

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSBALDO CHAPARRO,

Appellant,

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Elizabeth A. Brown
Clerk of Supreme Court
No. 81352

vs.

THE STATE OF NEVADA,

Respondent.

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**Appeal from a Judgment of Conviction in Case CR17-0636
The Second Judicial District Court of the State of Nevada
Honorable Egan Walker, District Judge**

APPELLANT'S OPENING BRIEF

JOHN L. ARRASCADA
Washoe County Public Defender
Nevada State Bar No. 4517
KATHRYN REYNOLDS
Deputy Public Defender
Nevada State Bar No. 10955
350 South Center Street, 5th Floor
Reno, Nevada 89501

Attorneys for Appellant

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on May 21, 2020. 6 JA 1045.¹ Appellant, Osbaldo Chaparro, (“Mr. Chaparro”) filed a notice of appeal on June 15, 2020. 6 JA 1048. This Court’s jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

Because Mr. Chaparro was convicted of two category A felonies, this appeal is not presumptively assigned to the Nevada Court of Appeals under NRAP 17(b). Nor, however, is it within the mandatory review of the Supreme Court under NRAP 17(a). The issues presented can arguably be resolved by either the Supreme Court or the Court of Appeals. The Supreme Court may keep this appeal or may, in its discretion under NRAP 17(b), assign it to the Court of Appeals for disposition.

¹“JA” in this Opening Brief stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1). Volume numbers appear immediately before JA.

III. STATEMENT OF THE LEGAL ISSUES PRESENTED

The district court's restriction of voir dire prevented Mr. Chaparro from ensuring that the jurors selected could impartially and conscientiously apply the law as instructed.

The district court abused its discretion in admitting the testimony of P.J., detailing a battery with intent to commit sexual assault by Mr. Chaparro in 2011, and caused undue prejudice to Mr. Chaparro.

The district court abused its discretion in admitting testimony by the State's DNA expert insinuating that Mr. Chaparro's DNA could not be excluded from material found on L.L.'s tights.

The district court's insistence on conducting sentencing through simultaneous audiovisual transmission violated Mr. Chaparro's right to due process under the United States and Nevada Constitutions.

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. The State charged Mr. Chaparro, by way of information, with one count of sexual assault, a violation of NRS 200.366, a category A felony, one count of battery with intent to commit sexual assault upon victim age 16 or older (an adult), a violation of NRS 200.400, a category A felony, and one count of open or gross lewdness, violation of NRS 201.210, a gross misdemeanor. 1 JA 1.

Due to scheduling conflicts, as well as other issues related to Mr. Chaparro's previously retained counsel, trial was delayed on multiple

occasions. 1 JA 75. Prior to trial, the State filed a motion to admit evidence of defendant's previous sexual bad acts, which Mr. Chaparro opposed. 1 JA 9, 22. Before the district court's ruling on the motion, the Nevada Supreme Court issued its decision in *Franks v. State*, 135 Nev., Adv. Op. 1, 432 P.3d 752 (2019). Applying the factors set forth in *Franks*, the district court granted the motion on May 22, 2019. 1 JA 41.

Mr. Chaparro proceeded to trial on February 11, 2020. 2 JA 169. Trial lasted 4 days. The jury found Mr. Chaparro guilty of all charges alleged in the information. 6 JA 992-94. Over Mr. Chaparro's objection, sentencing was held on May 20, 2020, via simultaneous audiovisual transmission. 6 JA 995. The district court denied Mr. Chaparro's requests to continue sentencing until an in-person hearing was possible. 6 JA 1001-1007.

The district court sentenced Mr. Chaparro to a term 364 days for open and gross lewdness with 364 days of credit for time served. The district court sentenced Mr. Chaparro to a consecutive term of life with the possibility of parole after 10 years for sexual assault, and consecutive term of life with the possibility of parole after 24 months for battery with the intent to commit sexual assault, for an aggregate sentence of life with

the possibility of parole after 12 years. 6 JA 1045-46. The district court awarded an additional 883 days of credit for time served with respect to this aggregate sentence. 6 JA 1045-46.

Mr. Chaparro filed a timely notice of appeal on June 15, 2020. 6 JA 1048.

V. STATEMENT OF FACTS

This is not a case of mistaken identity. In the early morning hours of December 17, 2016, video surveillance from outside of Harrah's casino in Reno shows Mr. Chaparro grab L.L. from behind, pull her towards him, grope her. They continue to spin in a circle, before Mr. Chaparro releases L.L. 3 JA 353 (playing State's Exhibit 2).² Other casino surveillance video shows Mr. Chaparro watching L.L. earlier in the night at Brew Brother's night club and following her through the Reno casinos known as "the Row." 3 JA 335-41 (playing State's Exhibit 1). Brew Brother's night club used a system called Patron Scan, which scanned the identifications and took contemporaneous photos of both Mr. Chaparro and L.L. when they entered the club. 4 JA 664-67.

²Contemporaneous to the filing of this brief, Mr. Chaparro has also filed a Motion to Transmit State's Exhibits One and Two to this Court.

Shortly after Mr. Chaparro grabbed and groped her, L.L. contacted hotel security at Harrah's, who contacted the police. 3 JA 360-61. However, in addition to the groping visible on the surveillance video, L.L. also told responding law enforcement officers that Mr. Chaparro had reached into her tights and digitally penetrated her. 3 JA 360-63. Mr. Chaparro denies ever digitally penetrating L.L. or attempting to do so. 3 JA 325.

Pretrial Motions

Based on L.L.'s allegations, the State charged Mr. Chaparro with one count of sexual assault, one count of battery with intent to commit sexual assault, and one count of open and gross lewdness. 1 JA 1. Prior to trial, the State filed a motion to admit evidence of prior sexual acts, seeking to admit evidence related to a 2011 conviction of Mr. Chaparro for battery with intent to commit sexual assault. 1 JA 9. Specifically, the State sought to admit the testimony of P.J., who had previously testified that Mr. Chaparro had attacked her in the parking lot of the Sparks Nugget while she was leaving a job interview. 1 JA 11. P.J. stated that Mr. Chaparro grabbed her from behind, forced her face down into her car, lay on top of her, and grabbed her breast. 1 JA 11. As she

continued to struggle, Mr. Chaparro ran away. 1 JA 11. Notably, P.J. did not allege any attempt by Mr. Chaparro to actually penetrate her.

Mr. Chaparro opposed the State's motion, arguing that P.J.'s testimony had little relevance to the instant case, and that any probative value was outweighed by the danger of unfair prejudice. 1 JA 22-32; 1A JA 41-43. Following a hearing, the district court granted the State's motion, finding the prior conviction to be relevant, and that the danger of unfair prejudice was not outweighed by the probative value of P.J.'s potential testimony. 1A JA 53-54; 1 JA 41-46.

Jury Selection

Mr. Chaparro proceeded to jury trial on February 11, 2020. 2 JA 781. During voir dire, the State asked jurors multiple questions regarding potential issues in the upcoming trial. Specifically, the State inquired regarding whether anyone had ever given a statement after a traumatic event, and whether it was reasonable for that statement to be completely accurate. 2 JA 261-63. The State inquired regarding the potential effects of a traumatic event on a witness, and specifically how a rape victim might react following an assault. 2 JA 263-65. The State inquired if anyone had ever disclosed a sexual assault to a member of the

jury, and whether that person had to “provide proof.” 2 JA 269. The State asked questions regarding whether a sexual assault had to be violent, the issue of consent, and whether victim blaming is ever appropriate. 2 JA 270-273. Finally, the State inquired regarding the possibility of digital sexual assault, confirming that the jurors understood that digital penetration was still sexual assault. 2 JA 275.

Following the State’s examination, the district court noted that it was close to 4:00, and reluctantly granted defense counsel’s request for a quick break (the first since the beginning of the voir dire process that afternoon). 2 JA 276. After resuming voir dire, counsel approached the bench to ask a question regarding the scope of the defense voir dire. 2 JA 295. Later, in chambers, the district court indicated that he had instructed that the defense could not voir dire regarding whether a juror might be unduly influenced by the fact that a defendant was previously convicted of battery with intent to commit sexual assault. 2 JA 297. The district court specifically noted that “I am unaware of any legal authority, which would allow either side to pre-try facts of a case, as it were, that is, inform the jury of facts that may or may not be admitted in this case. So I indicated that defense could not inquire.” 2 JA 297.

Trial Testimony

Among other witnesses, the State presented the testimony of L.L. and P.J., as well as extensive surveillance footage of L.L. and Mr. Chaparro's movements immediately before and after the alleged sexual assault. After the encounter with L.L., surveillance video showed that Mr. Chaparro proceeded into the Eldorado, where he used the bathroom, and met with friends, with whom he appeared to reenact the encounter. 4 JA 660-676 (playing State's Exhibit 1).

The State also presented the testimony of Deborah Robison, a sexual assault nurse examiner who conducted an examination of L.L. on the morning of December 17, 2020. 3 JA 469, 494. Ms. Robison testified that during her exam of L.L. she made use of toluidine blue dye, which "only uptakes to injured tissues." 3 JA 499. Applying the dye to L.L.'s vaginal area, she observed uptake of the dye, suggesting damaged tissue in one area. 3 JA 503.

Finally, the State presented the testimony of Stephen Gresko, a supervising criminalist at the Washoe County Sheriff's Office Forensic Science Division. 4 JA 580. Mr. Gresko analyzed hand swabs, vulva swabs, vaginal swabs, and a swab from the tights L.L. was wearing on

the night of her encounter with Mr. Chaparro. 4 JA 590. Of those samples, only the swab from the tights showed the presence of any male DNA. 4 JA 591. Analyzing the tights further, Mr. Gresko stated that he could determine that at least four males had contributed DNA to that sample. 4 JA 592. Beyond that, Mr. Gresko stated that “he couldn’t make any conclusions” regarding specific male DNA profiles on the tights. 4 JA 492. He later stated that meant that “[a]nybody could be included and nobody could be excluded.” 4 JA 593. With respect to the vaginal swabs, Mr. Gresko testified that he was not surprised by the lack of male DNA, stating “[s]ometimes we are able to get male DNA profile from a body swab from touch. It does happen. But it’s just as common not to see any male DNA profile.” 4 JA 593-94.

During the defense case, Mr. Chaparro presented the testimony of Claire Nelli, an independent forensic nurse examiner. 4 JA 754. Ms. Nelli testified that she had reviewed the video of the examination by Ms. Robison, and believed that Ms. Robison had applied too much blue toluidine dye. 4 JA 762. Due in part to the misuse of the dye, Ms. Nellie did not observe any definitive injury as observed by Ms. Robison. 4 JA 771.

Mr. Chaparro also presented the testimony of Dr. Phillip Danielson, an expert in the field of forensic analysis. 5 JA 818-19. Dr. Danielson testified that “[i]n the case of digital penetration, you would still expect that you could detect DNA from digital penetration on the vaginal vault.” 5 JA 852. Dr. Danielson further testified that with respect to either skin-to-skin contact, or skin-to-material contact (such as tights) any motion or friction “significantly increases the transfer of DNA.” 5 JA 856.

The defense rested on February 14, 2020. 5 JA 896. The State did not present any witnesses in rebuttal. Following deliberations, the jury found Mr. Chaparro guilty of all alleged counts. 6 JA 992-94. Mr. Chaparro’s sentencing was initially scheduled by the court for May 7, 2020. 5 JA 954.

Sentencing

In between the return of the jury’s verdict and sentencing, the United States experienced an outbreak of Coronavirus Disease (COVID-19). On March 18, 2020, the Second Judicial District Court entered Administrative Order 2020-05, closing the courthouse to all members of the public. *In the Administrative Matter of: Temporarily Closing Public Access to the Second Judicial District Court*, Administrative Order 2020-

05 (March 18, 2020) (viewable at <https://www.washoecourts.com/main/covid19response#AdminOrders>). A prior order, entered on March 16, 2020, encouraged appearances in “essential case types,” to be conducted “by alternative means under Nevada Supreme Court Rule Part IX . . . when possible.” *In the Administrative Matter of: The Second Judicial District Court’s Response to Coronavirus Disease (COVID-19)*, Administrative Order 2020-02 (March 16, 2020) (viewable at <https://www.washoecourts.com/main/covid19response#AdminOrders>).

On April 9, 2020, the Second Judicial District Court amended Administrative Order 2020-02 to provide that “all scheduled District Court hearings shall be conducted by alternative means to in-person hearings, or decided on the papers, or rescheduled.” *In the Administrative Matter of: The Second Judicial District Court’s Response to Coronavirus Disease (COVID-19)*, Administrative Order 2020-02(A) (April 9, 2020) (viewable at <https://www.washoecourts.com/main/covid19response#AdminOrders>).

Therefore, based on these administrative orders, Mr. Chaparro’s sentencing was scheduled to proceed using the software Zoom on May 20, 2020. At sentencing, counsel for Mr. Chaparro indicated that they had

discussed the Zoom procedure with Mr. Chaparro, and that he did not feel comfortable proceeding with a sentencing hearing conducted electronically. 6 JA 1002. Counsel noted that Mr. Chaparro had concerns about being able to have at least one of his attorneys speak with him during the pendency of the proceeding. 6 JA 1002. The court also addressed Mr. Chaparro directly. Mr. Chaparro informed the court that he strongly desired to have an in-person hearing, and was willing to continue his hearing. 6 JA 1006-1007. The district court denied Mr. Chaparro's request for an in person sentencing, finding that "[i]t makes no sense to continue this to a date uncertain in the future, which we cannot predict."

Following arguments of counsel, and victim impact testimony by L.L., the district court imposed a term of life with the possibility of parole after ten years for sexual assault, a consecutive term of life with the possibility of parole after two years for battery with intent to commit sexual assault, and a term of 364 days for open and gross lewdness. 6 JA 1045-46. Mr. Chaparro appeals.

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VI. SUMMARY OF ARGUMENT

The Nevada Supreme Court has consistently recognized that evidence of prior sexual bad acts is some of the most powerful (and potentially damaging) evidence that can be offered against a defendant. Accordingly, though admissible, evidence of prior sexual bad acts must be excluded if the probative value of the act is outweighed by the danger of unfair prejudice.

In this case, Mr. Chaparro's defense was consistent and clear: that while he grabbed and groped L.L., he never digitally penetrated or otherwise attempted to penetrate her. Nevertheless, the district court allowed the State to present the testimony of P.J., who testified that Mr. Chaparro had grabbed and groped her in a hotel parking garage years before the incident alleged in this case. Given the facts of this case, the testimony of P.J. had extraordinarily limited probative value, and presented an extreme danger that the jury would convict Mr. Chaparro based on his prior bad actions. The district court abused its discretion in admitting this evidence.

Similarly, given the potential danger of prejudice posed by admission of the circumstances surrounding Mr. Chaparro's prior

conviction, the district court erred in refusing to allow Mr. Chaparro to ask potential jurors about their ability to convict Mr. Chaparro on the facts of this case, rather than his prior conviction. The district court also erroneously admitted testimony by the State's expert insinuating that Mr. Chaparro specifically could not be excluded as a contributor to the DNA sample obtained from L.L.'s tights.

Each of these errors requires reversal. Finally, in the event this court upholds Mr. Chaparro's underlying conviction, due process requires a new, in-person, sentencing hearing.

VII. ARGUMENT

The district court's restriction of voir dire prevented Mr. Chaparro from ensuring that the jurors selected could impartially and conscientiously apply the law as instructed.

Standard of Review

The scope of voir dire "rests within the sound discretion of the district court." *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006). Accordingly, the district court's restriction of voir dire should be reviewed for an abuse of discretion.

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Discussion

“The purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court.” *Id.* In Nevada, pursuant to NRS 175.031, “[t]he court shall conduct the initial examination of prospective jurors, and defendant or the defendant’s attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper.” Notably, “[a]ny supplemental examination must not be unreasonably restricted.” NRS 175.031.

While the Nevada Supreme Court gives considerable deference to the district court regarding both the method and scope of voir dire examination, this court will reverse based on improper voir dire when a restriction is arbitrary, or amounts to an unreasonable restriction on counsel’s ability to examine prospective jurors. *See Salazar v. State*, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991) (finding that the district court abused its discretion in placing a 30 minute time limit on defense counsel’s questions, when such a limit left counsel with a little over one minute to examine each prospective juror).

Based on pretrial motion practice, it was evident that pursuant to NRS 48.045(3), the State would be permitted to introduce testimony related to Mr. Chaparro's prior conviction. 1 JA 41. Further, pursuant to the language of NRS 48.045, State could use this evidence to argue propensity. Nonetheless, the State still bore the burden of proving, beyond a reasonable doubt, the defendant's guilt in the instant case. Under these circumstances, it was imperative to establish that prospective jurors would not unlawfully shift the burden of proof on the basis that Mr. Chaparro had previously been convicted of a similar crime. The district court's refusal to allow any questions regarding the potential existence of a prior sexual assault conviction was a manifest abuse of discretion.

In announcing its decision, the district court reasoned that it was improper to inform the jury of facts that "may or may not be admitted in a case," or to otherwise "pre-try" the facts of the case. 2 JA 297. To ask a juror whether the fact that a defendant had previously been convicted of battery with intent to commit sexual assault meant that he should also be convicted in this case does not "pre-try" the facts of the case. It properly establishes whether a juror could still hold the State to its

burden of proof, even knowing that the defendant had a prior conviction. In a similar manner, the State was permitted to inquire about the effect of shock and trauma on a victim's written statement, whether different people would react to a traumatic event, such as rape, in a different way, whether a woman's dress or demeanor could ever "invite" an attack, and whether digital penetration still constituted sexual assault. Each of these questions foreshadowed significant factual issues that the State anticipated would be presented to the jury during the upcoming trial. 2 JA 261-75.

During the court's voir dire, multiple prospective jurors indicated that they or family members had been victims of sexual assault. 2 JA 228, 230, 241. Some were excused. Even so, the Nevada Supreme Court has clearly recognized that while admissible, evidence that a defendant has previously committed a prior sexual offense creates a significant risk that "a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment." *Franks v. State*, 135 Nev. 1, 5, 432 P.3d 752, 756 (2019). Accordingly, it was imperative that Mr. Chaparro generally inquire whether the existence of a prior conviction meant he was automatically

guilty in the instant case. The district court's refusal to allow him to do so was an abuse of discretion, and prevented Mr. Chaparro from ensuring that an impartial jury was seated.

The district court abused its discretion in admitting the testimony of P.J., detailing a battery with intent to commit sexual assault by Mr. Chaparro in 2011, and caused undue prejudice to Mr. Chaparro.

Standard of Review

A district court's decision to admit or exclude evidence pursuant to NRS 48.045(3) is reviewed for an abuse of discretion. *Franks v. State*, 135 Nev. 1, 432 P.3d 752, 755 (2019).

Discussion

Generally, evidence of other crimes, wrongs, or acts are not admissible to prove that a person acted in conformity therewith those prior acts. NRS 48.045(2). However, in 2015, the Nevada Legislature amended this prohibition against admission of prior bad acts to state that

Nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense.

NRS 48.045(3). Based on this amendment, the Nevada Supreme Court has concluded that NRS 48.045(3) "unambiguously permits the district

court to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense.” *Franks*, 135 Nev. at 4, 432 P.3d at 755.

Even so, in *Franks v. State*, the Nevada Supreme Court clearly indicated that while a prior sexual bad act may be used to prove propensity, such an act is not automatically admissible. *Id.* Notably, this evidence is subject to the well settled principle that otherwise relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at 5, 432 P.3d at 756. As discussed above, evidence of prior sexual bad acts carries particular danger that after hearing this evidence, a jury will convict for crimes other than those charged, or because the defendant is a “bad person.” *Id.*

Therefore, to admit evidence of a prior sexual bad act, the Nevada Supreme Court has determined that State must request permission to introduce the evidence, and the district court must subsequently conduct a hearing to consider

(1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. at 6, 435 P.3d 756 (quoting *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001)).

In this case, the State sought to introduce the testimony of P.J., who ultimately testified at trial that Mr. Chaparro had attacked her in 2011, in the parking lot of the Sparks Nugget. 4 JA 728. P.J. stated that Mr. Chaparro followed her to her car, asked her for directions, and when her car door was open, shoved her inside, grabbed her head, and pushed her against the seats. 4 JA 736-37. Mr. Chaparro grabbed P.J.'s breast, and said "relax and let it happen." 4 JA 739. P.J. screamed for help, and Mr. Chaparro got off of her and ran away. 4 JA 739.

Applying the factors in *Franks*, the district court found this testimony to be admissible. 1A JA 54-55. The court specifically noted the similarities between the cases, stating that "[b]oth instances involve accosting women who are unfamiliar to Mr. Chaparro, they both occur in public places at casinos, he waits until the women are alone, talks to them during the attacks, and in both instances Mr. Chaparro ceases his acts when the women summon help." 1 JA 44. Based on these similarities, the district court determined that this prior bad act was "important to help the jury understand Mr. Chaparro's intent," and that

its probative value was not outweighed by the danger of unfair prejudice.

1 JA 46. Accordingly, the district court found P.J.'s testimony to be admissible.

This was an abuse of discretion. As the district court noted, the attack on P.J. was remarkably similar to the acts alleged in the instant case. Even so, under the fifth factor set forth in *Franks*, P.J.'s testimony was utterly unnecessary to the State's case. Mr. Chaparro's attack on L.L., and his movements throughout the night, were recorded on surveillance video. Mr. Chaparro's driver's license had been captured on Patron Scan; his identity was not in question. Mr. Chaparro conceded, during opening arguments, that he was the person on the video, that he had groped L.L., and was guilty of open and gross lewdness. 3 JA 326.

The sole contested issue in this case was whether Mr. Chaparro had actually digitally penetrated L.L., or battered her with the intent to digitally penetrate her. The primary difference between the instant case and Mr. Chaparro's actions with P.J. is that P.J. never alleged any penetration by Mr. Chaparro, or any real attempt at penetration. Accordingly, P.J.'s testimony served no purpose in proving any contested fact more or less likely. Rather, the admission of P.J.'s testimony only

served to demonstrate to the jury that Mr. Chaparro was a bad person, who had previously attacked another woman under very similar circumstances, and deserved punishment. Any probative value of P.J.'s testimony was clearly outweighed by the danger of unfair prejudice. The improper admission of this evidence requires reversal.

The district court abused its discretion in admitting testimony by the State's DNA expert insinuating that Mr. Chaparro's DNA could not be excluded from material found on L.L.'s tights.

Standard of Review

"It is within the district court's sound discretion to admit or exclude evidence, and this court reviews that decision for an abuse of discretion or manifest error." *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

Discussion

To be admissible, any evidence must be relevant: it must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. In *People v. Marks*, the Colorado Supreme Court determined that testimony regarding inconclusive DNA test results is not generally relevant evidence, "because it does not have

a tendency to prove any particular fact that would be material to an issue in a case.” 374 P.3d 518, 523 (Colo. 2015) (internal quotations omitted). The court further noted that when a DNA test result is inconclusive, testimony suggesting that the defendant could be included as a source of the DNA is likewise improper. *Id.* at 524; *see also Valentine v. State*, 135 Nev. 463, 472, 454 P.3d 709, 718 (2019) (determining that the State committed misconduct during closing when it implied that the jury should “consider for yourself” a possible DNA match in a sample the State’s expert had testified to be inconclusive). Based on these concerns, the *Marks* court expressed a preference that rather than admit “inconclusive” or “no conclusion” results, the State should elicit a more general statement that “certain samples did not yield a result of evidentiary significance.” *Marks*, 374 P.3d at 524.

In this case, prior to trial, the defense expressed concern regarding presentation of evidence related to certain “no conclusions” results related to L.L.’s tights, and moved to exclude the DNA evidence found in the tights. 1 JA 159. On direct examination, the State’s DNA expert, Dr. Gresko, testified that using a swab taken from L.L.’s tights, he obtained a DNA sample that indicated the presence of at least four different male

DNA profiles, but was otherwise inconclusive. 4 JA 592. On redirect, the State asked Dr. Gresko if this meant that “[n]o male could be excluded?” 4 JA 627. Dr. Gresko replied, “[n]o male can be excluded and anybody could be included.” 4 JA 627. Mr. Chaparro objected, and the district court overruled the objection. 4 JA 628. Dr. Gresko again stated that “There was no dominant profile. There’s missing information, which means it’s inconclusive. Anyone can be included, no one can be excluded.” 4 JA 628.

Admission of this testimony was an abuse of discretion. As indicated in *Marks*, because Dr. Gresko could draw “no conclusions” from the DNA evidence on the tights, the evidence held no relevance to the instant case. By repeatedly allowing Dr. Gresko to testify that “no male could be excluded” and that “anybody could be included” the State implied that Mr. Chaparro could have been a contributor of DNA to L.L.’s tights. As stated by the defense DNA expert, “no conclusions” means that “no conclusions can be drawn from this particular sample.” 5 JA 849. Nothing more. Dr. Gresko’s testimony improperly implied that Mr. Chaparro could have been one of the DNA contributors to the tights, and

caused undue prejudice to Mr. Chaparro. Reversal is required on this basis.

The district court's insistence on conducting sentencing through simultaneous audiovisual transmission violated Mr. Chaparro's right to due process under the United States and Nevada Constitutions.

Standard of Review

This court reviews *de novo* whether an error is constitutional in dimension. *Martinorellan v. State*, 131 Nev. 43, 46-47, 343 P.3d 590, 592 (2015). Preserved constitutional error requires reversal, unless the State establishes that the error was harmless beyond a reasonable doubt. *Id.* at 48, 343 P.3d 590, 593 (2015) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Discussion

Both the United States and Nevada Constitutions provide that a person may not be deprived of life, liberty or property without due process of law. U.S. Const. amend. V; U.S. Const. amend. XIV § 1; Nev. Const. § 8(2). Traditionally, this includes the right of a defendant to be physically present at every critical stage of trial. *See Manning v. State*, 131 Nev. 206, 201-11, 348 P.3d 1015, 1018 (2015). Sentencing is undoubtedly a

“critical stage” of trial. *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978). In this case, the district court’s refusal to continue Mr. Chaparro’s sentencing to allow for an in-person hearing, rather than a sentencing conducted by Zoom, violated Mr. Chaparro’s right to due process under both the United States and Nevada Constitutions.

Given the unique course of events following the COVID-19 pandemic, Mr. Chaparro is unable to locate any Nevada caselaw that directly addresses a defendant’s due process right to appear physically, rather than by simultaneous audiovisual transmission. However, in *Lipsitz v. State*, the Nevada Supreme Court examined the “physical presence” aspect of the Sixth Amendment Confrontation Clause, and the use of audiovisual technology. 135 Nev. 131, 442 P.3d 138 (2019). Noting that the Confrontation Clause traditionally requires “physical presence, oath, and cross examination,” the Court determined that in some circumstances, the use of audiovisual technology was permissible for an unavailable witness. *Id.* at 136, 442 P.3d at 143. Specifically, to use audiovisual technology for a testifying witness, the court must determine that the use of technology in lieu of physical appearance is both (1)

necessary; and (2) provides adequate indicia of reliability. *Id.* at 136-37, 442 P.3d at 143-44.

Applying the factors set forth in *Lipsitz* to the instant case, neither factor is satisfied. In *Lipsitz*, the victim was unable to physically appear because she had entered a rehabilitation facility in Florida. Defendant Lipsitz had invoked his right to a speedy trial, and was unwilling to continue trial until the victim's scheduled release. Accordingly, the court found that based on Mr. Lipsitz's own decision, the victim was unavailable, and the use of audiovisual technology was necessary. *Id.* at 137, 442 P.3d 144.

Here, the COVID-19 pandemic certainly was not a situation of Mr. Chaparro's own making. Due to the various local and state emergency orders, it would have been impossible to hold an in-person sentencing hearing on the scheduled date. However, Mr. Chaparro clearly indicated that he was willing to postpone his hearing until an in-person hearing was a possibility. 6 JA 1005-1007. Mr. Chaparro was in custody, and facing a minimum sentence of ten years to life. Notably, while the State did not object to appearing through simultaneous audiovisual transmission, the State also did not make any record regarding the

necessity of proceeding by way of audiovisual transmission. 6 JA 1004. Given his willingness to continue sentencing, it was not necessary to continue with Mr. Chaparro's sentencing on May 20, 2020.

In addition, in this case, simultaneous audiovisual transmission did not adequately preserve the rights provided by physical presence at a sentencing hearing open to the public. Mr. Chaparro was alone, by himself, in a jail courtroom with only a deputy from the Washoe County Sheriff's Office. 6 JA 1003. His only connection to his attorney was through a headset. 6 JA 998. While a criminal defendant may not generally interact with members of the gallery during any court hearing, a defendant, upon entering the courtroom, is at least able to see who is present in the courtroom, and know that his support system is, quite literally, at his back. 6 JA 999. In this case, while counsel for Mr. Chaparro had shared the link to the Zoom hearing with multiple family members, Mr. Chaparro had no way of confirming who was present on the Zoom hearing as an "attendee." 6 JA 1000. The district court refused to make any accommodation to allow Mr. Chaparro to confirm that his family members were present. 6 JA 1001.

The due process clause itself is a recognition that procedures, norms, and traditions are important. Mr. Chaparro was facing the imposition of a life sentence. He deserved to do so with the full physical support of his attorneys and his family members. The use of audiovisual technology over Mr. Chaparro's objection and request to continue violated his right to due process, and requires a new sentencing hearing.

VIII. CONCLUSION

The district court abused its discretion in restricting the ability of Mr. Chaparro to conduct a thorough and appropriate voir dire, and in admitting evidence of Mr. Chaparro's prior sexual bad act, when the act had limited probative value, and presented clear danger of unfair prejudice. The district court also erroneously allowed the State's expert to present misleading testimony regarding the DNA analysis performed in this case. Viewed either individually or cumulatively, these errors require reversal. *See, e.g., Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (discussing cumulative error).

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Finally, even if this Court declines to reverse on the above grounds, Mr. Chaparro is entitled to a new sentencing hearing where he is allowed the due process right of physical presence at the proceedings.

DATED this 20th day of October, 2020.

/s/ Kathryn Reynolds
KATHRYN REYNOLDS
Deputy Public Defender
Washoe County Public Defender's Office
Nevada State Bar No. 10955

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 Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 6,621 words. NRAP 32(a) (7) (A) (i), (ii).

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 of the transcript or appendix where the matter relied upon 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 20th day of October 2020.

/s/ Kathryn Reynolds

KATHRYN REYNOLDS

Deputy Public Defender

Washoe County Public Defender's Office

Nevada State Bar No. 10955

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of October 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Osbaldo Chaparro (#1234050)
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

/s/ Kathryn Reynolds
KATHRYN REYNOLDS
Deputy Public Defender
Washoe County Public Defender's Office
Nevada State Bar No. 10955