

IN THE SUPREME COURT IN THE STATE OF NEVADA

No. 72056

JORGE MENDOZA

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Direct Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Carolyn Ellsworth, District Court Judge
District Court Case No. C-15-303991-1

APPELLANT'S OPENING BRIEF

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I.

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because the primary offense arises from a Category A felony, is not a plea, and challenges more than the imposed sentence or sufficiency of the evidence.

II.

JURISDICTIONAL STATEMENT

Appellant brings the instant appeal seeking reversal of the jury verdict and resulting judgment of conviction entered against him. Nevada law permits a direct appeal from a final judgment entered against a defendant in a felony criminal case. See NRS 177.015. The verdict reached by a jury amounts to a final judgment upon the filing of the judgment of conviction. Castillo v. State, 106 Nev. 349, 351 (1990). Appellant's sentencing hearing occurred on November 28, 2016. The Judgment of Conviction was filed on December 2, 2016. Appellant filed a timely Notice of Appeal on December 22, 2016.

III.

INTRODUCTION

Appellant Mendoza was charged with Count 1 - Conspiracy to Commit Robbery, Count 2 - Burglary While in Possession of a Deadly Weapon, Count 3 - Home Invasion With Use of a Deadly Weapon, Counts 4-5 - Attempt Robbery With

1 Use of a Deadly Weapon, Count 6 - Murder With Use of a Deadly Weapon, and
2 Count 7 - Attempt Murder With Use of a Deadly Weapon. 1 AA 1. Mendoza was
3 found guilty of all counts, including First Degree Murder, after a 19 day trial. 13 AA
4 3006.

5
6 As to Count 1 he was sentenced to 24-72 months, as to Count 2 he was
7 sentenced to 48-180 months to run concurrent, as to Count 3 he was sentenced to 48-
8 180 months to run concurrent, as to Count 4 he was sentenced to 36-120 months with
9 a consecutive 36-120 months all to run concurrent to Count 3, as to Count 5 he was
10 sentenced to 36-120 months to run concurrent, as to Count 6 he was sentenced to life
11 with the possibility of parole after 20 years with a consecutive 48-240 months all to
12 run concurrent to Count 5, and as to Count 7 he was sentenced to 48-240 months to
13 run concurrent. His aggregate sentence is life with the possibility of parole after 23
14 years. 13 AA 3013. This direct appeal of his Judgment of Conviction follows.

15 16 17 18 19 20 21 22 23 24 25 26 27 28 IV.

STATEMENT OF THE ISSUES

A. Whether the District Court erred in allowing Summer Larsen to testify
at trial.

B. Whether the District Court erred in permitting the State to admit cell
phone records that were provided to Mendoza during the time of trial, and that were
admitted through an undesignated expert.

1 C. Whether the District Court erred in allowing the State to disclose to
2 the jury about Figueroa's agreement to testify required him to "testify truthfully".
3

4 D. Whether the District Court erred and violated Mendoza's right to a fair
5 trial by refusing to allow Mendoza to have the jury instructed with regards to self-
6 defense.
7

8 E. Whether cumulative error warrants reversal of Mendoza's conviction.
9

10 V.

11 **STATEMENT OF THE CASE**

12 This is an appeal from a Judgment of Conviction of a guilty verdict after a
13 jury trial.
14

15 On October 22, 2014, the State filed a Criminal Complaint against Mendoza
16 charging him as stated above. 1 AA 1. He was charged along with David Murphy,
17 Robert Figueroa, and Summer Larsen. No preliminary hearing was held because the
18 case went to the Grand Jury. On January 30, 2015, an Indictment was filed against
19 Mendoza. He plead not guilty to the charges and a jury trial was set. 1 AA 19.
20

21 On February 27, 2015, a Superseding Indictment was filed adding Joseph
22 Laguna as a fourth codefendant. 1 AA 27. On May 29, 2015, a Second Superseding
23 Indictment was filed. 1 AA 34.
24

25 During the course of the case, two of the codefendants, Summer Larsen and
26 Robert Figueroa, entered into Guilty Plea Agreements whereby they agreed to testify
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1 against their codefendants. Figueroa entered into an agreement shortly after arrest.
2 Larsen entered into an agreement just days before trial was set to begin.
3

4 A jury trial began on September 12, 2016, lasting 19 days. All defendants were
5 convicted of all charges. With regard to the Open Murder charge, Mendoza was
6 found guilty of first degree murder with use of a deadly weapon, while his
7 codefendants were found guilty of second degree murder with use of a deadly
8 weapon. As stated above, Mendoza was sentenced to an aggregate sentence of life
9 with the possibility of parole after 23 years. Judgment of Conviction was filed on
10 December 2, 2016, and this timely appeal follows.
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13 VI. 14

15 STATEMENT OF THE FACTS 16

17 Appellant Mendoza was convicted of the murder of Monty Gibson, along with
18 several other charges related to that murder, as stated above. Monty Gibson died
19 from a gunshot wound to his head. 6 AA 1326.
20

21 Joseph Larsen resided at 1661 Broadmere where he sold marijuana out of his
22 home for a living. 5 AA 1113-1114. Summer Larsen testified that she knew
23 Defendant David Murphy since she was 18 years old, and that she married Defendant
24 Joseph Larsen in 2012, and had an on and off sexual relationship with him from the
25 time she was 18 years old. 5 AA 1111-1112. Summer had moved into 1661
26 Broadmere with Joseph Larsen in 2013. She eventually moved out of Broadmere
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28

1 because she began having issues with Joseph Larsen. 5 AA 1113. After she moved
2 out of the house she would continue to fight with Joseph and would do thing to the
3 house, such as break in to steal marijuana or money. 5 AA 1114. She had broken
4 into the house in July 2014 with another individual named Snoop, and they stole
5 \$12,000.00 and 12 pounds of marijuana. 5 AA 1116. Summer testified that she had
6 informed David Murphy of the fact that she stole money and marijuana with Snoop,
7 and that Murphy was unhappy with the fact that she did it with someone else and not
8 him. 5 AA 1117. After multiple conversations with Murphy, he and Summer made
9 a plan to rob the house that supplied Joseph Larsen with his drugs. 5 AA 1126.
10 Summer claimed to have not known that Murphy intended to rob Joseph Larsen's
11 residence.

12
13
14 Steven Larsen testified that Joseph Larsen is his son. 6 AA 1321. Steven
15 helped Joseph and Summer rent the residence on 1661 Broadmere. 6 AA 1325. After
16 Summer had moved out, Steven was aware of incidents where Summer caused
17 damage to the residence. 6 AA 1335. Two weeks prior to the incident, Steven was
18 present when Summer was breaking windows at the house. 6 AA 1327. About a
19 month prior to the shooting there was a burglary at the residence. Id. Monty Gibson
20 moved in with Joseph after Summer moved out to help with the bills. 6 AA 1330.
21 On September 21, 2014, Gibson was in the process of moving out to live with his
22 girlfriend. Id.

1 In the earlier hours on September 21, 2014, Steven was contacted by Tracy
2 Rowe. 6 AA 1331. Rowe informed Steven that there was going to be a break in at
3 Joseph's house. Steven contacted Joseph and told him and Gibson to leave the house
4 and take anything they did not want stolen. Id. Steven believed that Summer was
5 the person who was going to break into the residence. Id. Initially Joseph agreed to
6 leave the residence. 6 AA 1332. However, Joseph called Steven back 20 minutes
7 later and was upset and had informed Steven that people had kicked in his door. 6
8 AA 1332. He informed Steven that Gibson had been shot and that he had shot
9 someone as well. 6 AA 1333. When Steven got to the residence, Gibson was dead
10 in the doorway. 6 AA 1338. Joseph informed Steven that he and Gibson were inside
11 eating pizza when there was a knock at the door, and then the door got kicked in. 6
12 AA 1341. A gun fight then ensued and Joseph shot Mendoza in the leg. 6 AA 1474.
13 The intruders then left the house, Gibson went to shut the front door, and was shot in
14 the head. 6 AA 1342.

15 Defendant Robert Figueroa testified that he was charged with the murder along
16 with the other defendants. 8 AA 1805. After his arrest he entered into an agreement
17 with the State and ultimately testified at the grand jury in this matter. 8 AA 1810.
18 After he testified at the grand jury he entered into a formal guilty plea agreement,
19 pleading guilty to Robbery with Use of a Deadly Weapon and Conspiracy to Commit
20 Robbery. 8 AA 1812. He also entered into an agreement to testify. Id.

1 On the morning of September 21, 2014, Figueroa received a call from Joey
2 Laguna. 10, 216. Laguna was Figueroa's roommate. 8 AA 1814. Laguna informed
3 Figueroa that he had a robbery lined up with Murphy and Figueroa had decided to
4 participate in the robbery with the other defendants. 8 AA 1815-1816. They were
5 intending to rob 200 pounds of marijuana from Larsen's marijuana supplier's house.
6
7 8 AA 1818. At approximately 7:30a.m., Appellant and Laguna picked up Figueroa
8 from his home. 8 AA 1819. Appellant was driving a light brown vehicle. Id. The
9 intention was for Laguna, Figueroa and Appellant to rob the house of the marijuana,
10 and bring it back to a truck that Murphy would be waiting for them in. 8 AA 1820.
11
12 Once they get to the residence Mendoza said he did not want to go forward, and the
13 men regrouped at Laguna's house. 8 AA 1823. Once back at Laguna's house,
14 Murphy changed the plan into one to rob Larsen's house instead. 8 AA 1827. Later
15 that evening, at approximately 7:00p.m. Mendoza return to Figueroa's house to pick
16 him up again. 8 AA 1832. They then picked up Laguna and Murphy. 8 AA 1832.
17
18 All four men were armed. 8 AA 1833. They arrived at 1661 Broadmere at
19 approximately 8:00p.m. 8 AA 1835. Murphy dropped off the other three men at the
20 house. 8 AA 1838. Once the three men approached the house, Figueroa kicked in
21 the door and was immediately shot in the face upon entering the house. 8 AA 1839.
22
23 Figueroa then retreated and began to run away from the house. 8 AA 1840. While
24 retreating from the house, Figueroa witnessed Murphy picking Laguna back up from

1 the house in the vehicle. 8 AA 1842. Figueroa was bleeding, and ultimately decided
2 to hide behind some bushes in a backyard of one of the houses in the neighborhood.
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4 8 AA 1844. He remained in hiding for about 8-9 hours. Id. In the early morning
5 hours of September 22, 2014, Figueroa's sister picked him up. 8 AA 1863. He went
6 to a hospital in California to get treatment for his gunshot wound. 8 AA 1864. On
7 October 20, 2014, he was finally arrested for his involvement in the crime. 8 AA
8 1866.
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11 Roger Day testified that he resides on Long Cattle, which is close to where the
12 shooting occurred. 6 AA 1401. At about 8:00pm on the evening he heard gun shots
13 so he went to further investigate the sounds. 6 AA 1402. When he went to his door
14 he witnesses a man standing outside his door on the street firing shots towards 1661
15 Broadmere house. 6 AA 1402-1404. The man had a black bandana over his face and
16 a black hat. 6 AA 1402. He then witnessed the man run down Long Cattle out of
17 sight. 6 AA 1409. Day also saw a second person on Broadmere scooting on the
18 ground on his butt. Id. The person scooting on the ground had an injured leg and was
19 also holding a rifle. 6 AA 1411. He was wearing an orange ski mask as well. 6 AA
20 1412.
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25 Gene Walker testified that at on the evening of September 21, 2014, he called
26 911 because he heard gunshots in his neighborhood. 4 AA 871. He looked out his
27 front window and saw a man in the street wearing an orange mask holding a semi-
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1 automatic rifle scooting on the ground. 4 AA 876-877. Officer Kovacich heard a
2 call of a shooting be broadcast so began to make his way to the scene of the shooting.
3
4 4 AA 905. Once Kovacich arrived at the scene, he narrowed down which residence
5 the crime had occurred at, and noticed a blood trail at the corner of Broadmere and
6 Long Cattle. 4 AA 906. At this point it was Kovacich and 4 other officers walking
7 east. Id. Kovacich noticed a pick up truck with the tailgate down, and a rifle laying
8 in the back of the bed. 4 AA 907. He called in the gun and proceeded to sweep the
9 area following the blood trail. Id. The blood trail ended at Homestretch and Shifting
10 Winds. The officer then set up a perimeter and called in for canine. 4 AA 912.
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14 Officer Kovacich made his way back to the truck and noticed someone moving
15 inside of the back seat of a black car in the area. 4 AA 914. Officer Ronald Theobald
16 pulled the individual out of the black vehicle, and noticed an orange ski mask on the
17 driver's side floor. 5 AA 1072. The individual in the black car was Appellant
18 Mendoza. 5 AA 1074. Mendoza had been shot in the upper thigh. Id.
19
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21 After the home invasion and homicide occurred, Joseph Larsen bought
22 Summer a ticket to leave town. 5 AA 1128. She claims to have left because she
23 thought it was her ex-boyfriend, Snoop, who had done it. 5 AA 1128. Summer
24 testified that she did not know Appellant, or Defendants Laguna and Figueroa prior
25 to this case. 5 AA 1129.
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1 After a second suspect, Figueroa, was arrested in this homicide investigation,
2 Summer flew back to town. 5 AA 1130. Joseph Larsen paid for her to stay in
3 Emerald Suites. Id. While at Emerald Suites, Summer and Joseph had an altercation,
4 and the police arrived. Id. Summer was arrested and interviewed by Detective Barry
5 Jensen. Id. She stated that during that interview she was on drugs and does not
6 remember what she said. Id.

7
8 After Summer Larsen was indicted for this case, she ultimately entered into a
9 plea deal with the State of Nevada. 5 AA 1133. She plead guilty to conspiracy
10 robbery and attempt robbery related to the robbery of Joseph Larsen's drug suppliers.
11 Id. She testified she did not know that Joseph Larsen's house was going to be robbed
12 on September 21, 2014, and she did not know that Murphy was involved. 5 AA 1136.
13 She met with the State several months prior to trial, but did not enter into her guilty
14 plea agreement until September 6, 2017, only days before trial was set to begin. 5
15 AA 1165.

16 VII.

17 LEGAL ARGUMENT

18 A. The District Court erred in failing to exclude Summer Larsen (Summer 19 Rice) from testifying at trial.

20 On September 6, 2016, the State provided notice to Defendants that an
21 agreement had been reached with Summer Larsen, and that the State intended to call
22

1 her as a witness at trial. Up until that day, the three remaining Defendants were under
2 the belief that Larsen would be a co-defendant in their trial.
3

4 A calendar call in this matter was held on September 7, 2016. During that
5 hearing, Defendants had argued that the State should not be permitted to call Larsen
6 as a witness based on the untimely disclosure and the prejudice it would cause the
7 remaining Defendants. 1 AA 41. Defendant Murphy filed a written motion in
8 support of this argument. Defendants' position was that they would be prejudiced
9 since they would not be allowed to adequately investigate into Larsen as a witness
10 for cross examination purposes. The State argued that it had no ability to notice
11 Larsen until after she formally entered into an agreement with them. Id. The district
12 court judge ultimately denied any requests to exclude Larsen from testifying. Id. The
13 court ruled that the State had provided timely notice, even though the Notice of
14 Witness naming her as a witness was not filed until September 7, 2016, when trial
15 was beginning on September 12, 2016. Id. Larsen's testified before the jury on
16 September 22, 2016. 5 AA 1111.
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22 NRS 174.234 provides, in relevant part:
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- 24 1. Except as otherwise provided in this section, not less than 5
25 judicial days before trial or at such other time as the court directs:
26 (2) The prosecuting attorney shall file and serve upon the
27 defendant a written notice containing the names and last known
28 addresses of all witnesses the prosecuting attorney intends to call
during the case in chief of the State.

...

1 3. After complying with the provisions of subsections 1 and 2, each
2 party has a continuing duty to file and serve upon the opposing
3 party:

4 (a) Written notice of the names and last known addresses of any
5 additional witnesses that the party intends to call during the case
6 in chief of the State or during the case in chief of the defendant. A
7 party shall file and serve written notice pursuant to this paragraph
8 as soon as practicable after the party determines that the party
9 intends to call an additional witness during the case in chief of the
10 State or during the case in chief of the defendant. The court shall
11 prohibit an additional witness from testifying if the court
12 determines that the party acted in bad faith by not including the
13 witness on the written notice required pursuant to subsection 1.

14 The court found that the State complied with NRS 174.234 because it provided
15 written notice of its intent to call Larsen the day after she formally entered into a
16 guilty plea agreement with the State September 6, 2016. 1 AA 41.

17 The statute does allow for notice to be made “as soon as practicable”, however,
18 it also allows for the court to preclude a witness if it is determined that the party acted
19 in bad faith by not noticing the witness within the 5 judicial days required by the
20 statute. The State had done a proffer with Larsen several months before she entered
21 into her agreement to testify. The State was well aware of the fact that Larsen would
22 be accepting a plea bargain with the tradeoff that she testify against her codefendants,
23 yet the State conveniently did not allow for that to happen until days before trial was
24 set to begin. A ruling such as this creates quite a slippery slope where prosecutors
25 will be persuaded to make informal agreements with cooperating defendants only to
26 wait until immediately before trial, or even during trial, to formalize the agreement
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1 and provide codefendants with proper notice. This would provide prosecutors with
2 tactical advantages, and create an unfair situation where codefendants are not able to
3 adequately prepare for the new witness.
4

5 The statute clearly allows for the trial court to exclude a witness if it is
6 determined that there was bad faith in a failure to disclose a witness earlier. However,
7 in this situation, the trial court did not even delve into the question of bad faith. There
8 was no questioning that would have allowed for an adequate determination of
9 whether or not the State acted in bad faith in its delay to notice Larsen as a witness.
10 The court erred by failing to make factual determinations that were central to the
11 issue, such as:
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15 The court's error prejudiced Appellant and denied him the right to effectively
16 cross-examine Larsen regarding the highly-incriminating testimony she provided at
17 trial. "[P]ersons vulnerable to criminal prosecution have incentives to dissemble as
18 an inducement for more favorable treatment by the State." Sheriff v. Acuna, 107 Nev.
19 664, 667 (1991). Based on that reality, this Court has long recognized the importance
20 of ensuring that a defendant receives a full and fair opportunity to cross-examine a
21 witness whose testimony is the product of a cooperation agreement with the State.
22 See Lobato v. State, 120 Nev. 512, 519 (2004); Mazzan v. Warden, 116 Nev. 48, 67
23 (2000); Jimenez v. State, 112 Nev. 610, 620 (1996); Roberts v. State, 110 Nev. 1121,
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1 1132-34, (1994), overruled on other grounds by Foster v. State, 116 Nev. 1088
2 (2000).
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4 The trial court's belief that Appellant should have been preparing to cross-
5 examine and impeach Larsen before he received notice that she was cooperating with
6 the State is also flawed. Larsen's "testimony was central to the case, and therefore
7 the jury's assessment of [her] credibility was important to the outcome of the trial."
8 Jimenez v. State, 112 Nev. at 620. Informant testimony must be highly scrutinized to
9 guard against fabrication. To guard against the inherent unreliability of informant
10 testimony, one indispensable safeguard guarantees the defendant the right to
11 investigate and prepare an effective cross-examination of an informant. See Acuna,
12 197 Nev. at 669.
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17 The State's decision to not provide reasonable notice to Appellant of its
18 cooperation agreement with Larsen deprived him of the opportunity to effectively
19 impeach the witness on cross-examination. "It is well settled that evidence that would
20 enable effective cross-examination and impeachment may be material and that
21 nondisclosure of such evidence may deprive an accused of a fair trial." Roberts, 110
22 Nev. at 1132-33. Appellant's inability to effectively cross-examine Larsen was the
23 direct result of untimely disclosure, and the District Court erred in not precluding her
24 from testifying.
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1 **B. The District Court erred in permitting the State to admit cell phone**
2 **records that were provided to Mendoza during the time of trial, and that**
3 **were admitted through an undesignated expert.**

4 The District Court erred in permitting cell phone records to be used at trial that
5 were disclosed untimely, and that were admitted through undesignated expert
6 testimony. On the sixth day of trial, the State emailed defense counsel previously
7 undisclosed cellular telephone records for text messages between Appellant and
8 Defendant Laguna. 5 AA 1025-1026. Based upon the fact that the records were
9 disclosed late, and because Defendants had not had a chance to have their expert
10 review the records, Defendants requested that the records be excluded pursuant to
11 NRS 174.234. Defendants further argued that the State would need to present expert
12 testimony regarding the new records, which violated Nevada law because they did
13 not provide notice that expert testimony would be admitted regarding those records.
14 5 AA 1027. Since the State would need expert testimony to explain the new records
15 to the jury, the State failed to provide notice of the substance of its expert's testimony,
16 specific to the new records, twenty-one days before trial. Id.

17
18 The prosecution responded by claiming that they did not have a duty to turn
19 over the records before they received them. Id. In explaining the timing of the
20 disclosure, the State explained that it noticed the cellular records for Appellant's
21 phone were not complete. Thereafter, the State contacted the appropriate custodian
22 of records and asked why they failed to provide the complete cellular records

1 pertaining to the case. 5 AA 1026. Records were then received and immediately and
2 sent to the Defendants. 5 AA 1026.
3

4 In response to the Defendant's argument regarding expert notice, and the fact
5 that the State would require its detective to interpret the records as an expert, the State
6 argued that "[i]t's not coming in through Detective Gandy, who's the expert who's
7 going to be testifying to this. It's coming from a custodian of records from another
8 company who's going to say, these are the phone records associated with my
9 company and these are true, fair and accurate business records. I mean, that's the
10 testimony it's coming in as." 5 AA 1028.
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13
14 Joseph Sierra is a custodian of records for T-Mobile. 6 AA 1336. During trial
15 Sierra testified as to how cell phones operate, and how cell phone towers are utilized.
16 6 AA 1337-1338. He also testified in great detail as to how to interpret the cell phone
17 records, and what each aspect of the records indicated. 6 AA 1345. He provided
18 information and records related to Appellant's phone account. 6 AA 1358. He then
19 went into great deal regarding interpreting Mendoza's phone records, including
20 interpreting text messages, phone calls, and tower locations. 6 AA 1360.
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24 Despite the State's representations to the court previously, Sierra provided
25 extensive expert testimony during his direct examination. Sierra explained how an
26 individual cellular telephone emits a radio frequency signal to a nearby tower, the
27 communication range of cell towers and the need for more towers in highly populated
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1 areas, how each tower has multiple sectors that receive communications depending
2 on the direction the cellular device is in relation to the tower, and how to read the
3 cellular records to determine what tower a device utilized during a particular call as
4 well as where it was directionally in relation to the tower.
5

6 The expert testimony the State elicited from the T-Mobile custodian of records,
7 despite assuring the Court that all the custodian or records was going to be doing was
8 authenticating the records, unfairly prejudiced the Appellant. Appellant did not have
9 sufficient time to analyze the records, or effectively prepare to cross examine the
10 custodian of records as the expert that he actually ended up testifying as. The trial
11 court erred in allowing the prosecution to utilize records turned over during trial to
12 form the basis of admitted expert testimony.
13

14 Nevada law imposes a duty on prosecutors to provide to the defense
15 documents, “which the prosecuting attorney intends to introduce during the case in
16 chief of the State and which are within the possession, custody or control of the State,
17 the existence of which is known, or by the exercise of due diligence may become
18 known, to the prosecuting attorney.” NRS 174.235. The prosecutor’s disclosures
19 must occur not less than thirty days before the start of trial unless the court orders
20 otherwise. NRS 174.285.
21

22 In this case, the prosecutor failed to provide Appellant with the cellular records
23 admitted as State’s Exhibit 303 thirty days before trial. Instead, the documents were
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1 disclosed during the second week of trial. The State's failure to obtain and disclose
2 the cellular records in a timely fashion was the result of inexcusable neglect. When
3 the State reviewed the records it was clear that the records were not complete. Thus,
4 the late disclosure was a direct product of the State's failure to exercise due diligence
5 in preparing his case and providing required documentation over to Defendants.
6
7

8 By admitting the new records and permitting detailed expert testimony from
9 an undisclosed expert concerning the records, the trial court severely prejudiced
10 Appellant. Testimony concerning how cellular towers communicate with devices
11 and record location amounts to expert testimony. See Burnside v. State, 131 Nev.,
12 Adv. Op. 40, 352 P.3d 627, 636-38 (2015). Much of the expert testimony elicited
13 from the T-Mobile Custodian of Records focused on how to read and interpret the
14 data. The State's failure to provide timely expert notice combined with the untimely
15 disclosure of the records themselves worked to unfairly surprise and prejudice the
16 Appellant.
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21 Pursuant to NRS 174.295(2), the remedy for a violation of the discovery
22 provisions is that the district court "may order the party to permit the discovery or
23 inspection of materials not previously disclosed, grant a continuance, or prohibit the
24 party from introducing in evidence the material not disclosed, or it may enter such
25 other order as it deems just under the circumstances." In this situation, the District
26 Court provided absolutely no remedy for the untimely disclosure, but instead made
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1 excuses for the State's lack of diligence and then went on further to allow the
2 custodian of records to testify as an undisclosed expert.
3

4 The district court abused its discretion by permitting the State to use untimely
5 disclosed records, and then compounded that by allowing expert testimony regarding
6 those records. As such, this Court should reverse the trial court's decision.
7

8 **C. The District Court erred and violated Mendoza's 5th and 14th Amendment**
9 **rights to a fair trial in allowing the State to disclose to the jury that**
10 **Figueroa's agreement required him to testify truthfully.**

11 The District Court violated Mendoza's 5th and 14th Amendment rights to a fair
12 trial by allowing the State to admit the entirety of Figueroa's agreement to testify and
13 to question him regarding that agreement during redirect of the witness. During
14 redirect of Robert Figueroa, Defendants objected to the admission of the Agreement
15 to Testify. 9 AA 2055. They argued that they did not cross examine him regarding
16 the agreement. 9 AA 2056. Since Defendants did not open the door to allow in the
17 language regarding testifying truthfully within the Agreement to Testify, they did not
18 believe that portion should be shown to the jury. Id. The State responded that all
19 three Defendants had implied during cross examination that Figueroa was only
20 providing information to get a better deal. Id. Appellant Mendoza joined into the
21 objections regarding the agreement to testify truthfully. 9 AA 2058. The court
22 ultimately decided to allow the State to admit the entire Guilty Plea Agreement,
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1 including the Agreement to Testify, as an exhibit. 9 AA 2070. The State then directly
2 questioned Figueroa regarding his agreement to testify truthfully. 9 AA 2074.
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4 In Sessions v. State, 111 Nev. 328, 333 (1995) this Court stated that NRS
5 175.282 requires the court to “permit the jury to inspect the agreement” after excising
6 any portion it deems irrelevant or prejudicial. The Court held that “neither the
7 provision added by the State requiring “truthful testimony,” nor the statutory
8 provision declaring an agreement void when perverted by false testimony are to be
9 included within the written agreement provided for a jury’s inspection.” Id. at 334.
10 Additionally, the Court stated that Nevada law “does not provide a basis for the
11 prosecution to comment on the truthfulness of the witness’s testimony as it relates to
12 the agreement.” Id. at n. 3.
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17 After the defendants completed their cross-examination of Figueroa, the trial
18 court granted the State’s motion to admit Figueroa’s agreement to testify without
19 redaction. The court ruled that the ‘obligation to be truthful’ language within the
20 agreement to testify was admissible because the defendants attacked the credibility
21 of the witness.
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24 Appellant did not open the door to the admission of the truthfulness language
25 within Figueroa’s guilty plea agreement. Appellant attacked the credibility of the
26 witness’s testimony and his motivations for testifying on behalf of the State, but in
27 no way commented on the truthfulness of the witness’ testimony as it related to the
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1 agreement. Under the decision of the trial court here, the entirety of agreements to
2 testify will always be admitted since every defendant in a criminal case must question
3 the credibility of a cooperating codefendant.
4

5 The trial court erred in allowing the jury to learn that Figueroa's agreement to
6 testify required him to 'testify truthfully.' The prosecutor's questions on redirect
7 examination implied to the jury that Figueroa must be telling the truth. The State's
8 multiple references to the 'truthfulness language' improperly vouched for and
9 bolstered Figueroa's credibility. As such, the District Court erred in allowing the
10 Agreement to Testify to come in as evidence, unredacted, and Mendoza's conviction
11 should be reversed.
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15 **D. The District Court erred and violated Mendoza's 5th and 14th Amendment**
16 **rights to a fair trial in refusing to allow Mendoza to have the jury**
17 **instructed with regard to the theory of self-defense.**
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19 Appellant chose to testify at his trial. He testified that he thought of David
20 Murphy as a cousin because of his relationship with Appellant's wife. 10 AA 2392.
21 He stated that his role in the robbery was simply to be to run in the house, grab a
22 duffle bag, and run out. 10 AA 2396. After the first attempted robbery at the
23 supplier house all the men met up again to go to 1661 Broadmere. 10 AA 2455.
24 The plan was for Figueroa to open the door and for Mendoza to get the marijuana.
25
26 Figueroa knocked the door open and took a few steps in when gunfire began to
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1 ensue. 10 AA 2460-2461. Once the gunfire started Mendoza began to step away
2 from the house. 10 AA 2461. Mendoza was shot in the leg and then fired back at
3 the house, not trying to hit anyone. 10 AA 2462. As he was trying to get away he
4 was shot in the leg. 10 AA 2464. Mendoza was trying to get away from the house
5 because he was in fear for his life because he was still hearing gunshots. 10 AA
6 2468. He fired his weapon back towards the house at this point and shot Monty
7 Gibson. 10 AA 2472.

11 After the close of evidence, the district court inquired as to whether defense
12 had any additional jury instructions. 12 AA 2809. Mendoza indicted that he wanted
13 to have the jury instructed as to self-defense. 12 AA 2810. Mendoza stated that he
14 believed the jury should be instructed as to self-defense because it was required in
15 this case because the State was proceeding under a felony murder theory, and at the
16 time of the shooting, the felonies had already been completed. 12 AA 2811. At the
17 time of the shooting Mendoza was no longer a threat to anyone, was outside of the
18 residence, and was simply trying to get away. Id. The testimony was undisputed
19 that Mendoza was retreating at the time of the shooting. 12 AA 2812. The State
20 responded that Mendoza does not have any right or justification to fire his weapon
21 at the homeowners as they came outside of their home, whether they were holding
22 a weapon or not. 12 AA 2814. The State argued that since Mendoza was outside
23 of the residence and simply saw the homeowner with a weapon, it would not justify
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1 him shooting the homeowner. Mendoza responded by arguing that it is up to the
2 jury to decide whether or not the conspiracy was still ongoing. 12 AA 2815. In
3 denying the request to have a self-defense instruction, the court stated that one can
4 not start a gun fight and then argue self-defense unless there's been a definite
5 indication that the initial aggressor is no longer a threat. Id.
6
7

8 The District Court erred and violated Mendoza's right to a fair trial by
9 precluding him from making his defense to the jury. Mendoza had testified with
10 the intention of arguing self-defense, and the trial court made that virtually
11 impossible by not allowing the jury to be instructed as to self-defense.
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14 This Court has previously stated that "a defendant has the right to have the
15 jury instructed on his theory of the case as disclosed by the evidence, no matter how
16 weak or incredible the evidence might be." Margetts v. State, 107 Nev. 616, 619-
17 20, 818 P.2d 392, 394 (1991).
18

19 In the current situation, Mendoza was clearly attempting to retreat from the
20 residence when the shooting happened. The initial crimes were completed, and
21 Mendoza had been shot and was scooting across the street to escape. He continued
22 to hear gunshots, and while trying to get away while wounded on the ground, he
23 saw one of the shooters in the doorway. He testified he was in fear for his life and
24 shot at the person in the doorway. As the caselaw states, even if the evidence is
25 weak to support a defendant's theory of defense, the defendant is entitled to have
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1 the jury instructed as to that theory. Mendoza's complete trial strategy was
2 destroyed once the judge refused to have the jury instructed as to self-defense. As
3 such, this violated Mendoza's right to a fair trial, and his conviction should be
4 reversed.
5

6
7 **E. Cumulative error warrants reversal of Appellant Mendoza's Conviction.**

8 Should this court fail to find that any single error compromised Mendoza's
9 right to a fair trial, it should recognize that the cumulative effect of these named errors
10 deprived him of a fair trial. The cumulative effect of errors may violate a defendant's
11 constitutional right to a fair trial even though errors are harmless individually.
12
13 McConnell v. State, 125 Nev. 243 (2009). Where cumulative error at trial denies a
14 defendant his right to a fair trial, this Court must reverse the conviction. Big Pond v.
15 State, 101 Nev. 1, 3 (1985).
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17

18 Relevant factors to consider in evaluating a claim of cumulative error include
19 whether "the issue of innocence or guilt is close, the quantity and character of the
20 error, and the gravity of the crime charged." DeChant v. State, 116 Nev. 918, 927, 10
21 P.3d 108, 113 (2000).
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24 Mendoza maintained a not guilty plea throughout the course of his case. He
25 always maintained that he did not commit the crimes that were charged. However,
26 due to the above issues, Mendoza never received a fair trial. If the collective presence
27 of errors devastates one's confidence in the reliability of the verdict, a new trial is
28

1 required. See Killian v. Poole, 282 F.3d 1204, 1211 (9th Cir. 2002). Under the
2 circumstances, cumulative deficiencies of trial counsel prejudiced Ford.
3

4 The issue of guilt was close in this case and the testimony against Appellant.
5 The gravity of the charge is the highest of any in our criminal justice system. While
6 each of the trial errors advanced in this pleading may not independently establish
7 interference with Mendoza's substantial rights, the combined effects of the errors
8 deprived Mendoza of a fair trial. This Court should reverse Mendoza's conviction
9 because the multiple errors that occurred during trial deprived him of his
10 Constitutional right to a fair trial.
11
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13 **VIII.**

14 **CONCLUSION**

15
16 For each of the reasons set forth above, Appellant Jorge Mendoza's conviction
17 after his jury trial should be reversed and remanded for a new trial.
18

19 Respectfully submitted this 1st day of November, 2017.
20

21
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1 I further certify that this brief complies with the type volume limitations of
2 NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or
3 more and contains **7000 words**. I understand that I may be subject to sanctions in
4 the event that the accompanying brief is not in conformity with the requirements of
5 the Nevada Rules of Appellate Procedure.
6
7

8 Dated this 1st day of November, 2017.
9

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