

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSBALDO CHAPARRO,

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**

APPELLANT'S REPLY BRIEF

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Electronically Filed
Feb 09 2021 03:47 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
No. 81352

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ARGUMENT IN REPLY

The district court abused its discretion in admitting testimony by P.J., detailing a prior battery with intent to commit sexual assault by Mr. Chaparro, which had little probative value in the instant case, and presented clear danger of unfair prejudice.

In *Franks v. State*, the Nevada Supreme Court recognized that while NRS 48.045(3) allows the admission of prior sexual bad acts for propensity purposes, the district court must nonetheless exclude such evidence if its probative value is outweighed by the danger of unfair prejudice. 135 Nev. 1, 6, 432 P.3d 752, 756 (2019). As stated in Mr. Chaparro's opening brief, factors for the district court to consider include

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

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

In explaining the rationale for allowing admission of prior sexual bad act evidence, the Ninth Circuit has noted that such evidence is often necessary in child molestation cases, which “require reliance on child victims whose credibility can readily be attacked in the absence of

substantial corroboration.” *LeMay*, 260 F.3d at 1028-29. Notably, in *LeMay*, the court allowed testimony regarding evidence that LeMay had previously molested two other young children in his care, when the child victims in the case at issue were “very young at the time of the incidents, and two years had passed before LeMay was tried.” *Id.* Similarly, in *Franks*, the Nevada Supreme Court allowed a child victim to testify to previous acts of molestation by the defendant when he argued in his defense that he had been tickling the victim and may have “grazed” her genitals. 135 Nev. at 2, 432 P.3d at 754.

Unlike *Franks* and *LeMay*, this case did not involve child victims. Rather, this case involved an adult victim, who testified clearly at trial. Mr. Chaparro’s identity was not at issue, and the interaction at issue was captured on video. As discussed in Mr. Chaparro’s opening brief, the testimony of P.J. did describe a similar attack to the one alleged by L.L.: Mr. Chaparro grabbed a woman, near a casino, and proceeded to grope her. However, Mr. Chaparro’s prior misconduct with P.J. had very little probative value with respect to the central issue in this case: whether Mr. Chaparro sexually assaulted L.L., or battered her with the intent to do so.

In its answering brief, the State contends that the attack on P.J. was relevant, because Mr. Chaparro was ultimately convicted of battery with intent to commit sexual assault. RAB 6. However, P.J. never alleged any penetration by Mr. Chaparro, or any real attempt at penetration. Her testimony had extraordinarily limited probative value. Nonetheless, the similarity between the attack on P.J. and Mr. Chaparro's interactions with L.L. presented an extremely high danger of unfair prejudice: that the jury would convict Mr. Chaparro on the basis that he was a bad person, who routinely attacked women in public, and deserved punishment.

Given the limited relevance of P.J.'s testimony, and the high danger of unfair prejudice to Mr. Chaparro, the district court abused its discretion in admitting evidence related to Mr. Chaparro's prior sexual misconduct with P.J. Reversal is required on this basis.

The use of simultaneous audiovisual transmission for sentencing, over Mr. Chaparro's objection, violated his right to due process under the United States and Nevada Constitutions.

In its answering brief, the State submits that sentencing through simultaneous audiovisual transmission did not violate Mr. Chaparro's constitutional rights, because no right to confrontation exists at

sentencing. RAB 9. This is generally true. However, in addition to the Sixth Amendment confrontation clause, Fourteenth Amendment due process requires that a defendant has a right to be physically present at every critical stage of trial, including sentencing. *See Manning v. State*, 131 Nev. 206, 201-11, 348 P.3d 1015, 1018 (2015) (detailing the right to physical presence); *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978) (determining sentencing to be a critical stage of trial).

While it addresses the Sixth Amendment confrontation clause, rather than due process, Mr. Chaparro contends that *Lipsitz v. State* nonetheless provides a useful framework for examining the use of simultaneous audiovisual proceedings over a defendant's objection. 135 Nev. 131, 442 P.3d 138 (2019). Specifically, the court must determine that the use of technology in lieu of physical appearance is both (1) necessary; and (2) provides adequate indicia of reliability. *Id.* at 136-37, 442 P.3d at 143-44.

In its answering brief, the State contends that use of simultaneous audiovisual transmission was necessary, because indefinitely continuing Mr. Chaparro's sentencing hearing would have been both "inherently unreasonable and impracticable." RAB 10. Mr. Chaparro contends that

this is belied by the fact that the Second Judicial District Court has done precisely this for defendants currently awaiting jury trial, most recently vacating all scheduled criminal and civil jury trials through March 7, 2021. *See In the Administrative Matter of: The Second Judicial District Court's Response to Coronavirus Disease (COVID-19)*, Administrative Order 2020-05(E) (January 15, 2021) (viewable at <https://www.washoecourts.com/main/covid19response#AdminOrders>).

As stated in his opening brief, Mr. Chaparro was facing the imposition of a life sentence. He clearly expressed his desire to have an in-person sentencing hearing, and indicated that he was willing to wait indefinitely to do so. The State made no record at the trial level of any prejudice that would result from postponing Mr. Chaparro's sentencing hearing. The use of audiovisual technology over Mr. Chaparro's objection and request to continue violated his right to due process, and requires a new sentencing hearing.

CONCLUSION

As fully discussed in Mr. Chaparro's opening brief, the district court abused its discretion in restricting the ability of Mr. Chaparro to conduct a thorough and appropriate voir dire, and in admitting evidence of Mr.

Chaparro's prior sexual bad act, when the act had limited probative value, and presented clear danger of unfair prejudice. The district court also erroneously allowed the State's expert to present misleading testimony regarding the DNA analysis performed in this case. Each of these errors requires reversal.

Further, Mr. Chaparro is entitled to a new sentencing hearing where he is allowed the due process right of physical presence at the proceedings.

DATED this 9th day of February, 2021.

/s/ Kathryn Reynolds
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 1,676 words. NRAP 32(a) (7) (A) (i), (ii).

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

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of February 2021.

/s/ Kathryn Reynolds

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 9th day of February 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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