who had never been designated as an expert witness for the purpose of pinpointing the location of telephones, and the exhibits supporting that pinpoint testimony were not timely disclosed to the defense prior to trial.

The Amanda iPhone app information was admitted through officers who testified to what Amanda supposedly communicated to them about her cell phone app. That information supposedly showed that Murphy drove Amanda to Laguna's house after the robbery to pick up Mendoza's car. Not only was that

testimony inadmissible hearsay, the unavailability of Amanda and Murphy to be cross-examined 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, because (1) it only showed where LAGUNA's phone was at the time of the robbery, which does not prove where LAGUNA was, and (2) Mendoza's car parked near LAGUNA's house is indicative of nothing, since it is undisputed that Mendoza and LAGUNA were friends.

Respectfully submitted,

Dated this 30th day of October, 2017.

/s/ Sandra L. Stewart
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Attorney for Appellant

IV

CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this reply 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 reply brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it contains only 2,372 words.

DATED: October 30, 2017.

/s/ Sandra L. Stewart
SANDRA L. STEWART, Esq.
Appellate Counsel for
JOSEPH LAGUNA

V

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

APPELLANT'S REPLY BRIEF

by mailing a copy on October 30, 2017 via first class mail, postage thereon fully prepaid, to the following:

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and by e-filing the original with the Nevada Supreme Court, thereby providing a copy to the following:

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/s/ Sandra L. Stewart
SANDRA L. STEWART