IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Sep 05 2017 11:40 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

DAVID MURPHY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 72103

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

CASEY A. LANDIS, ESQ.
Nevada Bar #009424
601 South Tenth Street, Suite 104
Las Vegas, Nevada 89101
(702) 885-9580

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This proceeding is appropriately retained by the Supreme Court. The Court of Appeals does not have jurisdiction because this is appeal involves conviction for offenses that are category A and B felonies. NRAP 17(b)(2)(A).

STATEMENT OF THE ISSUE(S)

1. Whether the Court properly denied Murphy's Motion to Exclude Summer Larsen.
2. Whether the Court properly denied Murphy's Motion to Sever.
3. Whether the Court was within its' discretion to admit cell phone records.

4. Whether the Court was within its' discretion to admit Figueroa's Agreement to Testify.

5. Whether Murphy was convicted by sufficient evidence.

6. Whether Cumulative Error does not apply.

STATEMENT OF THE FACTS

In or around July, 2014, Summer Larsen ("Summer") broke into her estranged husband, Joey Larsen's ("Larsen"), house and stole $12,000 and approximately 12 pounds of marijuana.[1] 6 AA 1362. She later told Appellant, David Murphy ("Murphy"), that she had done so, and he asked her why she did not bring him along. 6 AA 1363. Summer suggested that they could burglarize Larsen's supplier's house. 6 AA 1363-64. Summer told Murphy that Larsen's supplier obtained between 100-200 pounds of marijuana weekly, and described the procedure whereby Larsen's supplier obtained the marijuana and whereby Larsen, afterwards, purchased marijuana from his supplier. 6 AA 1364-66. This conversation occurred approximately three weeks prior to the events of this case. 6 AA 1366-67. A few days after the conversation, Summer showed Murphy where Larsen's supplier's house was located. 6 AA 1367. Murphy and Summer had several more conversations about robbing Larsen's supplier. Id.

[1] Summer Larsen is also known as Summer Rice. Id.

On September 20, 2014, Murphy told co-defendant Jorge Mendoza ("Mendoza") that he knew of a place they could burglarize to help Mendoza get some money. 12 AA 2643. Mendoza initially dismissed the conversation. 12 AA 2644. At 4:00 a.m. on September 21, 2014, Murphy called Mendoza and then left his house to meet at Murphy's house in his Nissan Maxima. 12 AA 2644-45. Mendoza then picked up Murphy, and the two of them went to co-defendant Joey Laguna's ("Laguna") house. 12 AA 2645. Mendoza then drove Laguna to Robert Figueroa's ("Figueroa") house, arriving around 7:30 a.m. 12 AA 2646-47. Figueroa got into the car with a duffel bag. 12 AA 2647. Mendoza, Laguna, and Figueroa then drove to an AMPM gas station to meet back up with Murphy. 12 AA 2648. Murphy had an older white pick-up truck, and was waiting with a Hispanic woman with tattoos. 12 AA 2650. The woman drove Mendoza's vehicle, and Murphy led in his pick-up truck. 12 AA 2651-52. The two cars drove to the neighborhood where Larsen's supplier lived, but a lawn maintenance crew was detailing a yard a few houses away. 12 AA 2654-55. Mendoza suggested they not burglarize the house; Figueroa said they should. 12 AA 2655. Figueroa was going to breach the door, and Mendoza was to run in and steal the duffel bag containing the marijuana. Id. Ultimately, no burglary occurred because the woman drove Mendoza's car out of the neighborhood. 12 AA 2657-58. The group then proceeded back to Laguna's house, where they engaged in further discussions about trying again, or robbing

somewhere else. 12 AA 2658. Mendoza and Figueroa left shortly thereafter. 12 AA 2660.

Around 6:00 p.m., Murphy told Mendoza to pick up Figueroa. 12 AA 2693. Mendoza did so, then proceed to Laguna's house, stopping on the way at Mendoza's house so that Mendoza could arm himself with a Hi-point rifle. 12 AA 2694-96. When they arrived at Laguna's house, Laguna came outside and Murphy arrived. 12 AA 2696-97. Figueroa asked who they were going to rob, and Murphy answered. 12 AA 2698-99. Eventually, the four of them left in Mendoza's car, with Murphy driving because he knew where they were going. 12 AA 2699-2700. They drove to Laguna's house. 12 AA 2700-01. On the way, the group decided to break into Laguna's house. 12 AA 2702. Figueroa was to enter the house, get everyone under control, Mendoza was to enter the house and grab the marijuana from upstairs, and Laguna was to stay outside and provide cover in case someone unexpectedly appeared. 2703. When they arrived, Murphy dropped them off, drove a short distance up the street, and made a u-turn to face the house and prepare to drive them away. 12 AA 2703-04.

Figueroa hit the door first, breaking it open on the second attempt. 12 AA 2706-07. Figueroa entered the house, and Mendoza remained near the front door with his rifle. 12 AA 2707. Shortly thereafter, gunfire erupted. 12 AA 2708. Figueroa was struck by a bullet in his face, dropped to the floor, and then was struck on his

left side as he turned to flee out the door. 9 AA 2083. Figueroa ran down the street. 9 AA 2083. Mendoza began firing his rifle while backing away and was shot in the leg and fell into the street. 12 AA 2209, 2711-12. Laguna ran out into the street as well. 12 AA 2712. Mendoza could not walk, so he scooted away from the house with the rifle still in his hands. 12 AA 2715-17. Mendoza fired his rifle at the house, killing Monty Gibson. 12 AA 2718-19; 6 AA 1305. While the shooting was occurring, Murphy picked up Laguna and fled the scene, stranding Mendoza and Figueroa. 9 AA 2089, 2102; 10 AA 2327-28. Mendoza scooted to an abandoned car and crawled inside, where he waited until the police followed his blood trail and apprehended him. 12 AA 2722-24.

Figueroa managed to escape down the street and hide in a neighbors' back yard for several hours. 9 AA 2089-91. Figueroa called Laguna, who did not answer; Murphy called Figueroa and told him that he was not going to pick him up.[2] 9 AA 2091-93, 2105. Figueroa then called "everybody in [his] phone" over the next 8-9 hours until his sister agreed to pick him up. 9 AA 2105-09. By then, Mendoza had been apprehended and everyone else had escaped. Murphy later drove Mendoza's wife to Mendoza's car so that she could retrieve it. 7 AA 1491-93; 8 AA 1884. Figueroa went to California and received medical care for his injuries. 9 AA 2110-

[2] Most of the conspirators have, and know each other by, nicknames. Murphy is "Duboy" or "Dough boy." 6 AA 1397. Laguna is "Montone." 9 AA 2061.

11. After he returned, he was apprehended by police on October 20, 2014. P AA 2113.

At trial, both Figueroa and Mendoza testified, generally consistently, as to the events described above. 9 AA 2048-10 AA 2330; 11 AA 2634-2785. Additionally, the jury was presented with cell phone records that demonstrated Murphy, Mendoza, Laguna, and Figueroa were talking to, and moving throughout the city together at the times, and to the locations, indicated by Mendoza and Figueroa. 7 AA 1582-1647; 8 AA 1907-2047.

STATEMENT OF THE CASE

On January 30, 2015, the State charged Murphy, by way of Indictment, with CONSPIRACY TO COMMIT ROBBERY, BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON, HOME. INVASION WHILE IN POSSESSION OF A DEADLY WEAPON, ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON, MURDER WITH USE OF A DEADLY WEAPON, and ATTEMPT MURDER WITH USE OF A DEADLY WEAPON. 1 AA 1-7. A Superseding Indictment was filed on February 27, 2015, and a Second Superseding Indictment was filed on May 29, 2015; both contained the same charges. 1 AA 23-29; 1 AA 67-73.

On April 3, 2016, Murphy filed a Motion to Sever. 1 AA 109-22. On April 7, 2016, the State filed an Opposition. 1 AA 136-56. On May 9, 2016, the Court held

a hearing and denied Murphy's motion, finding that Murphy, Laguna, and Mendoza's defenses were not mutually exclusive. 1 AA 178-86.

On September 8, 2016, Murphy filed a Motion to Exclude Summer Larsen. 2 AA 263-75. The State filed an Opposition the same day. 2 AA 276-82. On September 9, 2016, the Court denied Murphy's motion, finding that Summer Larsen was timely noticed and that, even if she were not, Murphy suffered no prejudice. 2 AA 283-306.

Murphy's trial began on September 12, 2016, and continued until October 7, 2016. 2 AA 307 – 14 AA 3276. Murphy was convicted on all counts. 14 AA 3357-59.

On November 28, 2016, Murphy was sentenced to an aggregate sentence of 23-to-LIFE. 14 AA 3360-87. A Judgment of Conviction was filed on December 2, 2016, and reflected the same. 14 AA 3388-90. On March 27, 2017, an Amended Judgment of Conviction (*nunc pro tunc*) was filed. 15 AA 3397-99.

On December 30, 2016, Murphy filed a Notice of appeal. 15 AA 3400-01.

SUMMARY OF THE ARGUMENT

The District Court properly denied Murphy's Motion to Exclude Summer Larsen's testimony because the State notified Murphy that she would be a witnesses within two hours of the Court accepting her guilty plea agreement, and filed an official Notice the next morning. The Court further properly denied Murphy's Motion to Sever at trial because Murphy's and co-defendant Mendoza's defenses

were not mutually exclusive, and judicial economy weighed in favor of trying co-defendants together. The Court further was within its discretion to admit cell phone records produced by the custodian of records after voir dire began because the State had properly requested the records well in advance of trial, and promptly turned them over once received. The Court was additionally within its discretion to admit Figueroa's Agreement to Testify without redacting language indicating that Figueroa agreed to testify truthfully because Murphy elicited testimony calling into question his credibility and suggesting that Figueroa lied in order to receive a less severe sentence. Murphy's insufficient sufficient evidence claim is erroneous because he was convicted based on overwhelming evidence, including testimony by co-conspirators, which was linked to non-accomplice testimony and cellular phone records. Finally, Murphy's allegation of cumulative error is meritless because the Court committed no errors.

ARGUMENT

I.

THE COURT PROPERLY DENIED MURPHY'S MOTION TO EXCLUDE SUMMER LARSEN

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131, (2008); see, e.g., Mclellan v. State, 124 Nev. ___, 182 P.3d 106, 109 (2008). NRS 174.234 states, in relevant part:

> 1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:

> (a) If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:
>
> …
>
> (2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.
>
> …
>
> 3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:
>
> (a) Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph *as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State* or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.

(emphasis added). Murphy argues that the State did not timely notice Summer Larsen as a witness, and that he was prejudiced as a result. Appellant's Opening Brief ("AOB") 23-34. Murphy's arguments are meritless for a multitude of reasons.

First, the State noticed Summer in a timely manner. Although Murphy makes a number of unsupported allegations that the State tactically delayed noticing Summer as a witness, aside from quoting NRS 174.234 Murphy provides *absolutely no* authority demonstrating that a witness noticed "as soon as practicable" under NRS 174.234 is considered untimely, or that the Court below should have applied any other test. Pursuant to NRS 174.234, the State must file a notice of witnesses it intends to call in the case in chief of the state. That notice of witness was filed on

March 26, 2015, well in advance of the five (5) day deadline. 1 AA 44-48. On September 6, 2016, Co-Defendant Summer entered a plea of guilty and agreed to waive her Fifth Amendment privilege against self-incrimination.[3] Until she entered her plea, was canvassed, and the Court accepted her plea, the State had no ability to call her in their case in chief absent conferring immunity, which was not an option for the State. Upon the Court accepting her plea, Murphy was notified immediately and provided the Guilty Plea Agreement, Amended Indictment, and Agreement to Testify on September 6, 2016. As it was late in the day, the State filed the formal notice of witness the morning of September 7, 2016.[4] Less than 24 hours passed between Summer's guilty plea being accepted by the Court, and Notice being formally filed. 2 AA 285. Therefore, the State properly conformed to the witness notice requirements. Resultantly, the Court did not abuse its discretion in denying the motion to exclude on the basis of timeliness.

Second, Murphy's claims of bad faith are not only unsupported, they are belied by the record. "Bare" and "naked" allegations are not sufficient to warrant

[3] Murphy does not include Summer's Guilty Plea Agreement, or the transcript from Summer's entry of plea, but the Court below stated that the Court accepted Summer's guilty plea between 2:00 and 2:30 p.m. on September 6, 2016. 2 AA 284-85.

[4] Murphy does not provide this Notice of Witness either, but the Court noted that the Notice was filed by 11:00 a.m. on September 7, 2016. 2 AA 285. Murphy concedes that he received notice that Summer would testify at "3:52 p.m. on Tuesday, September 6, 2016." AOB 23. Therefore, Murphy received actual notice less than two hours after Summer's plea was accepted by the Court.

relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). Bad faith requires an intent to act for an improper purpose. See Fink v. Gomez, 239 F.3d 989, 992 (9th Cir. 2001). As the Nevada Supreme Court has noted, "there is a strong presumption to allow the testimony of even late-disclosed witnesses, and evidence should be admitted when it goes to the heart of the case." Sampson v. State, 121 Nev. 820, 827, 122 P.3d 1255, 1260, (2005). Murphy was aware that the State was in negotiations to turn co-defendants into State's witnesses, including Summer, Murphy, and Laguna. 2 AA 300-01. Those negotiations fell through around August 22, 2016. Id. Afterward, the State drafted and sent a guilty plea agreement to Summer's counsel. 2 AA 301, 304. Summer's counsel then requested that she enter her plea on September 6, 2016, because he was out of the jurisdiction. 2 AA 301, 304. The State was in no position to control either Summer or her counsel, and was not able to force counsel to return to the jurisdiction for Summer's entry of plea. Further, Summer's entry of plea occurred on Tuesday, September 6, 2016, and Monday, September 5, 2016, was a holiday. Were September 5th not a holiday, and if Summer's counsel had been in the jurisdiction, presumably the Court would have accepted her guilty plea on that day and the State's notice would have occurred five days prior to trial,

vitiating even the "as soon as practicable" discussion above. Therefore, the State did not act in bad faith. Because the State did not act in bad faith, the Court was within its discretion to deny Murphy's Motion to Exclude Summer Larsen.

Third, Murphy's discussion of alleged prejudice is irrelevant. Pursuant to NRS 174.234, the Court below could only exclude Summer if (1) the notice was late, or (2) the Court found that the State acted in bad faith by not including Summer in it's initial witness disclosure. Prejudice is, therefore, not at issue by the plain text of NRS 174.234, nor is it implicated in any of the irrelevant authority Murphy cites. For example, Murphy repeatedly points to Roberts v. State, 110 Nev. 1121, 881 P.2d 1, (1994), as authority supporting his position. However, Roberts did not address NRS 174.234, but instead the State's obligation to disclose evidence. Roberts is irrelevant to the issue at hand. For the reasons just discussed, Summer's notice was not late and the State did not act in bad faith.[5] Moreover, Summer Larsen was a

[5] Murphy's prejudice arguments were relevant to his request for a continuance. However, Murphy has not argued that the Court below erred by denying his oral motion to continue, but merely that the Court's denial of his oral motion prejudiced him. AOB at 34. It is the appellant's responsibility "to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6; NRAP 28(a)(9)(A). Assuming, *arguendo*, that this sentence constitutes argument, this court reviews the district court's decision regarding a motion for continuance for an abuse of discretion. Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). The Court found that Murphy was not prejudiced sufficiently to grant a continuance because he should have investigated Summer and prepared for cross-examination earlier since it was possible that she would testify whether or not it was on behalf of the State. 2 AA 284-88, 290-91, 305-06. In fact, Summer testified at trial that whether or not she

charged co-defendant. The evidence of her guilt was included in the discovery previously provided. Finally, as an unsevered co-defendant, Murphy had to be prepared for her to testify in her own defense. Thus, any argument that a formal notice was necessary for Murphy to prepare for trial is an argument which is form over substance.

II.
THE COURT PROPERLY DENIED MURPHY'S MOTION TO SEVER

NRS 173.135 allows for two or more defendants to be charged under the same indictment or information if they participated in the same criminal conduct. This Court will not reverse a lower court's denial of a motion for severance absent an abuse of discretion. Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 569, (1998); Amen v. State, 106 Nev. 749, 755-56, 801 P.2d 1354, 1359 (1990). Joint trials are overwhelmingly favored. Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). "Moreover, it is well settled that where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary." Id. *citing* United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir. 1980); United States v. Silla, 555 F.2d 703, 707 (9th Cir. 1977). Broad allegations of prejudice are not enough to require a trial court to grant severance. United States v. Baker, 10 F.3d

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pleaded guilty, she intended to testify. 7 AA 1476-77. Further still, Murphy's counsel (and Laguna's counsel) extensively cross-examined Summer at trial. 6 AA 1388 – 7 AA 1467, 7 AA 1478-79. Therefore, the Court did not abuse its discretion in denying Murphy's request for continuance.

1374, 1389 (9th Cir.1993), cert. denied, 513 U.S. 934, 115 S. Ct. 330 (1994), overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000). Even if prejudice is shown, the trial court is not required to sever; rather, it must grant relief tailored to alleviate the prejudice. See, e.g., Zafiro v. United States, 506 U.S. 534, 540-41, 113 S. Ct. 933 (1993).

Within the federal system, and specifically the Ninth Circuit, the presumption is heavily in favor of joint trials. "[C]o-defendants jointly charged, are, prima facie, to be jointly tried." United States v. Gay, 567 F.2d 916, 919 (9th Cir.), cert. denied, 435 U.S. 999, 98 S. Ct. 1655 (1978); United States v. Silla, 555 F.2d 703, 707 (9th Cir. 1977) ("compelling circumstances" are generally necessary to show need for separate trials). The trial court has the broad discretion to join or sever trials and severance is not required unless a joint trial would be manifestly prejudicial. See Gay, 567 F.2d at 919. Federal appellate courts review a denial of a motion to sever for abuse of discretion and "[t]o satisfy this heavy burden, an appellant must show that the joint trial was so prejudicial as to require the exercise of the district judge's discretion in only one way: by ordering a separate trial." United States v. Ford, 632 F.2d 1354, 1373 (9th Cir. 1980), cert. denied, 450 U.S. 934, 101 S. Ct. 1399 (1981), overruled on other grounds by United States v. DeBright, 730 F.2d 1263 (9th Cir. 1984).

In both the state and federal system, the general rule favoring joinder has evolved for a specific reason-there is a substantial public interest in joint trials of persons charged together because of judicial economy. Jones, 111 Nev. at 854, 899 P.2d at 547. Joint trials of persons charged with committing the same offense expedites the administration of justice, relieves trial docket congestion, conserves judicial time, lessens the burden on citizens called to sacrifice time and money while serving as jurors, and avoids the necessity of calling witnesses more than one time. Id. at 853-54, 899 P.2d at 547, see also United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S. Ct. 849 (1979). Therefore, the legal presumption is in favor of a joint trial among co-defendants.

Murphy's argument that the Court was required to sever his trial because he and Mendoza had "mutually exclusive defenses" is meritless because these defenses were not, in fact, mutually exclusive.[6] AOB 35-47. Severance is not warranted or justified simply because each defendant seeks to blame the other for the crime. Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002). In Marshall, co-defendants Marshall and Currington were tried and convicted together of first degree murder,

[6] Murphy appears to assign error to the Court in denying his renewed Motion for Severance, as he relegates the fact that the Court denied his pre-trial Motion to Sever to a footnote, and prays that this Court not preclude review of his later request to sever the trial on the basis of his earlier speculative Motion to Sever. AOB 38-39, fn. 4. Nor does Murphy appear to argue that the Court erroneously denied his pre-trial Motion to Sever. Therefore, the State responds only to the renewed Motion to Sever.

robbery, and conspiracy to commit robbery. At trial, Marshall's strategy was to exclusively blame Currington; Currington's strategy was to blame Marshall. Id. at 644-45, 56 P.3d at 377-78. On appeal, Marshall claimed that the district court erred in not severing his trial from Currington's. Id. at 645, 56 P.3d at 378. He maintained that he and Currington had "antagonistic defenses" in that each argued that the other was responsible for the murder. Id., 56 P.3d at 378. Marshall relied on the standard this Court articulated in Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002). In Rowland, this Court stated that "defenses must be antagonistic to the point that they are 'mutually exclusive' before they are to be considered prejudicial," and necessitate severance. Id. at 45, 39 P.3d at 122. This Court further noted in Rowland that defenses are mutually exclusive when the core of the co-defendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant. Id. at 45, 39 P.3d at 123.

The Marshall Court expressed concern that the Rowland decision implied severance was justified in too broad of circumstances. The Court explained the Rowland holding and limited the circumstances in which severance is appropriate. It stated:

> To the extent that this language suggests that prejudice requiring severance is presumed whenever acceptance of one defendant's defense theory logically compels rejection of another defendant's theory, it is too broadly stated. As we have explained elsewhere, where there are

> situations in which inconsistent defenses may support a motion for severance, the doctrine is a very limited one. A defendant seeking severance must show that the codefendants have conflicting and irreconcilable defenses and that there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. We take this opportunity to further clarify this issue.

Id. at 646, 56 P.3d at 378.

The Court then explained the standard for severance.

> The decisive factor in any severance analysis remains prejudice to the defendant. NRS 174.165(1) provides in relevant part: "If it appears that a defendant ... is prejudiced by a joinder ... of defendants ... for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." Nevertheless, prejudice to the defendant is not the only relevant factor: a court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials. Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does not compromise a defendant's right to a fair trial. Despite the concern for efficiency and consistency, the district court has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. Joinder of defendants is within the discretion of the district court, and its decision will not be reversed absent an abuse of discretion. To establish that joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict.

Marshall, 118 Nev. at 646-47, 56 P.3d at 378-79 (citations omitted).

Significantly, the Marshall Court specifically held that antagonistic defenses are a factor, but not, in themselves, sufficient grounds upon which to grant severance of defendants. Indeed, even though the defenses offered by Marshall and his co-defendant were antagonistic, this Court held that the joinder of the defendants at trial

was proper. Id. at 648, 56 P.3d at 378. Finding Marshall's assertion that his and Currington's defenses were prejudicial by virtue of their antagonistic nature unpersuasive, the court explained that to prevail on the ground that severance was warranted, Marshall had to show that the "joint trial compromised a specific trial right or prevented the jury from making a reliable judgment about guilt or innocence." Id. at 648, 56 P.3d at 380. The court also noted that the State's case was not dependent on either defendant's statement and did not use joinder to unfairly bolster a marginal case. Id., 56 P.3d at 380. Moreover, the State argued both defendants were guilty and presented evidence to establish their separate guilt. Id., 56 P.3d at 380. The court affirmed Marshall's conviction. Id.

The United States Supreme Court conducted a similar analysis in Zafiro v. United States, 506 U.S. 534, 113 S. Ct. 933 (1993). In that case, defendants contended that it was prejudicial whenever two defendants each claim innocence and accuse the other of the crime. Id. at 538, 113 S. Ct at 938. The United States Supreme Court rejected this view, holding that "mutually antagonistic defenses are not prejudicial per se." Id., 113 S. Ct. at 938. The Court explained that severance should only be granted if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. Id. at 539, 113 S. Ct. at 938. It is not prejudicial for a co-defendant to introduce relevant, competent evidence that would be

admissible against defendant at a severed trial. Id. at 540, 113 S. Ct. at 938. The Court also noted that the trial court can cure any potential of prejudice by properly instructing the jury that it must consider the case against each defendant separately. Id. at 540-41, 113 S. Ct. at 939.

The instant issue is far easier to decide. First, unlike in Marshall or Zafiro, here Murphy and Mendoza were not accusing each other of having committed the crimes while claiming they, themselves, were innocent. Murphy alleged that he was not present at the crime scene when the murder and robbery occurred, and that he did not help to plan the robbery. 1 AA 118; AOB 38. Mendoza alleged that he was present and guilty of several of the crimes alleged, but that he was not guilty of murder because the robbery was completed and the killing of Monty Gibson was an act of self-defense. 12 AA 2727; 13 AA 3138. There is nothing "mutually exclusive" about these defenses, and the jury could have found that Murphy was not at the crime scene and that Mendoza acted in self-defense. Or the jury could have found that Murphy was not at the crime scene, but that Mendoza did not act in self-defense. The jury could have found that Murphy was at the crime scene, but that Mendoza acted in self-defense. Or, the jury could have found, as they actually did, that Murphy was at the crime scene and that Mendoza did not act in self-defense. In no way did Murphy's defense compel the jury to accept or reject Mendoza's defense, or vice versa.

Outside of Mendoza's specific defense, however, he testified that Murphy was present and that Murphy helped plan and execute both the earlier failed robbery attempt and the later robbery attempt that resulted in Monty's death. 11 AA 2634 – 12 AA 2785. Without question, this testimony was incriminating to Murphy. However, it is not the reason why he was convicted. By the time Mendoza testified, the jury had already heard from Summer that she and Murphy planned to rob Larsen's supplier's house. 6 AA 1363-69. The jury had already heard that Murphy drove Mendoza's wife to find Mendoza's car, which was used in the attempted robberies. 7 AA 1491. They had already heard that Murphy's cell phone signal placed him at the earlier attempted robbery, the later attempted robbery, and talking with and present with the conspirators throughout the day. 7 AA 1582-1647; 8 AA 1907 – 9 AA 2047. The jury had already heard from Robert Figueroa, who was present with Murphy for both attempts and throughout the day, and who testified to essentially the same things that Mendoza testified to regarding Murphy's presence and participation in both attempted robberies and their planning. 9 AA 2048 – 10 AA 2330. Finally, the jury had already heard from Detective Jensen that Figueroa implicated Murphy in the crimes, and that Summer had talked with Murphy while she was incarcerated. 10 AA 2330 – 11 AA 2628. In short, the jury already had overwhelming evidence contradicting Murphy's denial that he had anything to do with the crimes. Even if the Court *had* granted Murphy's request for severance, and

even if the Court had granted Murphy's request before Mendoza testified, all of the evidence just identified was admissible and would have allowed the jury to find Murphy guilty of the crimes of which he was accused.

Ultimately, Mendoza's testimony was little more than cumulative. Mendoza's testimony did not provide evidence of any new crimes that Murphy helped plan or commit, not did it shed much light on additional evidence that Murphy helped plan or commit the crimes of which he was accused. Murphy, Mendoza, Figueroa, and Laguna were in communication, either telephonically or in person, throughout all of the alleged crimes, and virtually all of Mendoza's testimony was corroborated by evidence from other witnesses as described above. Murphy's bare hope that the jury would consider Summer and Figueroa's testimony "purchased" and, therefore, unreliable, was not made appreciably weaker by Mendoza's cumulative testimony because Murphy could certainly have argued that Mendoza's testimony was merely an attempt to gain some leniency at sentencing. For the same reasons that Murphy hoped to argue to the jury that Summer and Figueroa's testimony was "unworthy of belief," Murphy could have argued that Mendoza's testimony was likewise unreliable, especially considering that Mendoza essentially admitted to every crime of which he was accused aside from the murder and attempt murder charges. AOB 43. Further, Murphy's argument that, absent Mendoza's testimony, there was not

sufficient evidence to corroborate Summer and Figueroa's testimony is meritless for the reasons articulated in Section V, infra.

Murphy's argument improperly tries to blend together justification for severance based on incriminating *testimony*, which is not a sufficient basis for severance, with mutually exclusive defenses, which *can be* a basis for severance. At trial, Murphy's counsel admitted, directly after hearing Mendoza's testimony, that "I don't really care as far as my client's defense goes about his self-defense theory and what he's saying, but I do care about the things he said that aren't at the core of his defense, obviously." 12 AA 2806. Murphy's counsel represented to the Court that he was concerned about cross-examining Mendoza because of the effect that it would have on Mendoza's defense. Id. at 2806-07. The Court, while perplexed, permitted additional briefing over the weekend. Id. at 2807. Both Murphy and the State submitted briefs. 12 AA 2814-30. The Court heard additional arguments and found that Mendoza's testimony, as well as all the testimony the jury heard prior to Mendoza, would be admissible at separate trials even if severance were granted, and that judicial economy would not be served by multiplying the number of times the witnesses had to testify. 12 AA 2833-34. Further, the Court held that the same protections against accomplice testimony that applied to Summer and Figueroa applied with equal force to Mendoza – the second of Murphy's arguments on appeal. 12 AA 2834. The Court further found that, under the felony murder rule, if the jury

did accept Mendoza's self-defense argument that both Murphy and Laguna would be acquitted of those charges, as they were vicariously liable for Mendoza shooting Monty Gibson. 12 AA 2835. Additionally, after Mendoza's trial continued, his Fifth Amendment right against self-incrimination would no longer apply and he could simply be subpoenaed to testify. 12 AA 2836. Finally, the Court found that Murphy had not been denied a specific trial right to cross-examine Mendoza. Id.

After hearing Mendoza's testimony, considering briefs from the parties, and after hearing two sets of arguments from all counsel, the Court cannot be said to have abused its discretion in denying Murphy's renewed request to sever. As such, Murphy's claim should be denied.

III.
THE COURT WAS WITHIN ITS DISCRETION TO ADMIT CELL PHONE RECORDS

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez, 124 Nev. at 649, 188 P.3d at 1131; see, e.g., Mclellan, 124 Nev. at ___, 182 P.3d at 109.

On September 19, 2016, Murphy made an oral motion to exclude phone records that the State had provided to him that morning. 6 AA 1272. The State responded that they had just gotten those phone records that morning and that the records were "immediately" emailed to counsel. Id. Texts from Murphy to Mendoza and Laguna that appeared on Mendoza and Laguna's phone had previously been disclosed, but appeared to be missing from the records provided from Murphy's

phone. 6 AA 1273. The State contacted the custodian of records, who reviewed their records and provided the missing records to the State, which were then forwarded to the defense. Id. Murphy alleged violation of NRS 174.234(2), which states:

> 2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
>
> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
>
> (b) A copy of the curriculum vitae of the expert witness; and
>
> (c) A copy of all reports made by or at the direction of the expert witness.

The State argued that they had noticed their expert witnesses well in advance of trial. On March 26, 2015, the State filed a Notice of Expert Witnesses that included custodians of record from AT&T, T-Mobile, Cricket, Metro PCS, Verizon, and Neustar phone companies, including identical statements that they "will testify as experts regarding how cellular phones work, how phones interact with towers, and the interpretation of that information." 1 AA 44-48. On April 3, 2015, the State filed a Supplemental Notice of Expert Witnesses, which again included those experts. 1 AA 49-53. On August 15, 2016, the State filed a Second Supplemental Notice of Expert Witnesses, which included the above experts. 1 AA 208-12. On August 22, 2016, the State filed a Third Supplemental Notice of Expert Witnesses, which again included the above experts, as well as E. "Gino" Bastilotta from the Las

Vegas Metropolitan Police Department ("LVMPD") who "will testify as an expert regarding how cellular phones work, how phones interact with towers, and the interpretation of that information" and Chris Candy, also from LVMPD, who was to testify as to the same. 1 AA 213-33. The Notice included the required CVs. Id. Voir Dire began on September 12, 2016, 21 days later. 2 AA 307.

Murphy now argues that the "substance" of the records disclosed on September 19, 2016, was not timely disclosed. AOB 47-48. However, Murphy fails to recognize that the State provided those records under its continuing duty to disclose pursuant to NRS 174.234(3)(b) in much the same manner as it disclosed that Summer would testify in section I, supra. The Notices of Expert Witnesses put Murphy on notice that experts would testify as to cell phone records well in advance of trial, and the State obviously could not provide notice that the experts would testify as to *those specific records* prior to the State receiving them. Importantly, these records were not in the possession or control of the State – they were owned and kept by the cell phone companies that produced the records. When the State noticed the records were incomplete, the prosecution asked for, and received, more complete records which were then immediately forwarded to Murphy and the other defendants. 6 AA 1272. Because the records were kept by cell phone companies, Murphy could have, of course, noticed that the records were incomplete sooner and subpoenaed those records himself. Equally importantly, most of the text messages

appeared on Laguna and Mendoza's phones and was previously disclosed in those records; the records disclosed on September 19, 2016, merely showed the same messages from Murphy's phone. 6 AA 1274. The State further responded that these records were being admitted through the custodian of records, and not as expert witness testimony; that is, these records were raw data and not a report generated by an expert or an expert opinion based on other data. 6 AA 1274-75, 1278. Beyond that, the State had *already* disclosed phone tower information for Murphy's phone, and the additional text messaged comprised 686 *kilobytes* of information, or about 250 text messages. 6 AA 1279-80. The Court indicated that it would consider a brief continuance for Murphy's expert to review the records, and Murphy represented that he would talk with his expert to see how long that would take. 6 AA 1278, 1280.

The next day, on Tuesday, September 20, 2016, Murphy told the Court his expert would need two days, including that day. 7 AA 1558. The State replied that they did not expect their expert to testify until the end of the week, so Murphy's expert ought to have an additional day or two to review the records. 7 AA 1560. The Custodians of Record would be called the next day, to which Murphy replied "I don't think that is a problem." Id.

On September 21, 2016, the State called Joseph Sierra, the T-Mobile Custodian of Records, which included the Metro PCS records as the companies had merged. 7 AA 1582-1635. Murphy now complains, at length, about Sierra's

allegedly "expert" testimony, which includes what certain columns mean, what abbreviations stand for, and how to adjust the times on the records. Id.; AOB 50-52. Sierra did not (and could not) testify that the records placed Murphy in a particular location at a particular time, and did not opine that Murphy was, on the basis of the records, involved with the crimes or at a crime scene while a crime was occurring. Sierra's testimony was ministerial in explaining how to read the records, and offered the jury information about how cell phone technology worked and the technologies involved – precisely as the Notice of Expert Witnesses stated four times previously. 6 AA 1619-25. Sierra *did* confirm that Exhibit 303, which is the basis of this claim, was generated the previous Friday, which would have been September 16, 2016, and that it was produced to the Clark County investigator that Monday, the 19th – exactly as the State represented to the Court. 7 AA 1601-02. The records had been previously requested by the State, but not produced by T-Mobile until that date. 6 AA 1602.

Murphy cites to NRS 174.235, which requires the State to disclose documents "which the prosecuting attorney intends to introduce during the case in chief of the State and *which are within the possession, custody, or control of the State*…" (emphasis added.) For the reasons discussed above, and confirmed by Sierra's testimony, the records were not in the possession of the State until September 19, 2016, at which point they were immediately forwarded to the defense, including Murphy. 6 AA 1272. As such, NRS 174.235 is inapplicable. Murphy also argues at

length about how the State could have recognized that the records were incomplete previously, although as the incomplete records were previously disclosed and the business records of T-Mobile were not in the control or possession of the State, Murphy could certainly have done the same. AOB 53. Murphy's final sentence could, with as much frankness and emphasis, read: Due diligence would have allowed Murphy "to obtain the complete records well before trial … at a time that did not impose a severe prejudice" on the defense. Murphy's citation to Sampson v. State, 121 Nev. 820, 122 P.3d 1255, (2005), is inapplicable for the same reason why NRS 174.235 is inapplicable – the record reflects that the State, unlike the defendant in Sampson, did not have possession of Exhibit 303 until the day it was disclosed to Murphy. Finally, the expert testimony which used the records to tie Murphy to a crime scene, or to show him collaborating and conspiring with the co-defendants, was not put before the jury until Officer Gandy testified on Friday, September 23, 2016. 9 AA 1962-2047. This is precisely when the State anticipated that the expert would testify. On September 20, 2016, Murphy represented that his expert would need until September 21, 2016 to review the records. 7 AA 1558. Murphy's expert received twice as much time as he required to review the records, and was, therefore, not prejudiced.

Accordingly, the Court did not abuse its discretion in denying Murphy's motion to exclude the records, as the State disclosed the records as soon as they were

available, the records were available earlier through Murphy's own due diligence, and Murphy was given twice as long as he represented that he needed to prepare given the new disclosure. Therefore, Murphy's claim should be denied.

IV.
THE COURT WAS WITHIN ITS DISCRETION TO ADMIT FIGUEROA'S AGREEMENT TO TESTIFY

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez, 124 Nev. at 649, 188 P.3d at 1131; see, e.g., Mclellan, 124 Nev. at ___, 182 P.3d at 109. NRS 175.282 states:

> If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for a recommendation of a reduced sentence, the court shall:
>
> 1. After excising any portion it deems irrelevant or prejudicial, permit the jury to inspect the agreement;
> 2. If the defendant who is testifying has not entered a plea or been sentenced pursuant to the agreement, instruct the jury regarding the possible related pressures on the defendant by providing the jury with an appropriate cautionary instruction; and
> 3. Allow the defense counsel to cross-examine fully the defendant who is testifying concerning the agreement.

Murphy argues that Session v. State, 111 Nev. 328, 333, 890 P.2d 792 (1995), supports his position but, in fact, it demonstrates why his claim is meritless. In Sessions, this Court stated that "district courts have both the discretion and the obligation to excise such provisions *unless admitted in response to attacks on the witness's credibility attributed to the plea agreement*." Id. at 334, 890 P.2d at 796. (emphasis added.) The Sessions Court further upheld the defendant's conviction,

even though the Court permitted the jury to inspect the co-defendant's plea agreement, including the truthfulness provision, *before the defendant ever testified*, because cautionary jury instructions regarding the skepticism the jury ought to place on testimony from co-defendants-turned-State's-witnesses renders the failure to excise the truthfulness provision harmless. Id.

The instant case is easier to resolve than Sessions because the plea agreement, including the truthfulness provision, was not entered into evidence until after Figueroa testified. 10 AA 2302; AOB 58. Further, the unredacted plea agreement was provided to the jury because Murphy, Mendoza, and Laguna did precisely what Sessions cautioned could lead to a truthfulness provision remaining unredacted: They attacked the "witness's credibility attributed to the plea agreement." Laguna's attorney went first. 9 AA 2132-58. She questioned Figueroa about his decision to talk with police and enter into a plea agreement and elicited answers suggesting that Figueroa entered into the plea agreement to escape liability for a murder charge. 9 AA 2135-38, 2156-57. Mendoza's counsel followed, and to his credit managed to cross-examine Figueroa without mentioning the plea agreement. 9 AA 2158-79. Murphy's counsel followed. 9 AA 2185 – 10 AA 2238. He first asked a series of questions demonstrating that Figueroa had lied on numerous occasions. 9 AA 2187-93. Later, he proffered questions regarding a second interview that Figueroa had with police and suggested that Figueroa's testimony had changed, leading the police

to view him more favorably and provide him with favors. 10 AA 2223-27. Murphy's questions then turned to potential sentencing implications, contextually inferring that Figueroa was willing to tell police what he had to because he was not "looking to spend hella years in prison." 10 AA 2227-30.

Murphy then went further, directly stating that Figueroa cooperated and entered into the guilty plea agreement in exchange for leniency at sentencing:

> Q: Do you recall when you signed the actual Guilty Plea Agreement with the State? Not when you were in court, but when you signed it? Does January 2015 sound correct?
> A: Yes, sir, around -- around that time area.
> Q: In --
> A: Time frame.
> Q: -- February 2015, does that sound about the time that you actually came to this court and pled guilty in open court pursuant to that agreement?
> A: That sounds about right.
> Q As of July 2015, you believe that Mr. Brown, your previous attorney, provided misrepresentation about your situation in this case, right?
> A: Yes, sir.
> Q: You believed he misinformed you, correct?
> A: Yes, sir.
> Q: And he failed to discuss options with you before you sat down with the State that morning?
> A: Yes, sir.
> Q: When you were originally arrested and charged with murder, are you aware of what sentencing risk you faced? What was the potential sentences you could deal with?
> A: Murder, that's -- that's life.
> Q: Beyond that, were you also concerned potential sentences because you could have an enhanced sentence because of habitual criminal sentencing enhancements?
> A: Yes, sir.

> Q: So just so it's clear that means that if you were convicted of a felony, doesn't matter if it was murder or not, your sentence could be substantially enhanced because you had prior felonies?
> A: Yes, sir.
> Q: And now turning to what your negotiation is based on your Guilty Plea Agreement with the State, we talked some about what you expect the sentence to be or what you anticipate it to be, but having said that, let me -- let me question this; you at least have a possibility of walking out of that sentencing with a sentence of three to eight years?
> A: Yes, sir. I mean, that's the bare minimum, the highest up there.
> Q: Understood. But that is a possible sentence that you could hope to get?
> A: Yes, sir.

10 AA 2275-77.

On redirect, the State elicited testimony that both Figueroa's counsel and the police expected him to be truthful during his interview, and that Figueroa was aware that any potential deal was going to involve prison time. 10 AA 2277-84. The State then highlighted portions of previous statements and testimony that were consistent with his testimony at trial. 10 AA 2284-98. The Court took a recess, and the State indicated that it was going to move to admit the Agreement to Testify, including the truthfulness provision. 10 AA 2302-04.

The Court stated:

> "I think that independently you [Murphy] did attack the credibility of the witness on cross-examination as -- so -- clearly. And Ms. McNeill did, unlike Ms. Larsen. I thought nobody really directly attacked her credibility concerning any plea negotiation. But you have here. You've talked about his discussions with his lawyer, what he understood -- I mean, it's just very clear to me that you have suggested to the Jury that he's lying to get the benefit of his lies and to, you know, get a better deal. And the case law on that is it doesn't – it wouldn't come in except

> if you do that, if you attack his credibility in regards to the Agreement to Testify. I think that does come in, unlike Ms. Larsen's."

10 AA 2303-04. The Court's last statement reflects the fact that Summer's Agreement to Testify was redacted because counsel cross-examined her without suggesting that she entered into a plea agreement and lied to receive a benefit at sentencing. 8 AA 1697, 1847. Importantly, counsel and the Court had already had a lengthy discussion about when an Agreement to Testify could be admitted unredacted pursuant to Sessions when Summer testified, well before Figueroa testified. 6 AA 1267-70. The Court even recessed and reviewed Sessions prior to making a ruling. 6 AA 1271-72.

Returning to Figueroa's Agreement to Testify, the Court indicated that, while it was allowing his unredacted Agreement to Testify to be admitted based on the cross-examination of the witness, a curative instruction was still going to be given to the jury. 10 AA 2304-05. The Guilty Plea Agreement and unredacted Agreement to Testify were then admitted. 10 AA 2317. The jury instructions included the promised curative instruction. 14 AA 3327.

Murphy's argument that "[i]f the truthfulness language was properly admitted here, then the holding in Sessions is meaningless because the credibility of an informant will always be attacked on cross-examination" is disingenuous for two reasons. AOB 59. First, the truthfulness language was admitted not because Figueroa's credibility was attacked, but because counsel asked questions indicating

that Figueroa lied in order to obtain a better sentence through the Agreement. Second, Summer's Agreement was redacted pursuant to Sessions, and so *even within this case* the holding was proven not to be meaningless. Counsel can, and in fact did, cross-examine an informant without running afoul of Sessions.

Further, even if the Court erred in finding that Figueroa's cross-examination attacked his credibility on the basis of his agreement to testify, because the Court issued a curative instruction, any error was harmless as in Sessions.

V.
MURPHY WAS CONVICTED BY SUFFICIENT EVIDENCE

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal"; Smith v. State, 112 Nev. 1269, 1280 927 P.2d 14, 20 (1996)

(overruled on other grounds); accord Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380. (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (Court held it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (In all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court), cert. denied, 429 U.S. 895, 97 S.Ct. 257 (1976). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 276, 282, 87 S.Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S.Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 376, 609 P.2d 309, 313 (1980). Also, the

Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 457, 552 P.2d 1378, 1379 (1976)).

Murphy correctly states that accomplice testimony must be corroborated by evidence which "tends to connect the defendant with the commission of the offense." NRS 175.291(1); Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995). "Corroborative evidence 'need not in itself be sufficient to establish guilt' -- 'it will satisfy the statute if it merely tends to connect the accused to the offense.' Id. quoting Cheatham v. State, 104 Nev. 500, 504-05, 761 P.2d 419, 422 (1988)). In addition, "corroborative evidence may be either direct or circumstantial, and can be taken front the evidence as a whole." Id. The State also agrees with Murphy that Summer, Figueroa, and Mendoza were accomplices, and if their testimony was corroborated there is no question that it was sufficient to convict Murphy. AOB 62. The only real issue, then, is whether other evidence sufficiently corroborated that testimony.

The jury heard that Murphy's phone number was 702-542-1558, as established from a ticket where he pawned an item. 6 AA 1340-43. As explained above, records from that phone number were introduced through custodians of record. 7 AA 1582 – 1647. Detective Gandy went through the cell phone records and created a map showing the locations of various phone records throughout the

day of the two attempted robberies. 8 AA 1920-35. Various phone numbers were tied to the defendants and Figueroa, including Murphy. 8 AA 1937. The records showed Murphy, Figueroa, and Mendoza communicating with each other. 8 AA 1943 – 9 AA 1945. The maps were placed into a power point presentation which depicted Murphy, Figueroa, Mendoza, and Laguna communicating and travelling together throughout the day. 9 AA 1951-59.[7]

At minimum, it is clear that Mendoza's phone was pinging off a tower in the north part of the valley between 7:22 a.m. and 10:33 a.m., placing it near Larsen's supplier's house. 9 AA 1953. Between 4:21 and 5:19 p.m. his phone was pinging off a tower near his home. 9 AA 1954. At 7:29 p.m., it was pinging off a tower servicing Laguna's home, just prior to the robbery. 9 AA 1955.

At 9:26 a.m., Figueroa's phone was pinging off the tower servicing Laguna's home. 9 AA 1956. Between 8:10 p.m. on September 21, 2016, and 6:09 a.m., Figueroa's phone is pinging off a tower that services Larsen's house – the scene of the second robbery – corroborating his statement that he called just about "everybody in his phone" while looking for someone to pick him up as he hid in a back yard with two gunshot wounds. 9 AA 2105-09.

[7] Exhibit 324, as a visual exhibit, would be helpful to the Court to determine whether it sufficiently corroborated the location and times of the various phone contacts.

At 7:46 a.m., Laguna's phone was pinging off the tower servicing Figueroa's residence. 9 AA 1957. At 8:55 a.m., Laguna's phone was pinging off a tower near the location of the first attempted robbery. Id. Between 10:40 a.m. and 7:02 p.m. it was pinging off a tower servicing his residence. Id. At 8:10 p.m., Laguna's phone was pinging off a tower servicing Larsen's house. Id. By 9:09 p.m., Laguna's phone was pinging off the tower that services his house again. Id.

Between 5:05 and 5:14 a.m., Murphy's phone pinged off a tower near the first robbery attempt. 9 AA 1958. Between 7:00 and 7:22 a.m., Murphy's phone pinged off towers near Laguna's house. Id. Between 8:55 and 8:59 a.m., Murphy's phone was again pinging near the location of the first attempted robbery. Id. At 9:13 a.m., Murphy's phone was pinging off a tower near Laguna's house. Id. Between 7:29 and 7:37 p.m., Murphy's phone was pinging near Laguna's house again. Id. At 8:06 p.m., Murphy's phone was pinging near the location of the second attempted robbery. Id. Between 8:40 and 8:45 p.m., Murphy's phone was again pinging near Laguna's house. Id. Between 12:23 and 12:25 a.m. on September 22, 2016, Murphy's phone was pinging off towers servicing Mendoza's address. 9 AA 1958-59. At 12:54 a.m., Murphy's phone was again pinging near Laguna's address. 9 AA 1959.

Amanda Mendoza's phone pinged near Laguna's residence at 12:50 a.m. on September 22, 2016. Id. By 1:19 a.m., her phone was pinging the tower near her residence again. Id.

These records corroborate the testimony that Murphy initially went to scout out the supplier's house, then went to Laguna's house and picked everyone up. Murphy, Mendoza, and Laguna's phones all pinged near the location of the first attempted robbery, and it is likely that Figueroa was there as well because he was at Laguna's house afterward. 9 AA 2072-74. The parties generally disbursed for the day, but some went to others houses. At around the time of the second attempted robbery where Monty Gibson was killed, Murphy, Mendoza, Laguna, and Figueroa's phones all pinged off the tower servicing that address. Figueroa's phone continued pinging that tower for hours as he called for a ride. Mendoza's phone followed his car (probably because he left the phone in the car) and appeared at Laguna's house after the botched robbery while he was still in the back of a car on the scene or apprehended by police. Murphy, Laguna, and Mendoza's phones appeared near Laguna's house again. Murphy left Laguna's house to go pick up Amanda Mendoza, who then pinged near Larsen's house and, then back near her residence just before the police arrived and saw the vehicle there.

Around 2:00 a.m., when Detectives went to Mendoza's house, his Champaign-colored Nissan was there. 8 AA 1813. Mendoza's neighbor had earlier testified that Murphy came by to take Amanda Mendoza to the car. 7 AA 1482-92. Mendoza's neighbor also testified that Murphy had a Hispanic girlfriend, as Summer stated. 7 AA 1500. That Mendoza's car had been missing corroborates the testimony

that Murphy, Laguna, Figueroa, and Mendoza had used that car in the commission of the later robbery. Were Murphy not part of the robbery, he would have no reason to know where the vehicle was shortly after the robbery. Further, it is clear that neither Figueroa nor Mendoza could have driven the vehicle away, as Figueroa was hiding in a back yard with gunshot wounds to his face and his side, and Mendoza was at University Medical Center receiving treatment for his gunshot wound after being apprehended by police. 8 AA 1808-09. Amanda Mendoza's neighbor had seen her access an app that provided a location to Mendoza's phone. 7 AA 1488-89. Police later saw that same location, and went to that location. 8 AA 1815, 1824-25. That location was 3668 Lucky Horseshoe Court. 8 AA 1850. That address is Laguna's residence. 9 AA 1596. A jury could infer that Murphy drove Laguna home after the robbery, and then explaining why he knew the vehicle was there, why Mendoza's wife's phone showed that it was there, why neither of them were apprehended at the scene, and why the vehicle they travelled to the robbery in was not found at the scene.

Based on the above, the phone records and other testimony sufficiently corroborated the testimony of Summer, Figueroa, and Mendoza because the records match the times they said they were certain places, and far from showing a phone at a particular location at one time, they show continued meetings and groupings of the defendants at two separate crime scenes throughout the day. Of course, this analysis

does not even include the statements that Summer and Figueroa made to police which, while not testimony as such, only further implicated Murphy and the other defendants. Because the records and testimony above sufficiently corroborated Summer, Figueroa, and Mendoza's testimony, the jury was entitled to consider the testimony of the other co-conspirators. And, because the jury could consider that testimony, the evidence of guilt was not only sufficient, it was overwhelming.

VI.
CUMULATIVE ERROR DOES NOT APPLY

A cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990). If errors are present, cumulative error only requires reversal if the issue of guilt is close, the errors are severe, and the crime is serious. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

For the reasons discussed above, the Court committed no errors. Because the court committed no errors, cumulative error does not apply.

Appellant's cumulative error claim should be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 5th day of September, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 10,560 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of September, 2017.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 5th day of September, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

CASEY A. LANDIS, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

JEV/John Niman/jg