
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 REPLY BRIEF

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I.

INTRODUCTION

Appellant Mendoza hereby submits this Reply Brief to address some of the arguments raised in the State's Answering Brief. In no way is Appellant's lack of Reply to any of the arguments made in the State's Answering Brief a concession that Appellant's arguments lack merit.

II.

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.

III.

LEGAL ARGUMENT

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

As it pertains to the timing of the State's disclosure of its intent to call Summer Rice during its case-in-chief, Appellant's argument is based on the Constitutional rights to confront witness and present a defense. The State's last-minute disclosure

1 inflicted unfair prejudice on Appellant and deprived him of those Constitutional
2 rights.
3

4 In response to those assertions of trial error, Respondent focuses exclusively
5 on the text of NRS 174.234 to claim that the timing of the prosecution's disclosure
6 was proper and protective of Appellant's Constitutional trial rights. Even though it
7 is Appellant's position that the prosecution violated the letter of NRS 174.234, that
8 determination is not dispositive of the issue.
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11 As detailed herein, technical compliance with NRS 174.234 does not make
12 Appellant's argument of his denial of a fair trial without merit. Adherence to the
13 letter of NRS 174.234 does not guarantee that a last minute witness notice is
14 protective of a Defendant's Constitutional trial rights. Appellant asks this Court to
15 view both compliance with the statute, together with Appellant's right to a fair trial,
16 which shows that the State's notice was inadequate pursuant to Nevada law and
17 deprived Appellant of a fair trial free of unfair prejudice.
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21 1. The Requirements of NRS 174.234 and Determining Bad Faith

22 Respondent claims that the prosecution fully complied with NRS 174.234 even
23 though notice was not provided five judicial days before trial, because Summer Rice
24 was noticed as a witness less than 24 hours after she entered into her guilty plea. The
25 Respondent's position hinges on the claim that the State had no ability to call
26 Summer, a codefendant, as a witness until after she entered her plea and waived her
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1 privilege against self-incrimination. While that statement is true, it does not mean
2 that the State lacked the ability to notice Summer as a potential witness well before
3 the guilty plea agreement was centered in open court. There is no rule that prevented
4 the State from noticing Summer as a potential witness when they filed their initial
5 witness list on March 26, 2015.
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8 Of greater importance, if the Respondent's interpretation of NRS 174.234 is
9 ratified by this Court then every prosecutor who seeks a tactical advantage can delay
10 the formal entry of a guilty plea with a cooperating codefendant until the day before,
11 or an hour before, they call that witness as part of their case-in-chief. In this case,
12 Summer testified for the prosecution on the sixth day of trial. If the Respondent's
13 interpretation is accepted, the prosecution could have scheduled Summer's plea
14 canvass for the day before and, thereafter, complied with NRS 174.234 by providing
15 notice of its intent to call Summer on the sixth day of trial – the same date she
16 testified. Beyond the deprivation of a defendant's trial rights that this scenario could
17 cause the Respondent's interpretation of NRS 174.234 falls far outside of the intent
18 and plain language of the statute.
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24 NRS 174.234(3)(a) instructs that a party must serve a supplemental witness list
25 “as soon as practicable after the party determines that the party intends to call an
26 additional witness[.]” The Respondent asks this Court to interpret that provision as
27 one that prohibits a prosecutor from notifying the defense of its intent to call a
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1 cooperating codefendant unless and until that codefendant enters into both a formal
2 guilty plea agreement and agreement to testify. The Respondent's desired
3 interpretation allows for unjust results in that the State is motivated to delay the
4 entering into an agreement to testify until a time that prejudices the defense.
5

6 Additionally, NRS 174.234 does not demand that a party have absolute
7 certainty that a witness will testify before providing notice of its intent to call that
8 witness. The plain language of NRS 174.234(3)(a) requires a party to provide notice
9 as soon as that party "determines that the party intends to call an additional
10 witness[.]" The reasonable interpretation of the statute requires a party to provide
11 notice as soon as that party has a good faith belief that it will call an additional
12 witness.
13

14 Lastly, the trial court erred by refusing to hold an evidentiary hearing where
15 Summer, Summer's defense counsel, and the prosecutor testified about the factual
16 events that led to the timing of the guilty plea agreement and corresponding witness
17 notice. To dispose of this appellate issue based on the current record would require
18 this Court to make factual determinations based on an inadequate record. *See Ryan's*
19 *Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299 (2012) ("An
20 appellate court is not particularly well-suited to make factual determinations in the
21 first instance"). Absent an order reversing Appellant's convictions, an order of
22 limited remand should be ordered to permit Appellant to develop the record below.
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1 2. The State's Witness Notice Violated Appellant's Constitutional Rights and
2 Deprived him of a Fair Trial
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4 Compliance with a statute's interpretation does not mean that there was not a
5 potential denial of a defendant's Constitutional rights. See, e.g., *Grey v. State*, 124
6 Nev. 110, 120 (2008) (holding that Nevada's discovery statute was unconstitutional
7 when interpreted to not require the prosecution to provide notice of expert rebuttal
8 witnesses). Even assuming that the prosecutor complied with Nevada's statutory
9 scheme regarding the noticing of witnesses, the late disclosure that Summer would
10 testify for the State violated Mendoza's Constitutional rights to confront witnesses,
11 present a defense, and to a fair trial.
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15 Respondent fails to respond to Appellant's argument that the timing of the
16 witness notice prevented him from investigating and preparing to effectively cross-
17 examine Summer. Relying on the claim that the prosecutor complied with NRS
18 174.234, Respondent ignores the fact that Appellant was prevented from conducting
19 reasonable investigation that would have permitted a Constitutionally effective cross-
20 examination of Summer. The necessity of permitting Appellant an opportunity to
21 prepare a full cross-examination was imperative based on the agreement between
22 Summer and the State and her obvious motive to testify falsely. See, e.g., *Lobato v.*
23 *State*, 120 Nev. 512, 519 (2004); *Jimenez v. State*, 112 Nev. 610, 620 (1996).
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1 The Due Process Clause requires that the procedures governing discovery in a
2 criminal case strikes a balance of power between the state and the defendant. *Wardius*
3
4 *v. Oregon*, 412 U.S. 470, 474 (1973). “The State may not insist that trials be run as a
5 ‘search for truth’ so far as defense witnesses are concerned, while maintaining ‘poker
6 game’ secrecy for its own witnesses.” *Grey*, 124 Nev. at 188-19 (quoting *Wardius*,
7 412 U.S. at 475).

9 Appellant had no reason to prepare a cross-examination designed to impeach
10 and discredit Summer until he learned about her agreement with the State days before
11 trial. The timing of that disclosure prevented Appellant from investigating readily
12 available sources of impeachment evidence. Those sources included jail calls,
13 intercepted letters, and documents generated as part of the proffer negotiations
14 between Summer and the State. The denial of the ability to investigate these sources
15 deprived Appellant of the ability to effectively cross-examine Summer at trial. See
16 *Brown v. State*, 110 Nev. 846, 853-54 (1994) (The inability to zealously cross-
17 examine an accuser violates the Constitutional and renders the verdict unreliable).

18 Here, no strong presumption existed in favor of permitting the State to call
19 Summer. Nevertheless, the State was permitted to elicit testimony from the late-
20 disclosed witness, which prevented Appellant from effectively confronting the
21 witness. That deprivation deprived Appellant of a fair trial and calls for a new trial in
22 this case.
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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.

7
8 The State does not dispute that the prosecutor provided Appellant with new
9 cellular telephone records seven days after trial commenced. Respondent, citing NRS
10 174.235, claims that the records were not disclosed late because they were disclosed
11 to the defense as soon as they were in the possession of the State. \

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14 NRS 174.235(1)(c) requires a prosecutor to disclose:

15 Books, papers, documents, tangible objects, or copies
16 thereof, which the prosecuting attorney intends to introduce
17 during the case in chief of the State and which are within the
18 possession, custody or control of the State, the existence of which
19 is known, or by the exercise of due diligence may become
20 known, to the prosecuting attorney.
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23
24 The disclosure required by NRS 174.235(1)(c) must occur not less than thirty
25 days before the start of trial unless the court orders otherwise. NRS 174.285. Here,
26 the prosecution's failure to provide the cellular records in a timely manner was the
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1 exclusive product of their failure to exercise due diligence in preparing this case for
2 trial.

3
4 A party's failure to exercise due diligence when reviewing records in
5 preparation for trial mandates exclusion of the newly obtained evidence to avoid
6 unfair surprise to the other party. See, e.g., *Sampson*, 121 Nev. at 829-830. The
7 prosecutor's explanation to the trial judge about the discovery of the existence of the
8 new records proves that it was caused by their failure to exercise due diligence. In
9 this case, the prosecutor did not even request the new records until after trial
10 commenced.

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12 The prejudice to Appellant was worsened when the State called the custodian
13 or records to testify about the contents of the new records within two days of
14 Appellant's receipt of the new records.

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1 IV.

2 CONCLUSION

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

6
7 Respectfully submitted this 19th day of March, 2018.

8 Respectfully submitted

9 /s/ Amanda Gregory

10 By:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14 point Times New Roman.

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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 **2352 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 19th day of March, 2018.

9
10 Respectfully submitted
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