IN THE SUPREME COURT OF THE STATE OF NEVADA

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OSBALDO CHAPARRO, No. 81352

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

/

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

JOINT APPENDIX VOLUME 1A

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Docket 81352 Document 2020-38430

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STEPHANIE KOETTING

CCR #207

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE EGAN WALKER, DISTRICT JUDGE

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STATE OF NEVADA, Plaintiffs, vs. OSBALDO CHAPARRO, Defendant.	Case No. CR17-0636 Department 7

TRANSCRIPT OF PROCEEDINGS

PRETRIAL MOTIONS

February 14, 2019

1:30 p.m.

Reno, Nevada

Reported by: STEPHANIE KOETTING, CCR #207,
Computer-Aided Transcription

APPEARANCES:

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By: TOBIN FUSS, ESQ.
350 S. Center
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RENO, NEVADA, February 14, 2019, TIME

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THE CLERK: CR17-0636, State versus Osbaldo Chaparro. Matter set for pretrial motions. Counsel, please state your appearance.

MR. LEE: Matt Lee on behalf of the State.

MR. FUSS: Tobin Fuss for Mr. Chaparro, who is present in custody, along with cocounsel Jaclyn Millsap.

MS. MILLSAP: Good afternoon.

THE COURT: Mr. Chaparro, good afternoon to you, sir. My name is Egan Walker. I have the privilege of being responsible for Mr. Chaparro's case. This is the time and date set for hearings on pretrial motions. There are a number of motions outstanding.

Mr. Lee and/or Mr. Fuss, do you have any witnesses that you intend to testify here this afternoon, kind of who are they and what's the lay of the land?

MR. LEE: Your Honor, I have Officer now Sergeant Corey Autrey here regarding the motion to suppress.

MS. MILLSAP: We don't intend to call any witnesses, your Honor.

THE COURT: Would it be your preference, collectively, counsel, out of courtesy to the witness, deal

with the motion to suppress first and then deal with either noncontroversial or less controversial issues?

MR. LEE: I would ask for that, your Honor.

MS. MILLSAP: I don't have any issue with that.

THE COURT: Let's deal with the motion to suppress first. It is Ms. Millsap's motion. It is, of course, related to the voluntariness of Mr. Chaparro's statements. Please, your witness.

MR. LEE: Your Honor, I'm going to move to admit Exhibit 1 by stipulation.

THE COURT: Exhibit 1 is admitted for purposes of the hearing only.

MS. MILLSAP: My understanding is Exhibit 1 is a recording of the interview between Detective Autrey and my client Mr. Chaparro.

THE COURT: Correct.

(One witness sworn at this time.)

THE COURT: Sergeant, please go ahead and have a seat. Once you're comfortably seated there, pull the microphone in front of your face. If you would and give your attention to Mr. Lee.

COREY AUTREY

called as a witness and being duly sworn did testify as follows:

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DIRECT EXAMINATION

BY MR. LEE:

Q. Sergeant, if you could please state your full name and spell your last name?

A. Corey Autrey, A-u-t-r-e-y.

Q. What do you do for a living?

A. I'm a patrol sergeant for the City of Reno Police Department.

Q. How long have you been in law enforcement or as a police officer?

A. 13 years.

Q. And just prior to becoming a sergeant, what was your role and how many years did you do it?

A. I was a sex crimes and child abuse detective and I occupied that position for three years.

Q. Were you the lead detective on case number Reno PD 16-24406 involving the investigation of Mr. Osbaldo Chaparro?

A. Yes, I was.

Q. Did you have a chance to meet with Mr. Chaparro on December 21st, 2016?

A. Yes, I did.

Q. Do you see Mr. Chaparro here in the courtroom today?

A. He looks quite a bit different, but I believe

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that's him sitting at the defendant's table.

Q. Wearing what?

A. Orange shoes and blue set of scrubs.

Q. In your contact with Mr. Chaparro was during the entirety of an interview on that date, December 21st?

A. Yes.

MR. LEE: Your Honor, may the record reflect that Sergeant Autrey has identified the defendant.

THE COURT: He has pointed to the defendant and identified an item of his clothing.

BY MR. LEE:

Q. And then, sergeant, what was your understanding as to why were you interviewing Mr. Chaparro?

A. It was regarding a sexual assault that occurred on the 17th, I believe, of the same month.

Q. Was that downtown at Harrah's?

A. Yes, it was.

Q. Here in Reno? Was it in Reno?

A. Yes.

Q. At the interview, did you bring him to the station?

A. I did not.

Q. But soon after he was brought, was it you who went to interview him?

A. Yes.

Q. Was that interview recorded?

A. Yes, it was.

Q. And that was subsequently produced to the State as discovery?

A. Yes, sir.

Q. And at the outset of your contact with him or soon thereafter, anyways, within a few minutes, did you provide Mr. Chaparro with any rights?

A. Yes, I did.

Q. What kind of rights?

A. I advised him of the Miranda admonition.

Q. You said it's recorded, right?

A. Yes.

Q. You watched it just before testifying today, part of it anyways?

A. Yes, I did.

MR. LEE: Your Honor, may I play Exhibit 1, if we could?

THE COURT: Certainly.

MR. LEE: If we can figure this out.

(DVD played at this time.)

BY MR. LEE:

Q. Let me ask you a few questions about context,

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sergeant. This is an interview room at the police station?

A. Yes.

Q. Who is that in the pinkish shirt?

A. That is then Detective Tom Yturbide, now a sergeant as well.

MS. MILLSAP: I'm sorry. I did catch that.

THE WITNESS: Sergeant Yturbide.

BY MR. LEE:

Q. It is that Y-t-u-r-b-i-d-e?

A. I believe so.

Q. Who is that in black right there?

A. That is Mr. Chaparro.

Q. Is he handcuffed at this point?

A. Yes.

Q. I'll play it at four seconds and we'll watch to about one minute.

(DVD played at this time.)

I'm going to stop it 1:12. Who was the other officer who came in?

A. I'm is, I'm not sure if he's an officer or Detective Kimble with Sparks Police Department who is attached to the regional sex offender notification unit.

Q. After Detective Yturbide leaves, then is Mr. Chaparro sitting there for a little amount of time

without you coming in yet?

A. Yes.

Q. I'm going to skip to approximately 5:50 into the interview.

MR. FUSS: Can I get the time that you stop it to the time we're going to?

MR. LEE: Yes. I stopped at 1:12. This is all Windows Media time and I will start it at five -- I'm going to -- I'll start at 5:48.

THE COURT: Counsel, so it's in the record, so you all know, I was provided a copy of the DVD with the motion ahead of time, I have reviewed it, not that it should foreclose any presentation. I just want you all to be aware that I have independently reviewed it.

BY MR. LEE:

Q. Detective, we'll watch about two minutes.

MR. FUSS: May I interrupt? When you're talking about the time frame, we're talking about one minute and 12 seconds to 5 minutes and 48 seconds? Not 1:12 in the morning to 5:48 in the morning?

MR. LEE: Again, this is all the time I'm stating is Windows Media time.

MR. FUSS: We're talking about minutes at this point?

BY MR. LEE:

Q. Correct. Now starting at five minutes and 58 seconds.

(DVD played at this time.)

So it's clear, I stopped at 7 minutes, 7 seconds into. Is that, correct?

A. I can't see the time stamp.

Q. I'll just leave that. It's for the record at that point. Detective Autrey, at that point you began discussing things with Mr. Chaparro, correct?

A. Yes.

Q. Do you remember how the interview concluded?

A. He ultimately invoked and the interview was terminated.

Q. Okay. Because of his invocation?

A. Correct.

MR. LEE: Your Honor, that's all I have for purposes of today's hearing.

THE COURT: Cross examination.

MS. MILLSAP: Thank you, judge.

CROSS EXAMINATION

BY MS. MILLSAP:

Q. Detective Autrey, you said you've been in the police department for 13 years?

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A. Yes, ma'am.

Q. And for three years of that specifically working on the sex crimes unit?

A. Yes.

Q. When you became a police officer, you took training, correct?

A. Correct.

Q. And that's the POST academy, correct?

A. Yes.

Q. In the POST academy, do they teach you about Miranda and admonishing a suspect of what their Miranda rights are?

A. Yes.

Q. What is the training you received in POST academy about the Miranda admonition?

A. They discussed with us when it is required as well as the elements thereof.

Q. And did they provide any training on what the actual admonition is?

A. Yes.

Q. And what was that?

A. Well, it consists of the right to remain silent, that anything they say could be used against them in a court of law, that they could have an attorney prior to speaking

with me or during the interview. If they can't afford one, that the State of Nevada will provide them a public defender free of charge.

Q. Okay. That is the admonition or the language you were trained to use, correct?

A. No. We were not given a verbatim set of words to use for an admonition.

Q. Where do the words you just said come from?

A. The elements of Miranda that were provided to us.

Q. Right. That's what you were trained on, correct?

A. The elements.

Q. So moving forward, have you received any subsequent training regarding Miranda in your police work, your ongoing police work?

A. Yes.

Q. What has that training been?

A. It's been through interview and interrogations courses.

Q. And what specifically have you been taught when you're admonishing someone their Miranda rights? Let me be more direct. What's the language that you've been taught routinely in these trainings?

A. There is no standard, quote, verbatim set of instructions to be given.

Q. Does your specific -- let me rephrase that. Does the Reno Police Department have a standard issued Miranda card or Miranda warning that you can carry on you?

A. I believe they're available, but it is not a requirement.

Q. So they're available, correct?

A. I believe so.

Q. Have you ever looked at one of those?

A. I've seen them.

Q. And what's the language on the card?

A. I couldn't testify to that off the top of my head. It meets the elements of Miranda, but I couldn't tell the exact verbiage.

Q. On this specific day you didn't have that card on you I'm assuming?

A. No.

Q. So you weren't reading from that card, correct?

A. Correct.

Q. You didn't use the language you just testified to that you learned in your POST training, correct?

A. I did not use that exact language.

Q. And, instead, you use as we can all clearly see on the video the language in the video?

A. Yes.

Q. And have you been trained at any point in your tenure with the Reno Police Department to deviate from the language you learned in POST to use the language you learned in the video?

A. Yes.

Q. What was that training?

A. There was training through the Skip Rogers Interview and Interrogation, as well as I believe the Reed Institute, that taught rather than a strict verbatim reading off of the card as you mentioned what is often referred to as a soft sell so long as it still meets all the elements of Miranda.

Q. Okay. So tell the Court and myself more about what you learned about a soft sell. What does that mean?

A. The difference being reading verbatim off a card, strict language such as, you have the right to remain silent. Rather than saying that, I tell them, you do not have to speak with me. It means the same thing, I just worded it differently. So it still meets the elements.

MS. MILLSAP: Judge, I would just ask he just testified to a legal conclusion. I'm sure your Honor can parse that out. But he just said it means the same thing, so I want your Honor to be aware that's really for your Honor to decide.

THE COURT: I don't think there's a necessity to interrupt his testimony to say that. By that I mean it's more appropriate to argument. I understand what you're saying. Please go ahead.

BY MS. MILLSAP:

Q. Thank you. Go ahead.

A. That would be -- and the same thing would apply to each element thereof.

Q. What is the purpose of a soft sell?

A. I have found that I have greater success in having people speak with me explaining Miranda in that manner.

Q. So to elicit a confession or an admission?

A. No. The Miranda admonition is merely to satisfy Miranda. There are plenty of other things I use to get to the truth of the matter.

Q. When did you start deviating from the strict language of the Miranda warning and specifically when did you start using this soft sell language?

A. I couldn't tell you exactly, but probably very shortly after I became a police officer.

Q. So you've always been using this language?

A. Yes.

Q. In fact, you routinely use this language when you're interrogating suspects?

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A. Yes.

Q. And by this language, I mean very similar to the language in the video, correct?

A. Very similar, yes.

Q. In other words, you're not saying, you have the right to remain silent. You're saying, like you indicated, you don't have to speak with me, correct?

A. I don't use those specific words, correct.

Q. Okay. You don't use those specific words, meaning you don't say, you have the right to remain silent, correct?

A. Correct.

Q. And instead you're saying something like, you don't have to speak with me, correct?

A. Correct.

Q. And in addition, instead of the language, anything you say can be used against you in a court of law, you're combining this language with the statements about, I am going to put this in my report, it will be in my report, anything you say is going to make its way into that report, correct?

A. With some more to it, that's not all, but yes.

Q. You're using that language when you're soft selling, as you call it, the portion of, it can be used against you, you're instead using this language, this is going to be in my report, I'm writing a report, it will be in

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my report, correct?

A. Something to that effect, yes.

Q. Okay. And, in addition, after you're explaining to them unequivocally, hey, this will be in my report, is when you then couple that statement with, it could make its way into court, could be used against you, doesn't mean that it absolutely will, but it could?

A. Yes.

Q. You're always combining those two statements, correct?

A. Not always.

Q. You would agree with me, though, that you've done it in multiple other cases other than Mr. Chaparro, correct?

A. Yes.

Q. Lastly, when you see Mr. Chaparro come into the screen or the interview room, you can see that he's being guided by detective, now Sergeant Yturbide.

A. Yturbide.

Q. So he's guiding Mr. Chaparro into the room, correct?

A. Yes.

Q. You can see that Mr. Chaparro is handcuffed?

A. Yes.

Q. When the sergeant is leaving the room, he actually

advises Mr. Chaparro, this door is going to be locked behind me, correct?

A. Yes.

MS. MILLSAP: May I have a moment, your Honor?

THE COURT: Sure.

BY MS. MILLSAP:

Q. So you mentioned that you were trained on the soft sell, correct?

A. Yes.

Q. And does the soft sell language or that idea of the soft sell in the Miranda admonition, is that also part of the Reno Police Department's standard operating procedures?

A. I don't believe it is canonized on any general order, however, it is a common practice.

Q. So you don't believe it's written in any policy or procedure with Reno Police Department?

A. I don't believe so.

Q. But it is trained in that most Reno Police Department officers go to these trainings and learn this informations and then employ it in their police work?

A. I don't know if I can say most. I can definitely say some.

Q. To your knowledge, is this a pretty standard training that officers attend?

A. Of the officers who go to an interview and interrogation schools, yeah, those two, the Reed and Skip Rogers.

Q. When would an officer be sent to such training?

A. At any given time in their career, be they parole or detectives, it doesn't matter.

Q. So most often, then, you'd agree with me a lot of officers are attending this training?

A. Yes. I couldn't give you a number, but yes.

Q. So, now, as a sergeant you also participate in training other officers?

A. Not as of yet.

MS. MILLSAP: Nothing further, your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. LEE:

Q. Sergeant, is any of this that you said that you stated to Mr. Chaparro in the interview memorized by any means? Is it word-for-word, in other words?

A. No.

Q. Are you conveying to him your understanding of the Miranda admonishment?

A. Yes.

MR. LEE: That's all I have.

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MS. MILLSAP: Judge, can I ask a quick follow-up?

THE COURT: Sure.

RECROSS EXAMINATION

BY MS. MILLSAP:

Q. When he's saying is this word-for-word, you're not giving the actual legal Miranda word-for-word strictly, correct?

A. Correct.

Q. You're giving instead pretty much word-for-word your soft version of the Miranda warning, correct?

A. I wouldn't say word-for-word. I'm merely meeting my understanding of all the elements of Miranda.

Q. When you say not for word-for-word, what do you think you're changing in certain suspect interviews?

A. Well, there have been times where I've said that anything that goes in my report could be used against you in a court of law and there are other times where I have not said that. I don't go in with a script. It's not exactly the same every time. I just make sure I hit all of the elements of Miranda.

MS. MILLSAP: Nothing else, judge.

THE COURT: May this witness be excused?

MR. LEE: Your Honor, let me ask for clarification. Are we going to argue the suppression right

now?

THE COURT: Yes.

MR. LEE: I would ask that he be excused.

THE COURT: Thank you very much for your time, sergeant. Good day to you. It's your motion, Ms. Millsap, argument.

MS. MILLSAP: Thank you, your Honor. Judge, I think this is a fairly simple legal issue in that it's not an overly complicated argument. I think your Honor will either agree with defense or it will not. Nonetheless, I would like to delineate what my points are and what really my gripe, so to speak, or my argument with this admonition.

But I understand full well and even cited in my original motion that Miranda does not have to be recited verbatim, there does not have to be a talismanic, if I'm pronouncing that correctly, recitation of the Miranda. I full well understand that.

But the other law I cited in my motion is that it absolutely does have to reasonably convey the ultimate message of Miranda and it has to reasonably convey to someone their rights, their constitutional rights.

And my issue with the admonition here is really multiple. You know, I think the problem with the soft sell is the language the officer is using. Maybe to an extent you

can deviate from it somewhat, but if you're soft selling it or to use the language I've used, you're minimizing it, you're downplaying it, you're diluting it, you're really confusing it to a substantial degree that someone loses the reasonable information or the reasonable interpretation of what their rights are. And I think that's occurring here for several reasons.

First, instead of saying, you have the right to remain silent, I think the soft sell, you don't have to talk to me if you don't want to, I think that language is so substantially deviated that it really doesn't convey to someone they have a right.

I think it minimizes so much that someone is losing the information, this is actually a right of mine that is embedded in the constitution and it's simply just instead appearing at least that the officer is almost in a friendly way communicating, hey, you don't have to talk to me. I think that is extremely problematic.

I think more so and what I would submit is probably the biggest issue with the soft sell admonition this officer is using is that instead of advising someone, look, this is the consequence, this is the result if you waive your right is that this information can be used against you. And notably this officer knows very well the strict language of

the Miranda warning. He testified to it, he rattled it off easily from memory the actual verbatim strict reading of the Miranda admonition and then testified instead he's intentionally soft selling it in order to get a defendant, he said it's more likely when I soft sell that a defendant will speak to me. And then I said, really, to get an admission or confession? He denied that or didn't give me, quote, unquote, give me that answer. I think the Court can decide for itself what his intent is in soft selling.

But going back to this portion of his admonition that I think is highly problematic, A, he is not telling this person, this person being my client, at least in this example, that this can be used against you in court. Okay.

What he's instead doing is saying unequivocally and making it a point to say, I am going to write a report on this, and I'll explain what we're talking about in a minute, but I'm going to write a report on this. That's unequivocal. This will happen. I am going to write this report. Anything you say is going to make its way into that report. So he's being very unequivocal about the fact it's going to be in the report.

My issue then is that substantially, when you juxtapose that language to the actual Miranda portion of this section could make its way, and you could rewatch the video,

I'm sure you watched it -- as you indicated, you already watched it, but I would encourage the Court to watch it again to also listen to the emphasis in his voice, could make its way into court, could be used against you. Doesn't mean that it absolutely will, but it could. Again, he's emphasizing could.

Arguably, at least I would submit to the Court, and, again, in an effort to downplay, soft sell, really minimize the consequence and therefore minimize his understanding and ability to intelligently waive this right, he's minimizing the consequence and therefore minimizing Mr. Chaparro's ability to intelligently waive that right. Fully understanding, if I don't remain silent and if I answer these questions, the result is it will be incriminating in that when I exercise my next right to go to jury trial, it's going to be brought into that trial and used against me.

I would submit to the Court this is one of the most important parts of the admonition. You have the right to remain silent, but that doesn't carry much weight unless you actually intelligently understand what's going to happen if you don't. What does that actually practically mean for you when you then are exercising your other constitutional rights as a criminal defendant?

I think it's substantially downplayed again to the

point that Mr. Chaparro is therefore not intelligently waiving when he does go forward. And I think that in this case, which is unique and allows the Court to have actual insight into Mr. Chaparro's thoughts and whether or not he did intelligently waive his Miranda rights, and I would submit that he does not.

And then what's also doubly problematic is that when Mr. Chaparro is incorrect about what he's doing and actually exhibiting that he has a lack of intelligence about his constitutional rights, this detective is confirming that misconception.

Let me cite specifically in support of what I've just said. He says and we saw this on the video, what does that mean to you? And Mr. Chaparro says, that I'm giving up my rights. And then incorrectly Detective Autrey says, no, no, no, you aren't giving up your rights. I'm just saying, what does that mean? I want to make sure you understand.

Well, I think he's just played a very dangerous -- engaged in a very dangerous scenario with this person, because he has -- this person has endeavored to understand his legal rights from a detective. And the detective instead of just saying, let me read them to you again, let me make sure you understand them, and then actually making sure that he does actually accurately understand them, he says, you

aren't giving up your rights. Absolutely not true. Everyone in this courtroom knows that if he does go forward with the interview, he's waiving his Fifth Amendment right, i.e., he is giving up his rights.

I think that when Autrey affirms his misunderstanding, that becomes even more -- even heightened evidence to the Court that Mr. Chaparro was confused and didn't intelligently waive his rights or understand. At that point, he was even giving up a right or waiving a right.

Then, lastly, your Honor, I think if you move on to the very last portion of the interview where he indicates, Mr. Chaparro actually orally indicates what he believes to be what he's waiving, and he indicates, you're telling me you're going to ask me a couple of questions, if I don't want to speak I don't need to, if I want a lawyer, I can have one appointed to me.

So this Court actually has a unique opportunity to have insight into Mr. Chaparro's thoughts and to plainly and clearly see Mr. Chaparro does not understand that when he waives the right it will be used against him in court.

He glosses over that entirely. He doesn't reference it. He doesn't understand it intelligently. And I think that just confirms that this diluted rendition or the soft sell rendition of Miranda is not reasonably conveying to

a person, specifically, Mr. Chaparro exactly what his rights and consequences of waiving them are.

What I find also concerning and what I anticipate the State to stand up and argue is defense is expecting a verbatim admonition, defense is expecting strict language, defense is expecting a talismanic reading. I'm not. What I am expecting, though, is a reasonable conveyance, which this is not.

Additionally, judge, I think if an officer is capable of providing exact language from memory, it should be much closer to a reasonable conveyance of the actual admonition, which he's capable of. He demonstrated it on the stand. Yet he intentionally and routinely with suspects goes in, soft sells it, dilutes it, minimizes it such that it's not reasonably conveying the right.

He is verbatim giving this same admonition to multiple people. So he's capable of a strict language script-like admonition, yet he's choosing to give the wrong one. Based on that practice, I really think the Court should be concerned with that practice and habit of Sergeant Autrey. And I think based upon that, the Court should intervene and prevent future admonitions such as this, because I think it's highly problematic. I think the way that Court deters that is by suppressing this evidence. So with that, judge, I

would submit.

THE COURT: Thank you. Mr. Lee.

MR. LEE: Judge, I'll be fairly brief. Again, what the standard is, does the admonition reasonably convey? So when we're looking at all of these statements, do they reasonably convey? And here there's little doubt to say otherwise.

One, you don't have to talk to me. A little later, you can stop talking at any time. Even the defendant acknowledges, if I don't want to speak, I don't have to. That's exactly what a right to remain silent is. He doesn't have to talk.

The could make its way into court, could be used against you, the whole argument of can versus could is right in the issue of reasonably convey. Does that word reasonably convey? What's interesting when I was reviewing the Duckworth decision of the United States Supreme Court that's cited in my opposition in fact uses that word, that finding that an officer's recitation of these rights was adequate where it said that it -- I want to make sure I'm getting it right. Said that anything he said could be used against him in court. So even the Supreme Court has used the word could.

Looking at the McGill Supreme Court decision as well, may. It's all along the same lines, it reasonably

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conveys. Making someone say will or can instead of could is exactly what the Supreme Court has declined to make a rule about over and over and over again.

Then with regard to the right to an attorney and having one appointed, I think that's very clear. You can confer with an attorney prior to speaking, you can have one present while we talk. If you can't afford one, we'll appoint one free of charge. What's important here Detective Autrey even specifies, you can talk to one before we talk or during, and I think that's above and beyond Miranda even.

And then, again, Mr. Chaparro indicates his understanding by the statement, if I want a lawyer, I can have one appointed to me. He gets it. He understands it.

With regard to the waiver aspect of the defense motion, one, we don't need any words necessarily for a waiver. It can be inferred from the circumstances. We know that from prior decisions. So here where Mr. Chaparro is somewhat of an affable conversation where Mr. Chaparro continues to speak having understood his rights, we can understand that there can be inferred a waiver. That's exactly what we have here. That's just fine under the laws as we have them.

With regard to the asking -- well, let me backup. First, then, after all four admonitions are given under

Miranda, Detective Autrey, then Detective Autrey states, do you understand all of that? Yeah. He goes above and beyond and asks him, what does it mean to you? At which point Mr. Chaparro does explain his meaning. Again, don't have to walk. First he says, I'm giving up my rights. If Detective Autrey had agreed with that, that would be pretty tantamount to coercion. Yes, you're giving up your rights talking to me. He appropriately declined to say that, because that's not what he's doing.

Again, Detective Autrey is looking for an understanding, not a coercion that Mr. Chaparro is giving up his rights. So in further discussing that, Mr. Chaparro concludes that he understands he doesn't have to talk, he understands that he can have an attorney. It's all there.

Again, first of all for acknowledging that he understands all four, and then that further explanation of three of the four, that reasonably conveyed, your Honor, and, again, that's not an issue for a waiver of that right. A waiver only requires a preponderance of the evidence and here given all of that, that it was waived in two ways and then also inferred is also from continued talking is very clear.

There's one last point, your Honor, that I want to bring up. Just that even after 30, 35 minutes of an interview, the defendant, Mr. Chaparro, still knew his

rights. And that's acknowledged, we can see that from the fact that he had invoked them and he decided at that point, I don't want to talk anymore, at which point the interview was done.

Detective Autrey did all that was required under the Miranda decision, he did it appropriately and then concluded the interview when the right was indeed invoked. For all those reasons, your Honor, the motion should fail.

THE COURT: Thank you, Mr. Lee. Ms. Millsap.

MS. MILLSAP: Just briefly in response, I think the State is relying heavily on Duckworth. What I would invite the Court to do in this case is to relook at the totality of the language in this case. And I think in light of the totality of this admonition, it is distinct from the Duckworth case in that and particularly he's diluting, further diluting the consequences of waiving the right and speaking by coupling it with that very definitive, unequivocal strong statement of this will be in my report. I am writing a report. I am going to use it in my report. Anything you say is going to make its way into that report.

Then moves on to the very, it could be used in court, maybe not, not absolutely, it could. And so I think that this is distinct from Duckworth in that he's further diluting it, making it even more confusing such that he isn't

reasonably conveying the right in its totality.

In addition, judge, I think that the argument, the counter argument to, no, no, no, you aren't giving up your rights, he did that in an effort to not be coercive. I mean, there are a wide array of alternatives the detective had, then at that time Detective Autrey had in response to, yeah, I'm giving up my rights. Instead he said, you aren't giving up your rights. That's simply just not true. He's misadvising him.

He's not saying, if you continue on, you're giving up your rights. He's not saying, no, no, if you don't speak with me, you're not giving up your rights or you aren't giving up your rights. He's misadvising him. Because he thinks I'm giving up my rights, because I'm about to speak to you, he's saying, no, no, no you're not giving up your rights. That's simply false. He is giving up his rights when he endeavors to speak with the officer.

And, lastly, the State relying on he knew his rights, plural, simply because he later invoked his right to have counsel present, sure, he understood his right to have an attorney and I've never once argued that that was diluted that he did not know that.

What I'm arguing is maybe he would have much sooner invoked the right to an attorney or never even gotten

to the point where he did invoke if he reasonably understood the entire admission, which I would submit he did not, because the admonition did not reasonably convey his rights and therefore he did not intelligently waive them. So on that, judge, I would submit.

THE COURT: Thank you very much for your arguments, counsel. First, I think it's important to note the context subjectively of the meeting between Detective Autrey and Mr. Chaparro, and subjectively, I'm referring to the following facts:

First, Mr. Chaparro volunteered that he is and was at the time of the interview a criminal justice major. In fact, volunteered that he was a few units away from getting his AA and was looking to transfer over to UNR for a further degree as a criminal justice major.

At 10:55 minutes in the interview, he said, I wanted to come down to see what's going on, indicating a desire and willingness to engage in a custodial interrogation with Detective Autrey. It's clear Mr. Chaparro was in custody. It's clear that an interrogation occurred.

The United States Supreme Court and the Nevada Supreme Court have both made clear that as Ms. Millsap acknowledges, Miranda warnings are not talismanic, just like the colloquy I engage in with defendants when they waive

their constitutional rights for purposes of entering a guilty plea. There's no magic wording, there's no magic phrasing. There are basic subject matters that need to be discussed, but the way and order in which those are discussed, for example, is not a matter of black letter law.

So in this case, given that Mr. Chaparro said he wanted to be there, said he wanted to talk to the detective, indicated some schooled knowledge, if you will, of criminal justice broadly, I recognize that doesn't infer necessarily any particular knowledge of criminal procedure, and Mr. Chaparro's demeanor throughout the interview, even including when he invoked, as it were. It's clear that he wanted to talk to the detective and he felt comfortable as he repeatedly did, for example, denying accusations the detective was making about, look, I've got you on video and that's a lie you're telling me right now, Mr. Chaparro would quite easily and readily deny those things.

From where I sit, it's clear that if I view this case lens through the United States cases and particularly Duckworth, my inquiry is simply whether the warnings reasonably conveyed to Mr. Chaparro his rights as required by Miranda and they did.

He acknowledged and understood he had a right to remain silent and he could stop talking at any time and in

fact did. He acknowledged that he understood that the statements he was making, which would unequivocally go into the detective's report could be used against him in court. I do not believe there's a meaningful distinction for purposes of the Miranda analysis between the words can and should.

In fact, as Mr. Lee points out, the Duckworth opinion uses or confirms that an admonition that the statements you make could be used against you is adequate for purposes of Miranda.

Likewise, Mr. Chaparro confirms that he had the right to an attorney to be present during questioning and that one could be appointed for him at public expense. He acknowledges that not only verbally, but by way of his demeanor and his continued conversation in the context of the interrogation with the detective.

It's apparent that as a consequence, he was properly, as it were, Mirandized and his statements are available for use in evidence and I'll talk more in a moment about what I mean by that. But I find that under the totality of the circumstances, the Miranda admonishment given to him was adequate to the constitutional task.

I would offer as a footnote for a different defendant in a different cases, I might come to a different conclusion. But given Mr. Chaparro's clear comfort, both in

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terms of his diction, his demeanor and his responsiveness, volunteering, again, that he was a criminal justice major and his confirmation that he wanted to be there even after several minutes of the interrogation in order to figure out what was going on, I find the admonishment was both adequate and met the spirit of the Supreme Court's holding in Miranda versus Arizona and then it's clarifications about Miranda versus Arizona.

I'm going to ask you to craft the order confirming or denying the motion to suppress, Mr. Lee. Do you have any questions for purposes of clarifying that order?

MR. LEE: I don't. I was taking notes, your Honor. I'll do that.

THE COURT: So we know now based on my holding that this interview is available for use, and note the way I use that term, because Mr. Chaparro's contact with the detectives begins with him volunteering, hey, I thought it was related to my sex registration. That's intimately intertwined with your motion related to evidence of prior sex acts as you've entitled it.

And I'd like to go there next, but I want to footnote or bookmark this area, because just because I haven't suppressed related versus Miranda versus Arizona doesn't mean either that you intended to use the entire

recording or any parts of it, or that you would, but before that happens, we need to talk about that it and I know you know that, Mr. Lee.

MR. LEE: Can I ask for one clarification on that?

THE COURT: Sure.

MR. LEE: Even if your Honor was to grant the State's motion, I would not endeavor -- there's several parts in this interview that he references the previous contact, I still don't find it appropriate and I've actually redacted all of it just recently as well. So that would be something I would provide to the defense. Regardless of what your Honor decides on this second issue, I'm not going to include it in this interview.

THE COURT: I appreciate that, because I was telegraphing my concerns. I appreciate that. I'll be candid, Mr. Lee, and I leave to you how you use the evidence. I've already indicated for purposes of the motion to suppress it's available as evidence. And neither you nor I, nor counsel for Chaparro, nor Mr. Chaparro can say right now whether he's going to testify in this case or not.

Quite candidly, I don't see a whole lot interview that's useful on any question. I don't know all the facts in the case and I don't know how the live testimony of any of the witnesses will go. I just appreciate you're telegraphing

back to me, hey, judge, I don't intend to use the, my words, unnecessarily prejudicial pieces of this interview and I appreciate that I will need to redacted it and we'll need to talk more about it before I offer it into evidence.

Let's move to your motion, Mr. Lee, related to the admission of evidence of prior sexual acts. We have helpful, depending on how you define that term, instruction from the Nevada Supreme Court in Franks versus State. I realize Mr. Lee sort of got the last word appropriately in the pleadings and it was in the reply that Franks was identified.

MR. FUSS: Right. We were a little concerned. I believe he ended up matriculating E-Flex on Wednesday and he sent me and Ms. Millsap a courtesy copy around midnight on Tuesday night. I reviewed it. I'm familiar with Franks. I'm a little concerned about kind of the last minute offering of that at this point, but I don't see any basis to continue it. I'm familiar with the case. I'm familiar with the law.

THE COURT: I read it for whatever it's worth before the reply, as do I'm sure all of you. I make a habit of reading the advanced opinions as they're issued. Candidly, before the reply, when I was considering this language or term propensity, something kept going off in my addled brain, wait, didn't I just read something about this? So I don't think the timing really is of any moment legally

and I hear you to acknowledge that.

I assume from our previous colloquy, though, Mr. Lee, that the previous victim, who was the victim in the case for which Mr. Chaparro suffered a conviction is not available here today, is that correct?

MR. LEE: Judge, let me tell you the background. She was subpoenaed. She is very cooperative with the State. Ultimately, I don't believe we need to have her testimony based on Franks. We subpoenaed her before Franks came out, actually. However, I'll offer this, yesterday I received a call from one of her sons, she had a child die in a car accident yesterday.

THE COURT: Oh, good gracious.

MR. LEE: Of course I told her that this is nothing to worry about right now. Again, with the understanding of Franks that is not required, it is a proffer from the State. I felt I could do that today.

With regard to I rccognize I sent the reply late, if the defense feels like they want more time, at least there's no objection on my part if they want more time to push that back. That's where I'm at.

THE COURT: Mr. Fuss.

MR. FUSS: As long as we don't go too far outside Franks, I don't think there's anything else beyond it. I

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think we can go forward.

THE COURT: I have to make the determination, as a matter of fact that, first, the related, I'm going to call it, bad sexual act is proven by a preponderance of the evidence and I have proof beyond a reasonable doubt in the judgment of conviction over which I can take judicial notice that occurred in this department.

MR. FUSS: And the Court has that? It's been filed by the State or provided to you?

THE COURT: I looked at it in the record and I can tell you that I have seen that judgment of conviction. It is clearly relevant to the crime charged. Only for purposes of this motion, I would acknowledge that there is a haunting similarity factually between the facts which occurred in the prior case and the facts which are alleged in this case and some of those similarities are described by Mr. Lee in his motion.

And so given those Franks similarities, it is relevant to the crime charged. The real heart of the issue, and I promise now I'll give you an opportunity to argue, Mr. Fuss, is whether there is unfair prejudice, which inures to your client that outweighs the probative value of the proffered evidence and I think that's where the battle in this area belongs.

MR. FUSS: Well, I respectfully disagree with the Court. It may be relevant to the battery with intent to commit sexual assault and it may be relevant to the open and gross lewdness, but the prior act had no allegation or proof beyond a reasonable doubt or even a preponderance of the evidence of an attempt to digitally penetrate or penetrate period which takes us to the top charge of sexual assault.

THE COURT: Let me pause there for a moment or I'll lose my train of thought. I apologize for interrupting. I don't disagree with you that there wasn't a criminal allegation of sexual assault, but let's be fair to the facts that occurred.

The facts are: Both applied for a job at the Nugget. Victim alleges he follows her to her car. Victim alleges and the jury clearly found beyond a reasonable doubt, he pushed her into the car, climbed on top of her, put his hands down her top, touched her breast and said, just let it happen.

While there was no allegation that there was a sexual assault, he was found guilty with battery with intent to commit sexual assault beyond a reasonable doubt.

MR. FUSS: Right. So here's the big -- here's where I think the propensity, the prejudice versus the probative value, I think they established that as you have

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indicated that they've proved it by a preponderance of the evidence. I disagree with you regarding the similarities and I will go into that little bit later.

But as we're talking about the sexual assault, I can't imagine a jury knowing that he's been convicted of a prior battery with intent to commit sexual assault looking at a sexual assault charge, and the concern would be, we're here for the allegation of a second battery with the intent to commit sexual assault and a sexual assault where the jury would, hey, he's done it once, he's done it twice, we're going to convict him of the higher charge and ignore the element of the penetration.

I think the State's evidence regarding penetration has some holes in it and it will come down likely to the victim's testimony as to what the jury believes, because I don't believe independently the State has the evidence to sustain its burden.

But, again, if I'm looking at a gentleman who has a battery with intent to commit sexual assault conviction and it's brought in and then we're talking about the battery with intent to commit sexual assault, I believe that would be perhaps appropriate, but it is not. I'm afraid that the prejudice will mean that the jury will disregard the element of the penetration for the higher charge of the sexual

assault and convict him because he's here again for similar conduct, even though it's charged by the State as, I believe, a second charge.

I would disagree with the Court as to the similarities in, yes, it is sort of alleged that it -- he was convicted of having contact with a stranger in broad daylight. That after the battery, he disengaged. There's no information that he attempted to pull out his penis or to penetrate her. He disengaged.

In this case, we're talking about at night in a lighted area with people that are coming in and out of the breezeway where there's contact. And the issue is whether it's going to be -- if the jury determines that it's sexual in nature. And I think the facts in the video are going to show that's a judgment call.

And, again, as to the second charge, regarding the battery with intent to commit sexual assault, you have a prior, it's going to be very tough to overcome. And they may gloss over the issue -- I'm concerned that they'll gloss over the issue of what was his intent based on the battery the State alleges as being the battery with intent to commit sexual assault, because they've charged an open and gross lewdness. They also charged, I believe, a simple battery.

And so looking at the facts in their totality, I

think the jury without the prejudice of the prior would have a decision to make as to whether his actions on the night in question were sexual in nature or simply a battery. And if we offer the prior bad act, I think it's more prejudicial than probative.

We're not talking about children or witnesses that appear to be infirm based on their ability to testify and recall the facts. We're talking about adult women. And I don't think there's going to be any issue about whether or not the witness can testify or recall the events. As indicated, they're on video. There's no two ways around it.

And so it will be, like I said, it will be the decision for the jury to decide whether or not what the intent of the battery was. Does it meet the sexual assault? And then as my -- as I'm really concerned is that they will disregard the Court's instructions in sort of the opposite of what defense lawyers like, occasionally, is to have a jury nullification, the State would get the benefit of jury nullification, where the jury would say, I don't really care. This person looks like he's done this in the past, he's likely may have done it in the future and I don't want that to be glossed over.

The State points out that it's close in time. The conviction was back in 2011. I have no other bad act

evidence offered by the State indicating that anything has happened between 2011 and the allegations in this case. And so we have a five-year window where he was in the community on probation. He was, as you saw from the video from the prior hearing, a specific detective was brought in because he was responsible for the making sure that sex offenders were registering and where they were living, et cetera, he was involved in the case. And I don't have any other information other than trying to use the prior act in order to prove beyond a reasonable doubt that he acted with that intent in this particular instance.

They're separate events. One was not caught on video and one is on video. And I'm afraid they will lessen the burden of the State to prove beyond a reasonable doubt that, A, that he penetrated her against her will for the sexual assault, B, that the actions that he did that night were battery with the intent to commit sexual assault, whether it was open and gross lewdness on his behalf, referring to my client, or whether it was just a simple battery.

And if you offer the other prior bad act, I would submit that my experience is likely not going to be able to get a fair trial. And my other concern would be, are we even going to be able to seat a jury?

THE COURT: Thank you, Mr. Fuss. Mr. Lee.

MR. LEE: Judge, I think it's important to pause and look at the wording of NRS 48.045, subsection three, because it doesn't require the exact same offense in any way. Nothing in this section, reading from the statute, quote, nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that the person committed another crime, wrong or act that constituted a separate sexual offense.

Certainly, the similarities and conduct are very important. Those similarities are there with regard to -- gosh, even locations, at a casino, finding an opportunity with an individual who he had seen who then leaves an area where there's other people, it's an area by herself, finding an opportunity to attack in that situation and only stopping once there's a fear of other people finding or catching.

In the first case, Ms. Pamela was screaming really loud and fighting and that's ultimately when he stopped. In this case, we have our victim who, again, was yelling and also other people coming in from both directions and that's when he stopped.

The similarities are there. Whether he penetrated in one and did not in another really doesn't matter. The statute doesn't require that. It just requires a separate

sexual conduct.

So really on the last prong is what I understood the defense argument to be, the last Franks factor I'll call it, and to have to argue or decide at any point whether the probative value of the prior sexual act evidence is not substantially outweighed by a risk of unfair prejudice. Certainly, it's a difficult task for any court to undertake, and at first blow because what we're used to in 48.045 motions and such, we automatically think, well, sure, there's a risk of unfair prejudice because it's propensity evidence. But here, again, that's not really a factor. Because it is propensity evidence, it is relevant to the Court's decision. And then what the Court undertakes is weighing essentially those Lemay factors and I would say any other relevant factor.

But looking at Lemay and then reading that in conjunction with how Franks analyzed all the Lemay factors, it's clear at least from the State's perspective that the probative value, which is very strong, because in part the legislature has determined it to be so. Franks does discuss that, how it's important because the legislature has called it such, therefore it's very probative.

But in balancing those things out, one, Franks looked at the cases each involved sexual misconduct. It

doesn't say the exact same type, but those involved inappropriate touching, involved the same child. Here we've got very similar circumstances as to the method of attack and unidentified, at least to Mr. Chaparro, women who he attacked when they were alone and then stopped once the fear of being caught.

Number two, sufficiently close in time. I'm arguing, your Honor, that five years is not very far away in time. In fact, Mr. Chaparro had not finished all of his requirements of probation on the first case much prior to committing this act.

Three, what Franks is looking at is saying there's no demonstration of any intervening circumstances that would alter the balance. And here, again, we don't have anything such as that that I'm aware of.

And then lastly what Frank's looked at, and this was very telling as well, stating, quote, evidence need not be absolutely necessary to the prosecution's case in order to be introduced. It must simply be helpful or practically necessary.

So certainly this is helpful to the State's case. It gives great insight into propensities that Mr. Chaparro has, because he's acted on them before under very similar circumstances. And so given that, we have to have faith that

the jury will hear all the elements of the crime that the State must prove beyond a reasonable doubt of all three of these crimes. It's only three. The State hasn't charged Mr. Chaparro with a misdemeanor battery of any sort.

Here are those elements, the State will stand here and say we ask you to hold us to the burden we have with all of these elements. The defense I'm sure will harp on those as well, as they should, and we have to have faith in the jury they can do that. But, again, they should be able to hear all of the testimony in light of the great propensity evidence that Mr. Chaparro has given in this case.

THE COURT: It's his motion. I'll give you some latitude, Mr. Fuss. I see you rising to speak.

MR. FUSS: When you're talking about the intervening circumstances, I'm talking about almost five years, every day, 24 hours a day, 365 days a year.

THE COURT: You would agree, however, that if we were talking not for use or substantive purposes to show propensity, but if this were simply, for example, impeachment, it would clearly be admissible, because it's within ten years.

MR. FUSS: If my client took the witness stand, absolutely.

THE COURT: What's the difference? I realize time

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has an issue, but why would this not be relatively recent?

MR. FUSS: If we're just talking about whether for impeachment purposes would it be admissible by the State if my client took the witness stand?

THE COURT: Yes.

MR. FUSS: I wouldn't have anything to raise for an argument for that.

THE COURT: I'm just using the time element of that impeachment statute to draw an analogy. I realize they're different uses. When they say the closeness in time of the prior acts to this case charged, isn't that one kind of bookmark or analogy I could use to say whether it's close or not?

MR. FUSS: When they talk it being propensity and the guy has got five years in between the allegations, I think that's a long period of time. But I understand where you're statement is, but then it goes back really to the suppression issue. He has a right not to take the witness stand.

And, again, I'm worried about the jury is going to disregard any of the evidence in favor of my client and convict him based on the sole fact that he's been convicted before of what is arguably similar facts and circumstances. But I think we see the video, they're distinctly different.

I just don't know how -- if I were to get into the victim's sexual proclivity, I can't do that without an offer of proof first and likely not coming in. I don't understand why all of a sudden -- I mean, I understand what the legislature intended, but how do we not get back to the character evidence and propensity in order to find this gentleman guilty? And I think the risk of unfair prejudice outweighs the probative value.

THE COURT: Well, the difficulty with prior act evidence is always the argument that Mr. Fuss makes. If Justice Cherry were sitting in the room while I was about to say what I am going to say, I promise I would say the same thing and he would smile.

I imagine there was no small amount of ribbing sent his way at the bench conference when they decided who was going to write this opinion and Justice Michael Cherry's name went on it. Because if you had asked me to speculate would Justice Cherry author an opinion saying propensity evidence is admissible in a sex related case, I'd have said no way. And yet here it is.

And I think what it reflects is Justice Cherry as he has always done in his position as a Supreme Court Justice and now as a senior Supreme Court Justice, and that's to follow the law. When the legislature made the changes to

48.045 they made, which I again would never have predicted, and said clearly we draw -- we rebalance the scale and in sex crimes cases in particular, this evidence is not inadmissible as it had often and frequently been or had been reflected in competing Nevada Supreme Court opinions related to its admissibility.

In my view, the legislature rebalanced the scale and the Supreme Court has now quite clearly said that propensity evidence in these cases, meaning sexual offense related cases, is admissible after the balancing we're about to undertake. I think that's informative.

I find the similarities between the crime for which Mr. Chaparro has been convicted and the crimes for which he is alleged -- that he's alleged to have committed in this case are remarkable. Of course, there are always dissimilarities, day versus night, things of this nature. But public places, strangers to him, accosting women, and when they summon help, ceasing activity, et cetera, the similarities far and away outnumber any dissimilarities between the incidents.

The closeness in time I think not only is between the date of conviction of the prior felony and the allegations in this case, but also the fact that he had recently, like within a year, been discharged from probation

when this act is committed, and at least in his mind, arguably, free from the constraints of oversight that probation would provide. And I find them to be closely tied as a consequence. The frequency of the prior acts is one, but given its similarity, that's a compellingly probative prior act.

The presence or lack of intervening circumstances, I don't think really applies in this case save and except that my argument about the similarity of the charges given the intervening probation and how that makes the timing impractical for effect shorter between the incidents. And the necessity of the evidence beyond the testimony is already offered at trial.

The challenge in a sex crimes case is always proving intent, because no reasonable juror wants to believe, understandably, that this kind of offense happens, let alone in their community. And it's difficult for the State to ask the jury to take a trip through the mind of any defendant to show that they would have an absence of mistake. This wasn't just an innocent contact between two people who bumped together in the breezeway at Harrah's, for example. And that, instead, Mr. Chaparro harbored the specific intent to engage in an unlawful sex act against the will of a victim makes the evidence necessary.

Of course, probative evidence is always prejudicial and probative evidence that tends to convict is the most prejudicial. It is not unconstitutionally prejudicial, however. If that were the case, then the State couldn't present any evidence that tends to convict a person.

I've been struggling in my mind to come with an analogy and this analogy has absolutely nothing to do with this case and certainly and most particularly absolutely nothing to do with Mr. Chaparro, because there's no evidence of what I'm about to analogize at all about Mr. Chaparro as a person in this case or otherwise.

The kind of unnecessarily prejudicial evidence to my mind that would swing this scale of weighing the other way would be if the allegations against Mr. Chaparro were that he were somehow, for example, a bigoted person that had made bigoted statements in either the prior offense or this offense. So that if in the prior offense the jury was to hear evidence that he was a bigot, which he is not, and they would therefore say, since he's a bigot, he's more likely to have committed X crime, that would be unnecessarily prejudicial in my mind. There is no similar evidence in this case. The issue is simply the unlawful sexual contact with the specific intent alleged.

So for all of those reasons, I will allow the

State to produce in its case in chief even evidence related to the prior incident that led to Mr. Chaparro's conviction.

Again, Mr. Lee, I'm going to ask you to craft the order granting that motion. Do you have any questions for purposes of clarifying that order?

MR. LEE: I don't right now.

THE COURT: Anything else you want to place into the record, Mr. Fuss?

MS. MILLSAP: Judge, did you want to -- were you intending, then, to take the other motions under submission and do written orders?

MR. FUSS: Regarding this motion, I guess we'll get to that as a housekeeping after we get through as to how he's going to present that evidence.

THE COURT: And I should worry you if you are appropriately reading my mind in the sense of that's why I bookmarked it when we talked about this interview.

MR. FUSS: At the end of the hearing, should we set another date to discuss things like what's redacted, what's not redacted, what they're going to present. I assume we would do that.

THE COURT: Maybe we can get there. Let's work through these other motions and then we'll come back to.

MR. FUSS: Otherwise, I have nothing else to add

regarding your ruling.

THE COURT: Thank you for that, Mr. Fuss. So the next thing I'd like to discuss is defendant's motion for the State to disclose demonstrative evidence. I don't desire any more oral argument related to it. I'm simply going to deny the motion except to offer this cautionary tale.

I think I've had the privilege in presiding in two trials now where Mr. Lee was counsel and I offer that to my defense colleagues in this way. I think Mr. Lee knows me reasonably well. And if Mr. Lee were to put something in his opening statement or any Power Point related to his opening statement that was objectionable, I will hold that very strongly against him, particularly if the objection included a motion for a mistrial. Because I would then make a specific finding with some increased likelihood that the State had engaged in intentionally misconduct and the likelihood of mistrial would be high as a consequence.

I think Mr. Lee knows that and appreciates that. I don't know, Mr. Lee, if you intend, as I have seen some of your colleagues to be want to do, to give your colleagues a copy of the Power Point closer to the trial. I would recommend that. I am certainly not going to order that. But I would recommend that so that they at least have an opportunity to not, as it were, on the fly bring up any

issues that they think may be objectionable.

MR. LEE: Can I ask for a little clarification, your Honor? Your Honor has discussed opening statements. I rarely do a Power Point in opening statements. I've done it. But I thought this included my closing argument as well.

THE COURT: I'm getting there.

MR. LEE: Okay.

THE COURT: I just, again, I would recommend it. I'm not going to order you to do it, but I would recommend it.

As regards closing statement, to all of the attorneys in the courtroom, I'll simply say this: If a piece of evidence is displayed or something purported to be evidence is displayed in closing statements and it has not been admitted in the trial, you will have a very unhappy judge on either side of the room.

Logical arguments about what the evidence is or means that can find its way, for example, into tabulations or formulations or otherwise is a part of the art of advocacy. And I am likewise not going to require either side to share with either side in advance the contents of their outline as it were. Before Power Point, we all had outlines and there would be no real meaningful difference between asking to get the outline versus asking to get the Power Point. I would

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just recommend, again, that you all do that.

Fortunately, with the exception of Ms. Millsap, who I've had a few times in court and I've been very favorably impressed with, I will add, I have great trust for the attorneys here. And I think you all know that my goal is to stay out of the way in this case and to let the trial develop and the evidence develop with the least input as possible from me.

And your goal should be to see that happen, because if I'm getting involved, then something has gone wrong. I don't know if those broad philosophical statements answer your concerns or not, Ms. Millsap and Mr. Fuss.

MS. MILLSAP: Judge, they do and I wanted to also articulate, because maybe my motion didn't, that this was also applying to potentially some of the evidence that the State's experts might put on. I've had experience in firearms cases, which this obviously is not, where the State's firearms expert, ballistics expert came in and gave a whole Power Point presentation that defense had never seen. We thought there were a lot of objectionable things.

Really, the goal of this is not to insinuate anything about Mr. Lee, but just to prevent a mistrial and to give us an opportunity to object before the bell is rung in front of the jury. That's all.

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THE COURT: I heard it to be that. I don't think Mr. Lee takes any aspersions from it. The good news is I have straight shooters in front of me, Mr. Lee included. I've had the benefit of seeing him in trial. I'd be very surprised if anything controversial came to light. And in addition to all that, he's a gentleman in my experience. So I suspect that he'll to the extent he can follow my suggestion that he share what's appropriate in advance.

I don't know if there's anything else you want to say, Mr. Lee.

MR. LEE: Nothing, your Honor.

THE COURT: I indicate that I denied that motion, but I appreciate the issue being highlighted.

The defendant's motion to record bench conferences is granted. I think that's simply the law. And if I forget, please just remind me. The practical reality in this room, just so you know, in my opinion is the jury hears every word we say, because we're going to have to say it loudly enough for Ms. Koetting to record it and it's just a problem in this room.

I can guarantee you that juror number one and juror number eight almost always hear it and I'm half deaf and I think that's the case. Ms. Millsap.

MS. MILLSAP: My intention for that motion is to

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come in and say I don't have any objection to Mr. Lee's opposition which was really that we can record them after the fact. But if your Honor is concerned with them hearing, I just -- I don't think we need to clear the jury every time to have it reported. That was what I was going to indicate to the Court. I do want to make sure when we have a bench conference, it is somehow -- it's, A, still considered a contemporaneous objection for purposes of appeal, and then the objection, the discussion, the findings of facts and rulings are some how put on the record appropriately.

THE COURT: You will find me cooperative absolutely. For example, if there were an objection lodged and I overruled your objection, you will find me completely cooperative to allowing you at a break to develop whatever evidence outside the presence of the jury you thought should be developed so that you don't run afoul of my disdain for speaking objections particularly in front of a jury.

You'll find that more often than not, I try to conduct a bench conference as quickly and efficaciously in front of the jury in as clipped and jargon enough language as possible so my hope is they don't understand what we're talking about.

But if you also make an objection and recommended, judge, perhaps we can develop this record at the next break,

you'll find me cooperative that.

MR. FUSS: If it's I think crucial to handle right away, the Court will have no problem?

THE COURT: No.

MR. FUSS: If I recall correctly, I assume we'll dismiss the jury and do that on the record as opposed to going into chambers.

THE COURT: Yes.

MR. FUSS: My experience is that door is not very soundproof.

THE COURT: No, it is not. That is my experience as well.

The next thing to take up is the defendant's motion regarding custody. That is granted. Now, this is where we can revisit the issue, for example, of this recording of his interview. I'm not going to hold you to it, Mr. Lee, but if the recording of his interview is played, for example, and he doesn't testify, I'm of course going to give a jury instruction related to voluntariness of his statements. And I think any reasonable juror who sees this interview is going to infer and could infer that he's in custody. Your thoughts about that?

MR. LEE: Judge, the caselaw gets at a different issue. I think it's reasonable for any juror to understand

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at some point at least the defendant has been arrested and been in custody. I think what the caselaw gets at is the State, for example, parading that around, and over and over and drawing attention in some way. And, look, I have the same concerns as well. A bad record on my part causes a lot of trouble, and most importantly, against his rights and I don't want that either.

So, certainly, the State is not going to be parading anything around. If they infer something that is reasonable, say, from this interview where they see him in handcuffs, I don't think that is what the caselaw at all prohibits. It's really just the parading, the constant referencing to it and I don't see us doing that in that case in any way.

THE COURT: Mr. Fuss.

MR. FUSS: I'm in agreement with Mr. Lee, I think, on most of that issue. The only issue that I think was raised by the hearing is maybe keeping a -- maybe I'll wait until the end of the motion, but a place setting for a possible Jackson v. Denno hearing outside the presence and then also what we can and cannot offer in front of the jury.

THE COURT: I've granted the defendant's motion. There are, of course, caveats. For example, there's been some discussion about some jail calls. I don't know if it's

your intention to introduce such evidence, Mr. Lee. Can you say?

MR. LEE: I think there will be some jail phone call evidence, your Honor.

THE COURT: Can I expect you'll scrub from those calls the introduction of the call that says this is a collect call from the Washoe County Jail and the call will be recorded or whatever the dialogue is.

MR. LEE: I can. The only caveat is this and the defense agreed with me, it's hard to lay a foundation when I don't have any information of that. So if we can have a pretrial hearing regarding those calls, or after I produce a redacted version, if they would stipulate to those calls, at least as far as foundation is concerned, then we can get by that just fine.

THE COURT: Ms. Millsap.

MS. MILLSAP: Judge, my response, and not to be difficult, I'm just not sure what I'm willing to stipulate to today, but previously how I've handled this issue and I think was effective was that we cleared the jury for the State to lay foundation with a witness outside the presence. Once the foundation was laid and the exhibit was admitted, the jury came back in and the State simply played the exhibit for the jury to hear. And I think that can be an appropriate

resolution at least to propose to the Court.

THE COURT: We don't have to fashion a solution for this issue today. I'm going to put some pressure back on all of you this way: You are ordered, if I haven't already, to meet and confer with Ms. Oates no later than the Friday before trial to mark exhibits.

When you mark exhibits, I expect you to confer related to any agreements you can reach regarding the authenticity and/or admissibility of exhibits and there are two different questions, of course. So, for example, if you intend to produce jail calls, I would expect, I'm not imposing it on it and I would listen to any argument that the defense could say, we don't question the authenticity of it, but instead of the admissibility of it, two different things. And then we can avoid stopping, having a hearing outside the presence of the jury. If we have to do that, we certainly can.

We're a little bit taking pokes in the dark, because I don't expect Mr. Lee to know exactly what all the exhibits are or whether he's going to use all the jail calls now or in trial or not. I'll simply say this: Before any such exhibit is proffered to identify to or discussed in front of the jury, to include opening statements, we would have a hearing outside the presence of the jury related to

the exhibit and its admissibility. Does that make sense?

MR. FUSS: Yes. Court's indulgence. So, your Honor, my conversation with Mr. Lee was perhaps agreeing with the Friday before trial marking the exhibits, but I'd like to have a place holder maybe a week before that where we'll sit down and talk about what is and is not. And if we need to have an argument, I'd like to have a little bit of your time, not the day of trial or the Friday before trial, but a little bit of time so we can noodle up what happens.

THE COURT: I love doing things in advance. You'll have me.

MR. FUSS: I'm aware of that. Maybe if you have time, maybe you can carve out maybe -- I don't think we need a full afternoon, I would say an hour and a half, maybe, at the most, just to make sure we have -- if jail calls are going to come in, how we're going to get them in. If we're redacting, making sure we're on the same page about the redactions. If there's a question about what needs to be redacted and not redacted, obviously you'll make the final on.

THE COURT: We have a motion to confirm date.

THE CLERK: We can set a hearing between the exhibit marking and the trial itself.

THE COURT: So what I hear you to be suggesting is

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an exhibit marking farther in advance than the Friday before trial?

THE CLERK: Correct. That might alleviate any concern.

THE COURT: Let's do that and have a place holder hearing. Find me an hour and a half, say, 30 days in advance of the trial that we can set as a -- we'll call it a motions hearing. But a purpose for that will be to resolve any issues about the process of trial, the admissibility of evidence to the extent we can resolve it and the procedure for admission of that evidence.

THE CLERK: I'm looking at April. Counsel, what would you think about the 25th, April 25th at 2:30? April 25th at 2:30 would be a motions hearing.

THE COURT: We'll call it pretrial motions hearing.

THE CLERK: Then I could work with counsel a week prior to trial to mark exhibits and if there's any issues, we can set a hearing with you after that.

THE COURT: Perfect.

MR. FUSS: Mr. Lee informs me he has a CLE on the April 25th day, was curious if the Court had any time in the afternoon on the 22nd, which is the motion to confirm date? Not to be difficult.

(Discussion off the record.)

THE COURT: Counsel, what I'm going to do is order that at a time to be determined, yet to be determined with Ms. Oates, she'll reach out to you to find a time to mark exhibits with you. It will be more than the Friday in advance. If there are any other hiccups or issues at that time, we'll set an additional hearing before the trial.

MR. FUSS: If we're square on everything, then perhaps we'll just file a motion to vacate the 25th and free up some time for you.

THE COURT: Perfect. Thank you. Moving, then, down my list. Defendant's motion to invoke the rule of exclusion is granted. Just help me remember to do it. There's never a good time to do it. I will put an additional responsibility on all of you in way, however. Because I won't know your witnesses or who they are, I'll expect you all to keep an eye on the courtroom as well.

The bailiff knows to post a placard on the door indicating that if you're here as a witness, you must check in with him before you enter the courtroom. But, again, I'll need your help to identify who those persons will be, because I won't be able to admonish them in advance. So just help me remember to do it. Typically, I do it after we swear the jury and before opening statements or after opening

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statements in that area. But that's granted.

Defendant's motion to preclude reference to indigency is granted. I don't know of any circumstance in which we would have to refer to the fact that his attorneys are paid for at public expense. I'll call you his attorneys, I'll call you defense, but probably no other terms, other than your names, Ms. Millsap and Mr. Fuss.

Any other issues we need to discuss at this juncture, Mr. Lee?

MR. LEE: No, thank you, your Honor.

THE COURT: Mr. Fuss, Ms. Millsap?

MS. MILLSAP: No, your Honor.

THE COURT: Mr. Chaparro, do you have any questions, sir? Mr. Chaparro?

MS. MILLSAP: Judge, I think I'm surmising he's upset by some of the rulings from the Court.

THE COURT: I suspect as much as well and understand and respect that. I will respect his choice to remain silent. I wanted to give him an opportunity to ask any questions that he had so we're sure he understands these proceedings. It's been a pleasure to spend some time with you folks this afternoon. Thank you for your time.

MS. MILLSAP: Thank you, your Honor.

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STATE OF NEVADA)
) ss.
County of Washoe)

I, STEPHANIE KOETTING, a Certified Court Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify;

That I was present in Department No. 7 of the above-entitled Court on February 14, 2019, at the hour of 1:30 p.m., and took verbatim stenotype notes of the proceedings had upon the pretrial motions in the matter of THE STATE OF NEVADA, Plaintiff, vs. OSBALDO CHAPARRO, Defendant, Case No. CR17-0636, and thereafter, by means of computer-aided transcription, transcribed them into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 69, both inclusive, contains a full, true and complete transcript of my said stenotype notes, and is a full, true and correct record of the proceedings had at said time and place.

DATED: At Reno, Nevada, this 17th day of September 2019.

S/s Stephanie Koetting
STEPHANIE KOETTING, CCR #207

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