

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSBALDO CHAPARRO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 81352

Electronically Filed
Jan 14 2021 04:11 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENT'S ANSWERING BRIEF

JOHN L. ARRASCADA
Washoe County Public Defender

CHRISTOPHER J. HICKS
Washoe County District Attorney

KATHRYN REYNOLDS
Deputy Public Defender
350 South Center Street, 5th Floor
Reno, Nevada 89501

JENNIFER NOBLE
Chief Appellate Deputy
One South Sierra Street
Reno, Nevada 89501

ATTORNEYS FOR APPELLANT

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	1
II.	ROUTING STATEMENT	2
III.	ISSUES PRESENTED	2
IV.	STATEMENT OF FACTS	2
V.	ARGUMENT	4
	A. The District Court Did Not Abuse Its Discretion During Voir Dire.....	4
	1. Standard of Review	4
	2. Discussion.....	4
	B. The District Court Properly Admitted Testimony Regarding Chaparro’s Prior Battery With Intent to Commit Sexual Assault.	5
	1. Standard of Review	5
	2. Discussion.....	6
	C. The District Court Properly Admitted Testimony Regarding Forensic Testing of the Victim’s Clothing.	7
	1. Standard of Review	7
	2. Discussion.....	8
	D. Chaparro’s Constitutional Rights Were Not Violated by Sentencing by Remote Audiovisual Means, Which Were Necessary Due to the Ongoing COVID-19 Pandemic.	8
	1. Standard of Review	8

2. Discussion.....	9
VI. CONCLUSION	11

TABLE OF AUTHORITIES

	<u>Pages</u>
<u>Cases</u>	
<i>Chavez v. State</i> , 125 Nev. 328, 213 P.3d 476 (2009)	8
<i>Crawford v. State</i> , 121 Nev. 744, 121 P.3d 582 (2005)	5
<i>Franks v. State</i> , 135 Nev. 1, 432 P.3d 752 (2019)	6
<i>Holms v. State</i> , 129 Nev. 567, 571-572, 306 P.3d 415, 418 (2013)	5
<i>Hymon v. State</i> , 121 Nev. 200, 211, 111 P.3d 1092, 1100 (2005)	5
<i>Johnson v. State</i> , 122 Nev. 1344, 1354, 148 P.3d. 767 (2006)	4
<i>Lipsitz v. State</i> , 135 Nev. 131, 442 P.3d 138 (2019).....	9, 10
<i>Lucas v. State</i> , 96 Nev. 428, 432-433, 610 P.2d 727, 730 (1980)	5
<i>Means v. State</i> , 120 Nev. 1001, 1007–08, 103 P.3d 25, 29 (2004)	8
<i>Summers v. State</i> , 122 Nev. 1326, 148 P.3d 778 (2006).....	9
<u>Statutes</u>	
NRS 200.366	1
NRS 200.400	1

NRS 201.210.....	1
NRS 48.045	5
NRS 48.045(3)	4, 6

Constitutional Provisions

U.S. Const. amend. VI	8, 9
-----------------------------	------

Rules

NRAP 17(b).....	2
-----------------	---

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSBALDO CHAPARRO,

No. 81352

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

A jury convicted Osbaldo Chaparro, hereafter “Chaparro,” 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. Joint Appendix, hereafter “JA,” Volume 6, 992-994.

Prior to trial, the State successfully moved to admit evidence of Chaparro’s prior sexual bad acts. 1 JA 9, 22. Due to the ongoing COVID-19 pandemic, sentencing was held via simultaneous audiovisual transmission. The district court sentenced Chaparro to a term of 364 days for open and

gross lewdness, with 364 days of credit for time served. He was sentenced to a consecutive term of life with the possibility of parole after 10 years for sexual assault, and a 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. This appeal followed.

II. ROUTING STATEMENT

Because Chaparro was convicted of two category A felonies, this appeal is not presumptively assigned to the Court of Appeals. NRAP 17(b). The State has no preference as to which Court reviews this appeal.

III. ISSUES PRESENTED

- A. Whether the district court abused its discretion during voir dire.
- B. Whether the district court abused its discretion by allowing the jury to hear testimony regarding Chaparro's prior battery to commit sexual assault.
- C. Whether the district court abused its discretion in admitting expert testimony regarding forensic testing of the victim's clothing.
- D. Whether the district court's decision to conduct sentencing via simultaneous audiovisual transmission violated Chaparro's right to confrontation.

IV. STATEMENT OF FACTS

On December 16, 2016, Lindsey and her friend, Ashley, rented a hotel room in downtown Reno. 3 JA 327-334. Lindsey was in law school, and

home for the winter holiday break. *Id.* That night, the two women met up with a third friend, Natasha, and spent some time at Brew Brothers in the Eldorado Casino. *Id.* At approximately 3 am., Lindsey walked from Brew Brothers in the Eldorado Casino, toward her hotel room at Harrah's. *Id.* Unbeknownst to the victim, Chaparro was following her. *Id.*

As Lindsey neared the Reno arch, he accosted her, and grabbed her buttocks. *Id.*, 344-363. Chaparro kept hold of her and shoved his hand under her dress, penetrating her vagina with his fingers. *Id.* The victim screamed and struggled. *Id.* Much of the incident was captured on surveillance camera. *Id.* The victim threatened to call 911, and Chaparro whispered into her ear, "Do it. Who are they going to believe, me or you?" The victim's friend, Natasha, arrived to find her friend struggling with Chaparro. *Id.* Chaparro walked away, smiling as he passed Natasha. *Id.* The victim reported the incident to Harrah's security, and police were called. *Id.* A sexual assault exam was performed, and the examiner noted the presence of vaginal redness and abrasions. *Id.*, 501-502.

A criminalist testified that testing on the victim's clothing revealed that the DNA mixture was very low level, meaning very small amounts of DNA were present with multiple male contributors. Because of the low DNA levels, he was not able include or exclude Chaparro as a contributor to the

DNA mixture. 4 JA 592, 627-627.

During trial, the State also presented testimony from one of Chaparro's prior victims, Pamala. 4 JA 725-741. She described an incident in which Chaparro confronted her in a casino parking lot, shoved her into her car, and attempted to sexually assault her. *Id.*

V. ARGUMENT

A. The District Court Did Not Abuse Its Discretion During Voir Dire.

1. Standard of Review

This Court reviews the district court's decisions regarding the scope of voir dire for an abuse of discretion. *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d. 767 (2006).

2. Discussion

Chaparro asserts that he was impermissibly restricted from questioning jurors as to whether admission of a prior sexual bad act pursuant to NRS 48.045(3) would lead them to automatically conclude that Chaparro was guilty of the charges in this case. Opening Brief "OB," 18. The defense wanted to discuss the facts of Chaparro's 2011 battery with intent to commit sexual assault during voir dire. 2 JA 296-297. The district court declined to allow the defense to inquire about that subject, and indicated it was aware of no authority requiring the presentation of specific facts during jury selection. Specifically, the district court found that the propensity evidence at issue

pursuant to NRS 48.045 could not properly be the subject of voir dire questions. *Id.*, 299. Defense counsel provided no supporting authority for this request during trial, and no authority is provided on appeal. *Id.* Jurors are presumed to follow their instructions. *Hymon v. State*, 121 Nev. 200, 211, 111 P.3d 1092, 1100 (2005). The jury in this case was instructed that the State must prove each element of the charged offenses beyond a reasonable doubt. 6 JA 973-974;976, 981-982. The district court did not abuse its discretion by declining to allow the defense to veer off into a confusing factual exploration of the prior sexual bad act during voir dire.

B. The District Court Properly Admitted Testimony Regarding Chapparro's Prior Battery With Intent to Commit Sexual Assault.

1. Standard of Review

A trial court's evaluation of the probative value and potential prejudice of evidence "will not be reversed unless it is manifestly erroneous." *Lucas v. State*, 96 Nev. 428, 432-433, 610 P.2d 727, 730 (1980); *see also Holms v. State*, 129 Nev. 567, 571-572, 306 P.3d 415, 418 (2013). Put differently, "[a]n abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 121 P.3d 582 (2005) (citation omitted).

///

///

2. Discussion

NRS 48.045(3) determines that a prior sexual bad act constituting a sexual offense may be admitted to prove the character of the person, and to show the person acted in conformity therewith. In this case, the district court applied the factors outlined in *Franks v. State*, 135 Nev. 1, 432 P.3d 752 (2019) in evaluating whether Chaparro's prior sexual bad acts should be admitted. 1 JA 54-55. Those factors are: 1) the similarity of the prior acts charged; 2) the closeness in time of the prior acts; 3) the frequency of the prior acts; 4) the presence or lack of intervening circumstances; and 5) the necessity of evidence beyond testimonies already offered at trial. *Franks* at 6.

In its analysis, the district court noted the similarities between Chaparro's attacks on Lindsey and Pamala. 1 JA 44. It noted that the similarities between the two acts were compelling, and that the incident at issue in this case occurred shortly after Chaparro's release from probation in 2015. *Id.*, 45. Additionally, it observed that "intent is a necessary element in the instant matter. Given the nature of the charges, the evidence of the prior sexual offense is extremely valuable and important to help the jury understand Mr. Chaparro's intent." *Id.*, 45-46.

Chaparro argues that the district court abused its discretion, because

the only issue in this case was whether he actually penetrated Lindsey with his finger. OB, 21. He further asserts that because Pamala fortunately avoided sexual assault, her testimony “served no purpose.” *Id.* This is simply not true. Chaparro did not concede the battery with intent to commit sexual assault charge. During closing argument, his attorney argued that he was guilty of open and gross lewdness and “nothing else.” 5 JA 922. The defense asserted that “there was not objective proof” of Chaparro’s intent to commit sexual assault, and further argued that the public location of the event demonstrated that he did not have the intent to commit sexual assault. *Id.*, 933-935, 937.

When Chaparro battered Pamala in a casino parking lot, he intended to commit sexual assault. The evidence was relevant to show Chaparro’s character, and to support the State’s case that he intended to sexually assault Lindsey when approached her and battered in a public area outside a casino—just as he had done to Pamala. Evidence of Chaparro’s similar prior sexual bad act, perpetrated not long after he was released from probation, was properly admitted. The district court did not abuse its discretion.

C. The District Court Properly Admitted Testimony Regarding Forensic Testing of the Victim’s Clothing.

1. Standard of Review

This court reviews a district court's decision to exclude evidence in a

criminal case for abuse of discretion that will not be overturned absent manifest error. *Means v. State*, 120 Nev. 1001, 1007–08, 103 P.3d 25, 29 (2004).

2. Discussion

Chaparro argues that the district court abused its discretion by permitting the State’s DNA expert to testify with regard to the swab taken from the victim’s tights, “no male can be excluded and anybody could be included.” 4 JA 627. He argues that this expert testimony implied that he could have contributed to the low-level DNA mixture. But in reviewing the witness’ testimony, that is precisely the state of the evidence. The levels of DNA on the tights showed multiple contributors, and the analyst could not include or exclude anyone—including Chaparro—from that mixture. He explained that in detail. *Id.*, 592, 627-627. The district court did not abuse its discretion on this issue.

D. Chaparro’s Constitutional Rights Were Not Violated by Sentencing by Remote Audiovisual Means, Which Were Necessary Due to the Ongoing COVID-19 Pandemic.

1. Standard of Review

The question of whether a defendant’s Sixth Amendment Confrontation Clause rights were violated is a question of law that this Court reviews *de novo*. *Chavez v. State*, 125 Nev. 328, 213 P.3d 476 (2009).

///

2. Discussion

Chaparro asserts that his right to confrontation was violated because he was sentenced via simultaneous audiovisual transmission due to the ongoing COVID-19 pandemic. He concedes that holding a sentencing hearing in person would have been “impossible” but maintains that the district court should have postponed his sentencing indefinitely so that he could be sentenced in person. OB, 27. He also concedes that he could consult with his counsel through a headset during the hearing. *Id.*, 28.

First, the State notes that the Confrontation Clause does not apply to sentencing proceedings. *Summers v. State*, 122 Nev. 1326, 148 P.3d 778 (2006). Second, the State observes that Chaparro’s primary concern is that he was not able to confirm whether his family members were watching the hearing, and that he was “alone.” *Id.*, 28-29. He concedes that there is no authority supporting his position that sentencing via audiovisual means given the unique set of challenges presented by the pandemic is a violation of his right to confrontation. *Id.*, 26. He directs this Court to *Lipsitz v. State*, 135 Nev. 131, 442 P.3d 138 (2019). In that case, the court considered the issue of trial testimony via simultaneous audiovisual transmission and evaluated: 1) the necessity of the hearing being conducted using audiovisual technology; and 2) whether the medium provided adequate indicia of

reliability. *Id.*, 136-137. It ultimately concluded that the defendant's right to confront adverse witnesses was not violated.

Here, Chaparro insists that the district court should have applied the *Lipsitz* factors when deciding whether conducting sentencing remotely was appropriate. The State observes that *Lipsitz* can be easily distinguished because 1) it pertained to trial rights, not rights at a sentencing hearing; and 2) Chaparro conducted no cross-examination during his sentencing hearing. Moreover, he had been afforded the right to cross-examine the victim in this case during the trial phase. But even if the district court had applied the *Lipsitz* factors, it would have reached the same conclusion. There was no other way to hold this hearing, by Chaparro's own concession. Indefinitely continuing sentencing hearings for defendants, which is the alternative Chaparro suggests, would be inherently unreasonable and impracticable. The simultaneous audiovisual transmission allowed for a full and fair sentencing hearing, and no error occurred.

///

///

///

///

VI. CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the district court be affirmed.

DATED: January 14, 2021

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

///

///

///

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: January 14, 2021.

CHRISTOPHER J. HICKS
Washoe County District Attorney

BY: Jennifer P. Noble
Chief Appellate Deputy
Nevada State Bar No. 9446
One South Sierra Street
Reno, Nevada 89501
(775) 328-3200

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 14, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Kathryn Reynolds
Deputy Public Defender

/s/ Tatyana Kazantseva
TATYANA KAZANTSEVA