Appeal

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IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMON MURIL DORADO, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No.: 79556 Dist. Ct. Case No.: C-17-323098-1

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 and must be disclosed.

1. Attorney of Record: Michael Lasher
2. Publicly-held Companies Associated: None
3. Law Firm(s) Appearing in the Court(s) Below: Michael Lasher LLC

DATED this 12th day of March, 2020

/s/ Michael Lasher
MICHAEL LASHER, ESQ.

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I. STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the instant matter pursuant to NRS section 177.015(3). Dorado appeals from his Judgment of Conviction, which was entered on August 20, 2019. Pursuant to NRAP 4(b)(1), Dorado filed a timely notice of appeal on September 3, 2019.

II. ROUTING STATEMENT

This is an appeal from a conviction in District Court. This case is not appropriate for the Court of Appeals as it involves a Category A felony. NRAP 17(b)(2)(A).

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. **Almost Twenty Years of Pre-indictment Delay Prejudiced Appellant**
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STATEMENT OF THE CASE

PROCEDURAL HISTORY

On April 27, 2017, the State of Nevada filed an indictment charging appellant Ramon Dorado with three counts of sexual assault (NRS 200.366.2b) occurring 18 years prior, in April of 1999. Dorado was convicted on June 20, 2019 after a jury trial. 2 AA 180.[1] He was sentenced to twenty years to life. 2 AA 181-82.

STATEMENT OF FACTS

Because so much time had passed between 1999 and the charges being filed in 2017, coupled with Metro's loss of evidence and sub-standard investigation, Dorado's trial was fundamentally unfair.

Michelle Lehr testified she went dancing with friends at the Silver Saddle late in the evening on April 23, 1999. 7 AA 635. After the band stopped playing, her group spoke to the bartender and a bandmember, Ray, until daylight. Ray was nice, polite. 7 AA 647. They made a plan to go to PT's Pub. 7 AA 648. Ray got in the car with Lehr and said he needed to go to a friend's apartment to call work. 7 AA 650-51. Dorado tried to dance with Lehr but she did not want to. When she went to the

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[1] Citation format is as follows: Volume AA Bates Stamp Page.

door, he grabbed her. 7 AA 660. Dorado picked her up and carried her towards the bedroom. 7 AA 661. Dorado put her on the bed and tried to take her clothes off. 7 AA 662-63. Lehr blanked out for a second or two. 7 AA 665. Dorado put his mouth on her vagina, rubbed his half-erect penis against her vagina, and put his fingers inside her. 7 AA 666, 669, 670. Lehr left and eventually went to the police and then UMC. 7 AA 674-75. In 2007, she was convicted of conspiracy to commit theft. 7 AA 684-85, 688. On cross-examination, Lehr testified that April 24, 1999 was the first time she went out since the birth of her son. 7 AA 689.

Rachel Ekroos is a forensic clinical specialist. She reviewed the SANE exam previously performed by Marianne Adams, who no longer practices. 8 AA 746, 756-57. Ekroos didn't agree with all of Ms. Adams findings and didn't see bruising on certain pictures, but rather abrasions. 8 AA 764. These were nonspecific injuries, meaning there were a number of possible causes, including friction, but she did not know the mechanism. 8 AA 765-66, 780.

Prior to Maria Perez's testimony, the court held an evidentiary hearing because Perez told the prosecutor that she was "initially kind of skeptical" about Lehr's report of being raped because Lehr "would go

out with a lot of guys" and was promiscuous. 8 AA 783. At the hearing Perez testified, "I was kind of in disbelief." This was because they had about ten "crazy nights" in the last two years involving sexual relationships with men. 8 AA 792, 796. Defense counsel pointed out that this flatly contradicted Lehr's testimony that she had not gone out in the prior two years. 8 AA 797.

Maria Perez then testified in front of the jury. 9 AA 808. She, Lehr, and Joanne went to the Silver Saddle on April 24, 1999. 9 AA 810-11. Lehr drank and danced. 9 AA 813. The next day, Lehr told Perez that one of the guys from the band who she was talking to and who she danced with on his break invited her somewhere then raped her. 9 AA 817. On cross-examination, Perez testified she and Lehr would go to bars and clubs together, about 10 to 15 times in the period after Lehr's son was born. 9 AA 823-24.

Kimberly Dannenberger works in Metro's forensics lab. 9 AA 827. She testified that the DNA sperm profile was consistent with Ramon Dorado. 9 AA 839.

Detective Lora Cody, in the Cold Case Sexual Assault Unit, testified that the protocols to investigate sexual assaults have changed

drastically since 1999. 9 AA 856. When Det. Cody was assigned the case, she tried to gather all the prior reports. 9 AA 860. The sexual assault kit was retained but everything else was destroyed, including the physical property in early 2000. 9 AA 865.

The defense called one witness, Robert Bub, a police officer for LAPD for 33 years. 9 AA 893. In this case, Bub reviewed the Metro police reports and a transcript of Lehr's interview. The detective was assigned 9 days after the incident. Such a delay would impede an investigation. 9 AA 895. Metro didn't follow its own manual and policies in this case. 9 AA 896-97.

ARGUMENT

Argument 1

ALMOST TWENTY YEARS OF PRE-INDICTMENT DELAY PREJUDICED APPELLANT

Dorado's rights under the Sixth and Fourteenth Amendments were violated when he was forced to trial over 17 years after the alleged criminal conduct on April 24, 1999 because the State lost or destroyed physical evidence and documentation of law enforcement's investigation. Dorado raised the issue in a pre-trial motion and the State responded. Yet the district court never ruled.

Legal Framework

To assess whether Due Process has been violated for a pre-indictment delay, this Court must balance the reason for the delay against the prejudice to Dorado. "Whether due process has been violated is decided under a balancing test and '[i]f mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater'." *United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir. 1997) (citations omitted). *Ross* does not require a showing of intent to gain a tactical advantage. This is just one factor of many to be considered in a balancing test. *Accord, Saurez v. Sherman*, 2018 WL 4810773 *7 (C.D. Cal., Jan. 15, 1999) (adopting balancing test and citing *Ross, United States v. Huntley, 976 F.2d 1287, 1290 (1992), and United States v. Krasn, 614 F.2d 1229, 1235 (9th Cir. 1980)*); *United States v. Liersch*, 2006 WL 6469421 *17 (S.D. Cal., June 26, 2006) (citing *Ross* and adopting balancing test); *Gantt v. Roe*, 1999 WL 34868006 *23 (C.D. Cal., Jan. 15, 1999) (citing *Ross* and adopting balancing test).

Relevant Facts

Trial counsel filed a "Motion to Dismiss for Pre-Indictment Delay and Lack of Jurisdiction." 1 AA 61 et seq. Trial counsel correctly cited *United States v. Lovasco*, 431 U.S. 783, 788-90 (1977), which held that to show a Due Process violation, a defendant must demonstrate (1) he or she suffered actual prejudice and (2) when weighed against the reasons for the delay, the delay offends "those fundamental conceptions of justice which lie at the base of our civil and political institutions." Trial counsel also correctly cited *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989): "The Fifth Amendment guarantees that defendants will not be denied due process as a result of excessive preindictment delay." Trial counsel also directed the trial court to *United States v. Marion*, 404 U.S. 307, 322 (1971), which held that even when a case is filed within the statute of limitations, Due Process still protects a defendant from prejudice resulting from government delay. Trial counsel further cited *United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1109 (9th Cir. 2007), which held that the longer the delay, the more likely it is to be prejudicial. Finally, trial counsel articulated the balancing test to determine whether a preindictment delay offends Due Process. A defendant need not show that the

government intentionally or recklessly delayed the indictment. Instead, a defendant need only show that the government acted negligently in delaying the case and the delay prejudiced the defendant. *United States v. Moran*, 759 F.2d 777, 779 (9th Cir. 1985). Reckless delay, regardless of its duration, coupled with actual prejudice violates due process. *Lovasco*, *supra*, 431 U.S. at 790.

Trial counsel described the prejudice resulting from the delay: witnesses who would have supported Dorado's defense of consent have been lost to time. "The state waited 18 years to indict Mr. Dorado, during which time the majority of the physical evidence was destroyed, the defense's key eyewitness died, and most of the witnesses moved away and were lost." As well, the nurse who performed the sexual assault examination died in 2011 and so cannot be cross-examined about her conclusion that "the victim had little bruising . . . and that it was not definitive for sexual assault."

Turning to the balancing test, trial counsel argued that there was no legitimate reason for the delay because the government had all of the information it needed to prosecute the case. Lehr told the police that the alleged assailant was a Latino named Raymond (aka Ray) who was

5'6" and approximately 180 pounds, wearing light shirt, black pants, a black tie, and cowboy boots. He was a member of the band playing in the Silver Saddle on April 23, 1999. He took Ms. Lehr to 2101 Surprise Avenue to an apartment on the downstairs right side of the orange building with a pool. She told police that another Hispanic man in his 20s was in the apartment before and after the alleged attack. Despite this wealth of information, the government failed to adequately follow up on this case. They contacted Silver Saddle and were told that the Ray in question was Ramon, the band's accordion player. The police made no attempt to contact Ramon or follow up on any leads. "Instead, the case was cleared by Detective Barry Jenson (PN 3662) on June 8, 1999, just weeks after the alleged incident. On January 5, 2000, Detective Jensen signed the Evidence Disposition Order for the items related to the case." As such, trial counsel argued that there was no legitimate reason for the delay and that the detectives exhibited both negligence and recklessness by ordering the destruction of the physical evidence, including the clothing Ms. Lehr was wearing.

On October 29, 2018, the State filed an opposition, which alleged that the defense had previously made the same objection in its June 20,

2017 motion, which was denied. 1 AA 74 et seq. Yet the State's opposition mislead the trial court, which the State's own exhibit demonstrates. See Exh. 1, which is Dorado's June 20, 2017 Motion to Dismiss for Failure to Preserve Evidence. Instead of arguing for dismissal for pre-indictment delay, the 2017 motion argued that reversal was required for the government's failure to gather evidence, citing *Daniels v. State*, 114 Nev 262, 268 (1998) (police officers generally have no duty to collect all potential evidence from a crime scene). Notably, the 2017 motion did not argue for dismissal due to for pre-indictment delay, nor did it cite controlling federal precedent concerning preindictment delay. Unsurprisingly, the State's 2017 opposition did not argue that the case should not be dismissed for pre-indictment delay. As such, in 2017 neither party addressed the precise issue of the denial of Due Process for pre-indictment delay. The State's 2018 opposition is simply wrong; the issue had not been previously addressed.

Trial testimony revealed even more prejudice. Detective Lora Cody testified that the protocols concerning sexual assault have changed drastically over time, including much more care for crime scene

preservation. 9 AA 856. Detective Cody attempted to find the physical property in this case but couldn't. The sexual assault kit was retained but everything else was destroyed, including police reports. 9 AA 865, 867.

Metro's destruction of evidence hindered truth-finding in other ways. Because the audiotape of Lehr's statement to the detective was destroyed and because of the passage of time, there were critical gaps in her trial testimony. When asked if she told the Detective that her pantyhose were ripped, Lehr testified, "According to the statement, yes, that I took. I cannot recall everything I said back then. There's a lot of edits on that statement and blank spots from –" 8 AA 722. "Whoever transcribed that or did the typing on that did not get all of my words in there." 8 AA 725. Lehr gave her pantyhose to the police. 8 AA 739. But because the police destroyed Lehr's clothing (9 AA 865), Lehr's statement that the pantyhose were ripped could not be challenged.

Analysis and Standard of Review

Inexplicably, the trial court never ruled on Dorado's 2018 Motion to Dismiss for Pre-indictment Delay. Neither the docket nor the transcript indicates that the issue was ever heard. Yet the court had a

duty to rule once the issue was raised. *Donoho v. Eighth Judicial Dist. Court of State in and for County of Clark,* 108 Nev. 1027, 1030 (1992); *Brown v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 2013 WL 1092461 (March 13, 2013, Nevada Supreme Court, No. 62619. Unpublished opinion) ("district court disregarded its duty to rule on petitioner's constitutional speedy-trial claim before permitting the State to dismiss the information without prejudice."); Code of Jud. Conduct, Canon 2.5: Competence, Diligence, and Cooperation. (A) A judge shall perform judicial and administrative duties competently and diligently; Supreme Court Rule 17 (District Court duty to compile list of undecided motions).

Since the trial court did not rule, this Court reviews the issue *de novo.* Normally, "[i]n evaluating whether a defendant's Sixth Amendment right to a speedy trial has been violated, this court gives deference to the district court's factual findings and reviews them for clear error, but reviews the court's legal conclusions de novo." *State v. Inzunza*, 2019 WL 7195310 *2 (December 26, 2019, Nevada Supreme Court, No. 75662). Here, there are no factual findings to defer to. Thus, this Court must review both the facts and the law *de novo.*

The trial court erred in not dismissing the charges. On balancing the State's reason for the delay against the prejudice to Dorado, it is clear that Due Process has been violated under the balancing test articulated in *United States v. Ross*, 123 F.3d 1181, 1185.

Here, the reason for the delay was either negligence or recklessness. Despite having the name and potential residence of the suspect, the State did no further investigation and destroyed the physical evidence a mere eight months after the alleged incident. The State's own witness, Detective Cody, testified that protocols are different now, indicating that the prior investigation was poor. 9 AA 856. Even though Lehr identified for the police the specific apartment, they never searched for Dorado. Nor is there any indication that the police attempted to speak to the three people Lehr identified at the apartment: the young man in the apartment and two women who Lehr passed as she left. See exhibits to October 29, 2018 State's Opposition. 2 AA 114 et seq. Tellingly, the State frankly admitted to the jury that at the time of the alleged crimes, Metro did not have the funds to conduct testing. In 2015, they received significant money. 3 AA 203. This admission is both significant and a potential red herring. It is

significant because the State apparently believes that prosecution should be subject to the vicissitudes of funding, with no heed to Due Process. On this logic, Dorado could have been prosecuted in 2040 if that was the earliest Metro received funding. Yet the State's argument is also a potential red herring because DNA was not necessary to prosecute this case. That is, it cannot be argued that the delay was justified because the later-found DNA was necessary to identify the alleged suspect. Again, the State had all it needed. The police knew that the suspect was named Ramon and played in the band. 9 AA 867. Lehr drove the detective to the apartment complex and identified the specific unit where the incident took place. 7 AA 675. Thus, the police had all they needed if they wanted to prosecute this case in 1999. They chose not to. Their failure to do so was reckless, or negligent at best.

Dorado was significantly prejudiced, enough so that even if the State's actions were merely negligent and not reckless, reversal is required. As pointed out to the trial court, the SANE nurse, who had a chance to observe the alleged victim's demeanor and who concluded the injuries were minimal, died in 2011. 1 AA 71. Furthermore, at trial, Detective Cody enumerated all of the physical and documentary

evidence that was lost. 9 AA 865, 867. All that remained was the DNA, the poor transcript of Lehr's voluntary statement, and law enforcement's continuation report but not the original police report. 2 AA 114 et seq. Lost to time were the original tape recording of Lehr's statement to the detective, her clothing on the night of the crime (2 AA 115; 9 AA 865, 867), the 911 call (2 AA 158), and any business records of 2101 Sunrise, which had been torn down in the intervening years (1 AA 94). And because the police destroyed Lehr's clothing, Lehr's statement that the pantyhose were ripped could not be ascertained. Finally, if Dorado had been brought to trial in a timely fashion, he could have testified that the encounter was consensual. Yet after the alleged crimes, he suffered felony convictions that would have been used by the prosecutor as impeachment. Prior to the alleged crimes, Dorado had only one misdemeanor conviction. 10 AA 968. As such, he would have testified in 1999. Dorado was prejudiced and reversal of all counts is required.

Argument 2

THE COURT LACKED JURISDICTION BECAUSE THE STATUTE OF LIMITATIONS BARS PROSECUTION

Trial Counsel's October 19, 2018 "Motion to Dismiss for Pre-Indictment Delay and Lack of Jurisdiction" also argued that the trial court lacked jurisdiction because the statute of limitations had run. 1 AA 61 et seq. Trial counsel acknowledged that NRS 171.083 exempts sexual assault allegations from any statute of limitations. By its terms:

> 1. If, at any time during the period of limitation prescribed in NEV. REV. STAT. § 171.085 and 171.095, a victim of a sexual assault . . . files with a law enforcement officer a written report concerning the sexual assault, the period of limitation prescribed in NEV. REV. STAT. § 171.085 and 171.095 is removed and there is no limitation of the time within which a prosecution for the sexual assault must be commenced.

Trial counsel argued that since the State cannot produce a police report from 1999, NRS 171.083 is not satisfied and the statue expired four years after the alleged events pursuant to NRS 171.085 (1).

The State's October 29, 2018 Opposition attached as an exhibit Detective Hnatuick's Continuation Report dated April 25, 1999, which stated that an "incident report was

created under the above event number." 2 AA 117. Yet the State never produced the original incident report, which was destroyed. 9 AA 865, 867.

As shown above, the trial court did not rule on Dorado's October 19, 2018 Motion, despite a duty to do so. Since the trial court did not rule, this Court reviews the issue *de novo*.

Trial counsel was correct that the terms of NRS 171.083 (1) have not been satisfied because the State did not produce a "written report" "filed" by the victim. The plain language of the statue could not be clearer. Yet its requirements have not been met. Lehr's transcribed, voluntary statement is not a "written report," especially because the audio recording has been lost to time and the transcript contains many gaps that the transcriber could not understand. In fact, at trial Lehr theorized that she told law enforcement that her pantyhose were ripped despite it not being in the transcript because "[t]here's a lot of edits on that statement and blank spots from –" 8 AA 722. Furthermore, the State did not even produce the original incident report (although it did produce the continuation report), presumably because the original incident report has been destroyed. As such, the specific requirements

of NRS 171.083 have not been met and the district court lacked jurisdiction to prosecute Dorado. Lack of jurisdiction can be raised at any time. *Barber v. State*, 131 Nev. 1065, 1069 (2015), citing *Landreth v. Malik,* 127 Nev. 175, 179 (2011). The charges must be dismissed.

Argument 3

APPELLANT WAS DENIED DUE PROCESS BY THE STATE'S FAILURE TO COLLECT EVIDENCE AND PRESERVE WHAT THEY DID COLLECT

Metro willfully destroyed critical evidence in this case prior to Dorado's trial: the audio recording of the Lehr's statement to law enforcement, her clothing, and Det. Hnatuick's original police report. Furthermore, Metro effectively destroyed critical evidence by failing to conduct a basic, competent investigation of the case, in violation of their own protocols. Specifically, they failed to interview numerous witnesses identified by Lehr and failed to find and interview Dorado, despite knowing his name, employment, and likely residence. As a result, Dorado could not defend himself.

Legal Framework

Loss of Evidence Previously Collected

Dismissal is warranted as a violation of due process when the State loses critical evidence that it had previously gathered. *Cook v. State*, 114 Nev. 120, 125 (1998), a sexual assault case in which the defendant and complaining witness had significantly different versions of the events, held, "A conviction may be reversed when the state loses evidence if the defendant is prejudiced by the loss or the state acted in bad faith in losing it." In *Cook*, law enforcement lost the initial police report of the defendant's statement and all of the photographs of various items of evidence, including of the complaining witness' bedroom which the court noted *could* have undermined her statement that a violent struggle unfolded there. Instead, "[t]o establish prejudice, the defendant must show that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense." *Id.* at 125. Additionally, law enforcement failed to book the complaining witnesses' clothing into evidence and negligently failed to press the button to record the complaining witness' statement, which could have been used to show inconsistencies between her initial statement and trial testimony. *Cook*, *supra*, 114 Nev. at 123-24. *Cook* noted that it was not holding that the police have a duty to collect evidence, but that

"Cook's defense was unduly prejudiced solely on the evidence that was gathered and then subsequently lost." *Id.* at 126, fn. 6.

As pointed out by *Cook*, *State v. Havas*, 95 Nev. 706, 707 (1979) had similar facts and result.[2] There, the pants and undergarments of an alleged rape victim were lost by the police and were thus unavailable for inspection by the defense. Although the alleged victim testified during a preliminary examination that her clothes were not torn, the defendant wanted to inspect the items to demonstrate lack of force. *Id.* at 708, 710. In response, the State argued that the garments were not material because a showing of physical force was not necessary to complete the act of forcible rape. *Id.* at 708. *Havas* nonetheless held that the evidence was material and dismissed the rape charges. The court noted, "The crime of rape is rarely perpetrated in the presence of witnesses other than the defendant and the victim and great reliance

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[2] Cook, *supra*, 114 Nev. at 126, fn. 5, noted that *Deere v. State*, 100 Nev. 565 (1984), overruled *State v. Havas*, 95 Nev. 706 (1979) to the extent that the *Havas* holding formulated a per se rule that a rape victim's undergarments were always material and potentially exculpatory evidence. Rather, in *Deere*, the Court reiterated that "[t]he materiality and potentially exculpatory character of lost or destroyed evidence must be determined on an ad hoc basis on the facts of each particular case." *Deere*, 100 Nev. at 566–67.

must be placed on the testimony of the victim, and, if given, the defendant. Thus, the presence or absence of other evidence which would support or refute the testimony of the involved parties has the potential for great significance." *Ibid.*

Sanborn v. State, 107 Nev. 399, 407-08 (1991) reversed a murder conviction where the State mishandled gun evidence resulting in the loss of blood and fingerprints. In finding prejudice, the Court held, "If Sanborn's testimony is true, evidence of blood or fingerprints on the weapon *could have been* critical, corroborative evidence of self-defense." *Sanborn*, *supra*, 107 Nev. at 408, quoting *Sparks v. State*, 104 Nev. 316, 319 (1988) (emphasis added).

In *Sparks*, the police found a loaded handgun at the crime scene in a felt bag. They visually examined the gun and bag for blood and hair; neither were observed, and no chemical tests were performed. They booked the gun and bag into evidence, only to soon release it to the victim's son despite being aware of the integral part the gun played the defendant's statement. *Sparks*, *supra*, 104 Nev. at 319. In reversing the conviction, the Court held, "Appellant's claim of self-defense rested, almost exclusively, on her own testimony. Blood, hair, or fingerprints *if*

found on the weapon would have been critical, corroborative evidence supporting her testimony." *Ibid (emphasis added).* Thus, the defendant need not conclusively prove the materiality of the evidence when evidence is lost by the State. *See also, Daniel v. State*, 119 Nev. 498, 520 (2003) (loss or destruction of evidence by the State violates due process when the State acted in bad faith or defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before loss); *Leonard v. State*, 117 Nev. 53 (2001).

Failure to Gather Obviously Important Evidence

A related family of cases holds that the State's failure to gather evidence may warrant sanctions against it. To show a due process violation for failure to gather evidence, a defendant must first show that the evidence was material, i.e., that there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available. *Randolph v. State*, 117 Nev. 970, 987 (2001). *See also, Guerrina v. State*, 134 Nev. 338, 347 (2018), quoting *Jackson v. State*, 128 Nev. 598, 613 (2012).

Second, if the evidence was material, the court must determine whether the failure to gather it resulted from negligence, gross

negligence, or bad faith. In the case of mere negligence, no sanctions are imposed. For gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the State. Finally, in the case of bad faith, dismissal of the charges may be warranted. *Randolph v. State*, 117 Nev. 970, 987 (2001).

Standard of Review

The district court's denial of the motion to dismiss is reviewed for abuse of discretion. *Guerrina v. State*, 134 Nev. 338, 347 (2018).

Relevant Facts

On June 20, 2017, defense counsel filed a Motion to Dismiss for Failure to Preserve Evidence, outlining the foregoing legal principles. 1 AA 1. The State filed an Opposition on June 29, 2017. 1 AA 14. Defense counsel filed a Reply on August 14, 2017. 1 AA 54. The matter was heard on July 6, 2017 (2 AA 142) and on August 15, 2017 (2 AA 169).

Defense counsel pointed out that Metro lost critical evidence and did very little investigation. For one, they should have interviewed Perez and asked about Lehr's demeanor, as this was relevant to the defense of consent. 2 AA 149. The district court indicated that defense

counsel has not shown that there is a reasonable probability that if the evidence had been available the result would have been different because defense counsel was speculating as to the materiality. 2 AA 150. The district court was troubled by the lack of any case in which defense counsel simply argued materiality with no other corroboration. 2 AA 151, 153. Nonetheless, the court agreed that "obviously it wasn't a very good investigation." 2 AA 153.

The State, on the other hand, described the investigation as "excellent" (sic). 2 AA 154. Tr. July 6, 2017 at 13. The State acknowledged that the tape of the 911 call has been destroyed. 2 AA 158. Defense counsel responded that the 911 call was important because it often contradicts the witness' later statement. 2 AA 160. The district court again pointed out that defense counsel's arguments were speculative as to what the evidence might have shown. Ultimately, the court denied the motion on the materiality prong and did not make a finding regarding whether the investigation was negligent, grossly negligent, or in bad faith. 2 AA 163. Defense counsel then pointed out that the audiotape of the interview of Lehr has not

been provided to the defense, even though the transcript had been provided. 2 AA 165.

After checking into the existence of the tape, the motion was again heard on August 15, 2017. Defense counsel confirmed that the audiotape no longer existed and as such she would not be able to effectively cross-examine Lehr because the transcript contains many un-transcribed areas. 2 AA 170-72. Defense counsel argued that bad faith was shown by the detective putting the original audiotape in his desk drawer but then throwing it out when he retired. Clearly there was value to the tape or he would not have kept it in the first place. 2 AA 172. Defense counsel pointed out that the transcript of the tape was missing critical information, such as the complaining witness' answer to whether the alleged assailant was wearing a condom. If she had answered yes, then "we're in a whole different ballgame here," since this might indicate consensual sex. 2 AA 173, 176. Defense counsel also noted that the parties do not know how much each blank on the transcript covered on the audiotape. 2 AA 177. Finally, defense counsel cited *Cook v. State*, 114 Nev. 120 (1998) to address the district court's previously articulated concerns about materiality and speculation.

The district court ultimately denied the motion. "[I]t's not ideal, obviously, but you know, evidence is not always perfect and sometimes things get missed and sometimes mistakes are made, you know. All this is why we have a trial. . . . I see very little exculpatory value to the loss of the audio tape here. . . I find there's no bad faith. There's no evidence of any gross negligence by the State." 2 AA 177.

Analysis

The district court abused its discretion. First, it did not apply the proper standard to the evidence that had been collected and then lost. Second, its findings of no materiality and no gross negligence were belied by the record.

Metro collected and then lost (1) the original audiotape of Lehr's statement to the detective (2 AA 115; 9 AA 865, 867), (2) the clothing she wore on April 24, 1999 (*Ibid*), and (3) the 911 call (2 AA 158). The law is clear that the charges must be dismissed because Dorado suffered prejudice. The district court erroneously believed that Dorado was required to show bad faith and that he must conclusively prove that it is reasonably probable that that the results of the proceeding would have been different with the evidence, which is instead the

standard for failure to collect evidence. *Randolph v. State*, 117 Nev. 970, 987 (2001). Neither is required when the State loses evidence that it had previously collected. Instead, *Cook* makes clear that Dorado merely must show that the lost evidence *could* have undermined the complaining witness' statements. *Cook, supra*, 114 Nev. at 125.

Here, the audiotape of Lehr's statement, her clothing, and the 911 call all could have each impeached her trial testimony. That is, it is reasonably anticipated that the evidence would have been exculpatory and material to the defense. As pointed out by defense counsel, the audiotape could be used to fill in the extensive missing sections of the transcript, including whether the alleged assailant used a condom. As well, the 911 call is often more truthful than a complaining witness' later statement. Furthermore, the clothing, destroyed after only a few weeks, could have shown a lack of struggle. As in *Cook*, *Sanborn*, and *Sparks*, Dorado's consent defense was seriously undermined by the lack of evidence in a case with only one percipient witness at trial. *Cook* reversed for negligent failure to preserve the complaining witness' clothing and to record her statement when the officer forgot to push the record button. In Dorado's case, the detective threw out the tape when

he retired and released Lehr's clothing only a few weeks after the alleged incident. As in *Cook,* this evidence *could* have undermined Lehr's statement that a violent struggle occurred. Similarly, *Havas,* 95 Nev. at 708, reversed because the victim's clothing was destroyed. But since police destroyed Lehr's clothing in this case, her statements that the pantyhose were ripped and she stabbed Dorado went unchallenged.

Loss of these three items was more than a sufficient showing and the district court abused its discretion because it used the wrong standard, requiring outcome determinative prejudice as the basis for materiality for lost evidence (2 AA 163), instead of a showing that the evidence *could* have undermined the complaining witness' statement that a violent struggle occurred. While the district court decried the lack of a case holding that the defense need not show exactly what the lost evidence would have proven (2 AA 151, 153), it was presented four such cases by defense counsel: *Cook*, *Sanborn*, *Havas*, and *Sparks*. And they all required dismissal because Dorado was prejudiced. Lehr was the only percipient witness and any evidence that her story was incorrect was critical. This was a close case; the jury deliberated for about two hours. 2 AA 180. Reversal is required.

The district court also abused its discretion when attempting to analyze the evidence that was not collected by Metro but should have been, such as interviewing all of the witnesses named by Lehr and photographing the alleged crime scene. Specifically, the district court's findings of no materiality and no gross negligence were belied by the record. As to Metro's negligence in general, the district court was presented with the facts that the detective saved the audiotape and then threw it away upon retiring. While destruction of evidence is evaluated under a different standard, it still shows negligence in general. As defense counsel argued, clearly there was value to the tape or the detective would not have kept it in the first place. 2 AA 172. Furthermore, at trial, Bub testified that Metro did not follow the investigative protocols in its own manual. 9 AA 896-97. This indicates bad faith, which warrants dismissal of the charges. *Randolph v. State*, 117 Nev. 970, 987 (2001).

As to materiality of the evidence that was not gathered in the first place, the district court's analysis was also an abuse of discretion. Metro's failure to interview a critical witness, Perez, would have led to evidence that had it been known, it is reasonably probable that a

different result would have been reached. Had Metro interviewed Perez, they would have learned that she did not believe Lehr's report of rape because Lehr and Perez had had approximately ten "crazy nights" in which Lehr had sexual relations with men in the two months prior to this incident. 8 AA 792, 796. Yet Lehr stated to police and then testified that she had not been out socializing, and by inference had had no relations with men, in the two years prior to April 24, 1999. 7 AA 643, 689. Had Metro interviewed Perez, charges may not have been filed. Reversal is required.

Argument 4

THE STATE USED RACE-BASED PEREMPTORY STRIKES

The Fourteenth Amendment prohibits race-based peremptory challenges. *Batson v. Kentucky,* 476 U.S. 79, 97 (1986). During jury selection in the instant case, defense counsel objected after the State used peremptory challenges to strike four Hispanic Prospective Jurors. 6 AA 580, 582. Dorado is Hispanic.

Legal Framework

The equal protection clause prohibits a prosecutor from using peremptory challenges to exclude otherwise qualified persons from the

petit jury by reason of their race, even when the defendant is not a minority. *Powers v. Ohio*, 499 U.S. 400, 406 (1991).

This case involves the application of *Batson's* third step because the State proffered and the district court analyzed race-neutral reasons for striking four Hispanic Prospective Jurors. At the third step, the trial court must evaluate all relevant circumstances and determine whether the defendant has shown purposeful discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("*Miller-El II*"); *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). Nevada's jurisprudence is in accord. *Taylor v. State*, 2019 WL 6876758 (Dec. 16, 2019, Nevada Supreme Court No. 75447. Unpublished disposition.) *Williams v. State*, 134 Nev. 687, 692 (2018) held that the "district court should sustain the *Batson* objection and deny the peremptory challenge if it is 'more likely than not that the challenge was improperly motivated.' " (quoting *Johnson v. California,* 545 U.S. 162, 170 (2005). If the *Batson* challenge is erroneously denied, the error is structural and reversal is automatic.

Standard of Review

The United States Supreme Court has held that deference to the trial court's fact findings is due only when it has conducted a sincere

and reasoned effort to evaluate "all of the circumstances that bear upon the issue" of purposeful discrimination. *Snyder*, 552 U.S. at 478; *see Miller–El II*, 545 U.S. at 239. In analyzing the validity of the prosecutor's explanations, the reviewing court must consider "all of the relevant facts." *Batson, supra*, 476 U.S. at pp. 96-97. The district court's factual findings are reviewed for clear error. *Miller-El II*, 545 U.S. at 252; *Snyder*, 552 U.S. at 478. Nevada's jurisprudence is in accord. *Taylor v. State*, 2019 WL 6876758 *1 (Dec. 16, 2019, Nevada Supreme Court No. 75447. Unpublished disposition.)

Of course, where, as here, the trial court has used the wrong legal test, there has been an abuse of discretion. *Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011).

Relevant Facts

Trial counsel made a *Batson* challenge. 6 AA 680. He stated that of the State's first five strikes, four were Hispanic: 1084, 1180, 1257, and 1123. 6 AA 582-83.

When asked to give a race-neutral reason regarding Prospective Juror 1084, the prosecutor stated, "For most of my questioning, he was sitting in the back row with his head against the wall looking up at the

ceiling. When I asked if everyone agrees no means no, everyone shook their head, except for him," although the juror ultimately agreed. The potential juror also said he would need more than the victim's testimony to convict. The district court agreed that this was a legitimate reason for a strike, and added that Prospective Juror 1084 referred to himself as not Hispanic but "other race." "So that means to the court that he is not purely of Hispanic or Latin race, but he is a mixture of races and, therefore, does not consider himself of Hispanic race." 6 AA 585-86.[3] The prosecutor's recitation of facts concerning Prospective Juror 1084 was accurate. 4 AA 343, 346.

When asked to provide a race neutral reason regarding Prospective Juror 1180, the prosecutor stated that he appeared disinterested, rolled his or her eyes, and identified as "other race."[4] 6 AA 587. The voir dire is at 4 AA 394-95.

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[3] Even if Prospective Juror 1084 identified as "other race," this would be irrelevant for *Batson* purposes as long as the prospective juror did not identify as white. *Powers v. Ohio*, 499 U.S. 400, 406 (1991). Furthermore, prior to the State providing reasons for the strikes, the court found that the four jurors subject to the *Batson* challenge were Hispanic in origin based on the names and or appearances. *Id.* at 164.

When asked to give a race neutral reason regarding Prospective Juror 1257, the prosecutor stated that the Prospective Juror consented to statutory rape and so would be more favorable to a consent defense. 6 AA 588-89. The prosecutor was factually correct. 6 AA 558. The prospective juror was 15 or 16 years old and the perpetrator was a roommate; she didn't want the report filed because it was consensual. 6 AA 561.

The court instructed the prosecutor to address Prospective Juror No. 1123. Yet the transcript indicates that the prosecutor discussed Prospective Juror 7698, whom the prosecutor stated identified as "other race" and said that some women dress provocatively and so should expect something to happen, which the Prospective Juror later clarified. 6 AA 588-89. During voir dire, Prospective Juror 7698 stated that a woman who dresses provocatively should expect certain attention, but also agreed that it is still a crime if that woman is grabbed. 4 AA 383.

The following is the entirety of the district court's ruling:

> We basically have gone over a little bit extensively in removing two individuals who were Hispanic speaking solely because of the fact that they were Hispanic speaking. Both parties agreed to stipulate to remove those individuals that, based solely upon their native tongue, is not a valid reason to strike them. An inability to comprehend is one. But just

> because they have a tendency to speak one language over the other is purely picking on an individual race because of that. Based upon all of the arguments here today on regard to [Juror No. 1084], [Juror No. 1257], and [Juror No. 1123], the request for *Batson* challenge is hereby denied. I do not find a systematic approach.
>
> . . .
>
> We had gone through – one, two, three, four, five, six, seven – eight other people of Hispanic or Latin gender names – or excuse me – surnames and individuals – one, two, three, four – five that identify themselves as Hispanic in nature that were not stricken by the State. I do not see a systematic attempt to strike only individuals of Hispanic. The State has articulated a very valid basis for each and every one of the strikes.

6 AA 589-90.

Prior to requiring the prosecutor to articulate race neutral reasons, the district court stated:

> At this time, from a general finding, what I see is a pure *Batson* based only on surname, okay? That's usually why I see *Batson* challenges. Because everybody automatically infers because they have a Hispanic or Latino surname that those individuals are somehow Hispanic or Latino actually. I never judge race and/or gender neutrality at all because the fact is, I have a lot of people that come in here, including my family members, who happen to be last name Miranda and they are Hispanic only by Miranda. They're actually Asian. So the fact that they have a surname that happens to be Latino or Hispanic based does not influence this Court as to a pattern.

6 AA 584.

Analysis

The district court's ruling was confusing and perfunctory, was based on an erroneous legal standard, and factually incorrect. As such, the district court clearly erred.

First, the ruling was confusing and perfunctory. In fact, it was so devoid of analysis and a sincere and reasoned effort to evaluate "all of the circumstances" that it is not entitled to any deference. *Snyder*, 552 U.S. at 478; *Miller–El II*, 545 U.S. at 239. Nevada courts are in accord. In reversing the convictions, the Nevada Supreme Court in *Williams v. State*, 134 Nev. 687, 689 (2018) admonished the lower courts: "We have repeatedly implored district courts to . . . clearly spell out their reasoning and determinations," citing *Libby v. State,* 115 Nev. 45, 54 (1999); *Kaczmarek v. State*, 120 Nev. 314, 334 (2004); *McCarty v. State*, 132 Nev. 218, 230 (2106). *See also, Conner v. State,* 130 Nev. 457, 465, 327 P.3d 503, 509 (2014).

In the instant case, the district court's conclusion was as bald and unsupported as that in *Williams*. It did little or no analysis of the prosecutor's stated reasons and instead focused on irrelevancies. The district court merely commented in passing on the prosecutor's asserted

reasons, and even then for only two of the four struck prospective jurors. Regarding Prospective Juror 1084, the district court agreed with the prosecutor that the prospective juror would have required more than the victim's testimony to convict. 6 AA 585-86. Regarding Prospective Juror 1257, the district court agreed with the prosecutor that she was "white/Caucasian." 6 AA 587-88. That was the full extent of the district court's analysis. There was absolutely no analysis of the peremptory strikes of prospective jurors 1180 and 1123. This, despite the admonishment in *Williams v. State*, 134 Nev. 687, 689 (2018) for lower courts to "clearly spell out their reasoning and determinations."

Had it done so, the court would have compared the State's reasons with the answers of other jurors who were not struck. For instance, regarding Prospective Juror 1084, the district court agreed with the State that the strike was legitimate because the prospective juror would have required more than the victim's testimony to convict. 6 AA 585-86. Yet the State did not strike another juror who voiced the same concerns. Prospective Juror 1111 would not have found guilt solely based on the victim's testimony because the prospective juror sees his job to listen to both sides of every story. 4 AA 337, 339, 340. Yet

Prospective Juror 1111 remained on the jury. 7 AA 606. This disparity indicates that the State's reason regarding Prospective Juror 1084 was pretextual. As such, it is "more likely than not that the challenge was improperly motivated." *Johnson v. California,* 545 U.S. 162, 170 (2005). Thus, the court should have found that the peremptory strike of Prospective Juror 1084 was improperly motivated.

The court's analysis was also legally flawed. The district court stated that someone named "Miranda" could be Asian and thus not Hispanic. From this, the court concluded that a potential juror's Hispanic surname would not influence it as to a pattern for *Batson's* first step. 6 AA 584. Furthermore, in denying the *Batson* challenge to Prospective Juror 1084, the district court emphasized that the prospective juror referred to himself as not Hispanic but "other race." 6 AA 585-86. Yet none of the foregoing should alter the *Batson* analysis because striking an Asian, or a person of mixed-race, would nonetheless violate *Batson*. *Powers v. Ohio*, 499 U.S. 400, 406 (1991).

The court's analysis was legally flawed for other reasons. A systemic approach to striking minorities is not necessary to prove a *Batson* violation, as the court seemed to believe. 6 AA 584, 590 ("I do

not see a systematic attempt to strike only individuals of Hispanic (sic)." Striking even one juror based on race is unconstitutional. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (emphasis added) held that the defense need not "show that the prosecution had engaged in a pattern of discriminatory strikes against more than one prospective juror. We have held that the Constitution forbids striking even a *single* prospective juror for a discriminatory purpose." *See also*, *Powers*, 499 U.S. at 406-07. Thus, the district court's requirement of a pattern, and multiple strikes to potential jurors of the same race, was flawed.

Because the district court used the wrong standard, the ruling was an abuse of discretion. *Jeff D. v. Otter*, 643 f.3d 278 (9th Cir. 2011).

Finally, the district court was factually incorrect in an important regard. Regarding Prospective Juror 1257, the district court agreed with the prosecutor that she was "white/Caucasian." 6 AA 587-88. This is incorrect. The JAVS (June 18, 2019 from 2:15 to 2:22) indicates that this prospective juror was likely Hispanic based on her name. In fact, the district court had previously found that the four jurors subject to

the *Batson* challenge were Hispanic in origin based on the names and or appearances. 6 AA 585.

Given all of the foregoing, it is "more likely than not that the challenge was improperly motivated." *Johnson v. California,* 545 U.S. 162, 170 (2005). Reversal of the convictions is required.

Argument 5

THE DISTRICT COURT ERRONEOUSLY LIMITED DEFENSE EXPERT WITNESS TESTIMONY

The defense called only one witness, Robert Bub, a 33-year veteran of the Los Angeles Police Department who retired in 2015. 9 AA 893. The State's in limine motion to restrict or prohibit Bub's testimony regarding the poor police investigation in the case was extensively litigated; the district court made a reasonable ruling. 6 AA 591 et seq. Yet during Bub's testimony two days later, the district court seemed to have forgotten its ruling and sustained three objections by the State to evidence previously ruled admissible, thereby improperly limiting Bub's testimony in violation of Dorado's rights under the Fifth, Sixth, and Fourteenth Amendments.

Standard of Review

A lower court's ruling regarding the admissibility of an expert witness' testimony is reviewed for an abuse of discretion. *Hallmark v. Eldridge*, 124 Nev. 492, 498 (2008).

Legal Framework

Under *Hallmark*, a witness may testify as an expert under NRS 50.275 if: (1) he or she is qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement); (2) his or her specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony will be limited to matters within the scope of his or her specialized knowledge (the limited scope requirement). *Hallmark*, *supra*, 124 Nev. at 498 (internal quotation marks omitted).

A defendant has a right under the Fifth, Sixth, and Fourteenth Amendments to present relevant evidence in his or her defense. *See*, *Crane v. Kentucky*, 476 U.S. 683 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Vipperman v. State,* 96 Nev. 592, 596 (1980).

Relevant Facts

During the hearing on its in limine motion, the State made many arguments to oppose admission of Bub's testimony. The State argued that Bub's report and conclusions were just common sense, such as the conclusion that it would have been helpful had Metro found this or that witness, and thus won't assist the jury. 6 AA 592. The State also argued that Bub's other conclusions were mere conjecture. 6 AA 591. The district court ultimately ruled that Bub could testify that the Metro investigation was deficient and did not comply with its own handbook and "the failure to do that causes these problems." 6 AA 594. Bub will thus be allowed to testify that a proper investigation would have entailed certain steps in a sexual assault in which the defense was consent. On the other hand, the district court would not allow Bub to testify that, "Had they done this, this could have happened." 6 AA 596, 7 AA 600, 7 AA 603.

Yet when Bub testified two days later, the district court seemed to have forgotten its ruling and severely limited Bub's testimony. Bub testified that the charged incident was on April 24 and a Metro detective was assigned 9 days later, on May 3. Such delay would impede an investigation. Bub began to testify that a number of things

could have been done, but the court sustained the prosecutor's objection. 9 AA 895-96. Bub then testified that he reviewed Metro's manual regarding investigation. One section indicated that serious crimes should be reviewed as soon as possible. *Ibid.* Bub concluded that Metro did not follow its own policies in this case. Defense counsel then asked if Metro's failure to follow its own procedures caused some difficulty in Dorado defending himself. The Stated objected. The district court sustained the objection. Defense counsel then asked Bub if he would have done things differently. The district court sustained another objection by the prosecutor. 9 AA 897.

Given its earlier, reasoned ruling, the district court should not have sustained the objections because this was the precise testimony it ruled was admissible. The district court had ruled that Bub would be able to testify as to what a proper investigation would have looked like and that he can be asked "did this delay hamper the ability to do x, y, and z." 7 AA 603. Yet when Bub began to testify that a number of things could have been done that were not, the prosecutor's objection was sustained. 9 AA 895. Similarly, Bub began to testify that Metro's failure to follow its own procedures caused some difficulty in Dorado

defending himself. Yet the district court sustained the State's objection, despite its earlier ruling. When defense counsel then asked Bub if he would have done things differently, the district court sustained another objection. 9 AA 897. With three sustained objections, a contrary objection by defense counsel would have been futile. *Ennis v. State*, 122 Nev. 694, 706 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims.").

Yet the foregoing was precisely the sort of testimony the court had ruled was admissible. The district court abused its discretion because nothing had changed in the legal or evidentiary landscape. As such, it was error to not allow the testimony.

Dorado was prejudiced. Bub was the sole defense witness and his testimony that Metro bungled the investigation was critical to Dorado's consent defense. Lehr was the only percipient witness and any evidence that her story was incorrect was critical to Dorado's defense. This was a close case; the jury deliberated for about two hours. 2 AA 180. As such, the prosecutor cannot show that the error was harmless beyond a reasonable doubt. Reversal is required.

Argument 6

THE DISTRICT COURT ERRONEOUSLY DENIED RELEVANT DEFENSE EVIDENCE

Evidence of a complaining witness' previous sexual conduct is generally inadmissible. NRS 50.090 states in pertinent part:

> In any prosecution for sexual assault . . . the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless ... the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused cross-examination of the victim or rebuttal shall be limited to the evidence presented by the prosecutor or victim.

Thus, if the complaining witness testifies about prior sexual conduct, such testimony can be impeached. Additionally, a defendant's constitutional rights under the Sixth and Fourteenth Amendments to confront witnesses and present a defense must also be considered by a district court when deciding whether to exclude proffered defense evidence. The Nevada Supreme Court has articulated these constitutional rights and on occasion reversed convictions when the defense was erroneously precluded from presenting relevant evidence in a sexual assault case. *See, e.g.*, *Summit v. State*, 101 Nev. 159 (1985) (reversal where defense precluded from presenting evidence of child

victim's prior sexual knowledge to explain ability to make a false allegation); *Johnson v. State*, 113 Nev. 772 (1997) (where victim states that she had never had intercourse, defendant is allowed to cross-examine on this subject). *See also*, *Crane v. Kentucky*, 476 U.S. 683 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Vipperman v. State,* 96 Nev. 592, 596 (1980).

In the instant case, the district court erroneously excluded evidence that Lehr's best friend doubted Lehr's statement that she had been raped because Lehr and she had had "crazy nights" in which Lehr had sexual relations with men in the two months prior to this incident. 8 AA 792, 796. Notably, this proffered testimony directly contradicted Lehr's testimony that this was the first time she left her two-year-old son alone and the first time she went out to socialize since his birth. 7 AA 643, 689. As well, the friend's statement could have rebutted the State's theory that all of the injuries were caused by Dorado. True, the district court allowed limited evidence that Lehr and the friend had gone drinking in bars prior to the events in this case. But the district court prohibited any evidence of Lehr's prior sexual history, 8 AA 799, which directly contradicted her testimony on a crucial point.

Standard of Review

Generally, this Court reviews a district court's decision to admit evidence for an abuse of discretion. *Mclellan v. State,* 124 Nev. 263, 267 (2008). However, whether a defendant's Confrontation Clause rights were violated is a question of law that is reviewed de novo. *Chavez v. State,* 125 Nev. 328, 339 (2009).

Legal Framework

The Nevada Supreme Court has articulated a test to balance the legislative purposes behind NRS 50.090 with a defendant's rights to present witnesses in his own behalf and to confront and cross-examine the witnesses against him or her. *Summit, supra*, 101 Nev. at 162, citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967); and *Pointer v. Texas*, 389 U.S. 400 (1965). *Summit* also analyzed *Davis v. Alaska*, 415 U.S. 308, 320 (1974), which held that a statute sometimes must yield to a defendant's constitutional right to cross-examination. *Summit, supra*, 101 Nev. at 162. In the end, *Summit* held that "the trial court must undertake to balance the probative value of the evidence against its prejudicial effect, *see* NRS 48.035(1), and that the inquiry should particularly focus upon 'potential

prejudice to the truthfinding process itself,' *i.e.,* 'whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper basis." *Id.* at 163 (footnotes and citations omitted). *Summit* went on to reverse a conviction for the erroneous withholding of evidence of that the very young complaining witness had prior knowledge of sexual acts gleaned before the allegations in the case, which the defense wanted to present in order to explain how the complaining witness could have made a false allegation. *Ibid.* In the same vein, *Guitron v. State*, 131 Nev. 215 (2015) adopted the balancing test and reversed for the erroneous withholding of evidence that the young complaining witness had prior knowledge of sexual acts. *Id.* at 225.

The State must prove that an error of constitutional dimension is harmless beyond a reasonable doubt. *Guitron*, *supra*, 131 Nev. at 225 (citing *Obermeyer v. State*, 97 Nev. 158, 162 (1981). That is, the error must not have contributed to the verdict. *Ibid*, citing *Valdez v. State*, 124 Nev. 1172, 1189 (2008).

Relevant Facts

Lehr's friend, Maria Perez, was initially skeptical about Lehr's report of rape because Lehr was promiscuous. 8 AA 783. At the evidentiary hearing, Perez testified that she "was kind of in disbelief. . . . Because we had, like, kind of crazy night" before that night. The crazy nights involved Lehr's relationships with men, which Perez witnessed in the weeks before the alleged crimes. 8 AA 792, 795. There were about 10 crazy nights, some of which happened in the two months that Lehr lived with Perez. 8 AA 796. Defense counsel argued that the foregoing was admissible as impeachment and to attack credibility because "Michelle Lehr got on that stand and, like a mantra, repeated the fact that she had not been out for two years." 8 AA 797-98.

The district court concluded that Perez could be asked whether she and Lehr went out and drank alcohol in the previous two years. Yet the court prohibited questioning regarding Lehr's prior sexual partners. 8 AA 798-99, 9 AA 801.

Analysis

The district court erred. The plain language of NRS 50.090, the cases interpreting it, and the Constitution compel that the questioning should have been allowed.

By its own terms, NRS 50.090 allows "evidence of any previous sexual conduct" if the complaining witness "has testified concerning . . . the absence of such conduct." Here, Lehr testified to the absence of such previous sexual conduct. She testified that April 24, 1999 was the first time she left her two-year-old son alone and the first time she went out to socialize since his birth. 7 AA 643, 689. The clear inference was that Lehr had *no* sexual relations since the birth of her son. Defense counsel pointed this out to the court that this was clearly untrue. 8 AA 797-98. Perez told the court that she and Lehr had about ten crazy nights in which Lehr had sexual relations with men, causing Perez to disbelieve Lehr when she said she had been raped. 8 AA 792-96. Perez directly contradicted Lehr's testimony that she had no sexual relations prior to the alleged crime. As such, it should have been allowed under the plain terms of NRS 50.090.

The evidence should also have been allowed pursuant to cases interpreting the statute. *Summit* held that "the trial court must undertake to balance the probative value of the evidence against its prejudicial effect, *see* NRS 48.035(1). *Summit, supra*, 101 Nev. at 163 (footnotes and citations omitted). Here, the probative value of the

evidence was great: it directly contradicted the complaining witness' testimony that she had not had *any* sexual relations for two years prior to the alleged crime. It established that even the complaining witness' best friend did not believe her and so was in no rush to call the police. The evidence could also have been used to show that not all of the complaining witness' injuries were caused by Dorado, injuries which the State used to argue indicated lack of consent. 10 AA 916. In closing, the prosecutor argued that the SANE nurse testified that the complaining witness' injuries were consistent with her report of rape and that the injuries supported her story.

Nor was Perez's proffered testimony unduly prejudicial. It would not have confused the jury or caused them to convict on an improper basis because it was a simple contradiction of the State's star witness. Such impeachment is routine at trial and any concerns could have been addressed with a limiting instruction.

The State cannot show that the error was harmless beyond a reasonable doubt. The only testimony to support the State's theory of lack of consent was that of Lehr herself. Had she been clearly impeached and caught in a lie, the jury would not have believed her.

The jury was so instructed that if it disbelieves a witness in a material fact, it can disbelieve the rest of his or her testimony. See Instruction Number 6. Had Lehr been caught lying about her testimony that she had been celibate for two years, the jury would have disbelieved her testimony that Dorado raped her. The error was compounded by the prosecutors' argument in closing that defense counsel was urging the jury to believe everything Lehr testified to, or nothing at all. 10 AA 914. Had the jury know that Lehr had lied about being abstinent for two years, it would not have believed her testimony regarding Dorado. This was a close case; the jury deliberated for about two hours. 2 AA 180. As such, the prosecutor cannot show that the error was harmless beyond a reasonable doubt. Reversal is required.

Argument 7

THE PROSECUTOR COMMITTED MULTIPLE ACTS OF MISCONDUCT DURING CLOSING ARGUMENT

During closing argument, the prosecutor impermissibly shifted the burden of proof to Dorado. In order to impeach Lehr's testimony, the defense at trial tried to establish that given their similar sizes, Dorado could not lift Lehr as she claimed he did. 8 AA 734; 10 AA 931. Yet during the State's closing argument, the prosecutor stated that

there was no evidence presented regarding Dorado's weight in April of 1999, his size, or his ability to lift anybody. 10 AA 952.

This amounted to impermissible burden shifting in violation of the Fourteenth Amendment right to due process. *See Glover v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 125 Nev. 691, 708 (2009) ("Because prosecutors cannot comment on a defendant's failure to testify or shift the burden of proof to the defense, the prosecution has less latitude in arguing negative inferences than the defense."); *United States v. Roberts*, 119 F.3d 1006, 1011 (1st Cir. 1997) (Error for the prosecutor to explain to jurors that the defendant is responsible for presenting a compelling case as such a statement misstates the law about what the state must show and shifts the burden of proof.); *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979) (discussion of impermissibility to shift burden of proof to the defense in the context of jury instructions). It is also impermissible for a prosecutor to comment on the defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965).

In the instant case, the prosecutor's statement amounted to impermissible burden shifting because it was the State's duty to explain

an obvious weakness in Lehr's testimony, not that of the defense. Furthermore, the argument amounted to a comment on Dorado's failure to testify to his ability to lift somebody else.

Because defense counsel did not object, the misconduct is reviewed for plain error. *See* NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). To obtain relief under plain error review, "an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50 (2018), *cert. denied*, 139 S. Ct. 415 (2018). Plain error affects the defendant's substantial rights, "if the error either: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings." *Rowland v. State*, 118 Nev. 31, 38 (2002).

In the instant case, (1) there was error, (2) it was plain in that even a casual reading of the record discloses the error, and (3) the error affected Dorado's substantial rights because his Due Process rights

were violated when the prosecutor shifted the burden of proof to Dorado and commented on his failure to testify. Reversal is required.

Argument 8

CUMULATIVE ERROR

Dorado has shown how each of those errors individually prejudiced his case. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors undermines any confidence in the integrity of the proceedings and may be so harmful that reversal is required. *See Chambers v. Mississippi*, 410 U.S. 284, 290 fn. 3 (1973); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1987) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643 (1974) [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller*, 483 U.S. 756, 764 (1987). Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. *Chapman v. California*, *supra*, 386 U.S. at p. 24; *Alcala v. Woodford*, 334 F.3d 862, 893 (9th Cir. 2003); *Killian v. Poole*,

282 F.3d 1204, 1211 (9th Cir. 2002). In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. *Parker v. Gladden*, 385 U.S. 363, 366 (1966).

In the instant case, Dorado was tried twenty years after the events giving rise to this case. In the intervening time, critical evidence was lost, including the detective's original police report. Dorado was thereby prejudiced. Yet the State's sole reason in not bringing charges sooner was simply lack of funds. Dorado's rights should not be subject to the vicissitudes of funding. If the State was serious in prosecuting Dorado, they should have done it decades ago. And when Dorado was finally brought to trial, he was hamstrung by the passage of time and the district court's rulings. Dorado was prevented from presenting powerful evidence that the Lehr lied on the stand that she had not been out socializing in two years, since the birth of her son, and had not had sexual relations with men. Furthermore, the district court prevented the sole defense witness from elaborating on the poor quality of Metro's initial investigation of the case. Given this, the State cannot show

beyond a reasonable doubt that the cumulative errors did not contribute to the verdicts.

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 2007 Edition in Arial 14 point font; or

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2. This brief exceeds 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:

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[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, ad 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 12th day of March, 2020.

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