IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON JR.,	)	NO. 83335
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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REPLY ARGUMENT

I. The District Court Violated Newson's Right to Confrontation.

A. The State Cited Convenience as Justification for Marshall and Santana's Remote Testimony.

The State acknowledges that its Motion to Appear by Alternate Means filed in the district court merely explained that "witnesses will be unavailable without the use of video testimony." Respondent's Answering Brief ("RAB") 16 (citing AA I 50). Additionally, the State acknowledges, upon renewed objection at trial, it desired Marshall's testimony *via* video because "[] we're dealing with someone who's in a different state, who didn't want to travel. She's a new mother. She has

children. She had work responsibilities." RAB 17 (citing AA IV 828-829). Nevertheless, the State now claims it never cited convenience as justification for Marshall and Santana's video testimony at trial. RAB 16.

The State's justifications for Santana and Marshall's video testimony were inherently – indeed explicitly – based upon convenience to its witnesses. As the State **explicitly** noted in its motion, Marshall "works every day but the occasional Monday and cannot afford to appear for trial other than by video" and "currently lives in Phoenix, Arizona." AA I 50. Likewise, for Santana, "he started a new job and has mandatory training scheduled to begin on July 12 and running through mid-August. He currently lives in Pasadena, California." Id. Moreover, at trial, regarding Marshall, the State explained "I mean we're dealing with someone who's in a different state, who didn't want to travel. She's a new mother. She has children. She had work responsibilities." AA IV 828-29.

Without question, the prospect of missing work, the lack of funds for travel, and a conflict with mandatory training – for witnesses who are scheduled to testify at trial – are **explicitly** convenience concerns. Indeed, it defies logic, reason, and common sense for the

State to claim its justifications for Santana and Marshall's video testimony were for anything other than convenience.

Nevertheless, the State also suggests the district court's failure to make findings regarding Marshall and Santana's video testimony is somehow proof the State did not request video testimony due to convenience. RAB 16. However, ironically, by advancing this argument the State essentially concedes that the district court failed to make a case specific finding that the testimony of these witnesses *via* alternate means was necessary to further an important public policy. See Maryland v. Craig, 497 U.S. 836, 850 (1990). Additionally, the State essentially concedes the district court's failure violated Newson's due process rights. See Lopez v. State, 105 Nev. 68, 85 (1989) ("Failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations.").

The State also suggests – for the first time ever – that "each of the reasons cited by the State are also reasons a person would want to avoid the chances of being infected with and spreading COVID-19." RAB 17. Specifically, by travelling to Las Vegas to testify, both Marshall and Santana "risk becoming infected and spreading COVID-

19" which could possibly result in "serious illness or death" to them or someone else. Id. However, the State did not claim in the district court, and does not claim now, that Santana and Marshall were particularly susceptible to an adverse reaction to covid infection.[1] Indeed, without a specific vulnerability, these newly asserted and generalized concerns regarding potential covid infection applied equally to every trial participant, not just Santana and Marshall. Yet, the State expressed no concern about a general risk of Covid-19 to the 11 other witnesses, in addition to Marshall, Santana, and Newson, who testified at trial.[2]

Next, the State criticizes Newson for citing other jurisdictions to support his argument that a general covid threat is not an adequate justification to dispense with in-person testimony at trial. See RAB 18. The State argues the cited authorities are not binding on this Court. Id. This is true. However, Newson never claimed his reliance on these authorities was anything other than informative. Indeed,

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[1] A review of the transcripts from the district court proceedings confirms that neither the prosecutors nor the court uttered the words "covid," "Covid-19," "coronavirus," or "pandemic." This fact alone contradicts the State's claim that the court relied upon Covid-19 concerns to justify Marshall and Santana's remote testimony.

[2] Every potential juror arguably faced the same risk as Marshall and Santana, yet the State expressed no concern regarding juror Covid-19 risk.

Newson expressly noted that although this Court had not addressed Covid-19's impact on a defendant's confrontation right **at trial**, other jurisdictions had. AOB 21-22. Thus, Newson merely provided this Court with persuasive authorities to support his argument. There is nothing problematic about citing extra-jurisdictional authority in the absence of mandatory precedent.

Additionally, the State argues Newson's cited authorities contradict this Court's decision in Chaparro v. State, 497 P.3d 1187 (Nev. 2021). RAB 18. The State claims that Chaparro approved the district court's ability to craft procedures to address the covid pandemic, which ostensibly includes broadly allowing remote testimony. Id. However, this assertion represents an expansive interpretation of Chaparro.

In Chaparro this Court addressed the defendant's right to be physically present at sentencing during the Covid-19 pandemic. Id. at 1191. There, after the defendant's jury trial, the 2nd Judicial District Court issued a Coronavirus Administrative Order which required remote attendance at all "hearings." Id. Therefore, the AO did not apply to the defendant's trial, which had occurred in-person months earlier. Id. at 1190. Although the defendant argued on appeal that the

order nevertheless violated his confrontation right **at sentencing**, this Court declined to address the argument as defendant it raised it for the first time on appeal. Id. at 1192. Additionally, this Court noted that unlike trial, the constitutional right to confrontation does not apply to sentencing hearings. Id. fn. 2 (citing Summers v. State, 122 Nev. 1326, 1333 (2006)). Accordingly, because Chaparro did not involve the right to confrontation at trial, the State's reliance on Chaparro is misplaced.

Finally, the State contends Eighth Judicial District Court AO 21-04 did not "*require* the district court to make a finding that those appearing by alternate means are at a higher risk for COVID-19. RAB 21 (emphasis in original). The State is incorrect. While AO 21-04 stated appearance by alternative means were "preferred" to "reduce the potential for spread of infection," the order specifically excluded "bench trials" and jury trials[.]" AA I 62. Nevertheless, the order also explained for jury trials courts could "accommodate requests to appear by alternative means" but only for any ... "**witness who is considered a vulnerable person by CDC guidelines**." Id. (emphasis added). In Newson's case the State never asserted, and the district court never found, that either Marshall or Santana were "vulnerable"

persons per CDC guidelines.[3] Yet the express language in AO 21-04 required the State to assert that Marshall and Santana were somehow "vulnerable" to Covid19 infection per CDC guidelines to justify their testimony *via* alternative means. Additionally, this same language compelled the court to make an explicit finding that the witnesses were vulnerable before allowing their testimony by alternative means.

B. The District Court did not authorize Marshall and Santana to testify remotely due to Covid 19.

Regarding Newson's argument that the district court did not rely upon Covid when authorizing Marshall and Santana's remote testimony, the State essentially re-iterates many of the same arguments it made earlier in its Answering Brief. Basically, the State reiterates that the district court relied upon Covid-19 concerns to justify Marshall and Santana's remote testimony because the court,

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[3] The state's suggestion – that the court was not required to only accommodate "vulnerable" witnesses – begs the question, why did the State not request every witness testify *via* alternative means? Indeed, if the court was concerned about the general threat of coronavirus infection and spread, why did the court not order all witnesses to testify remotely? The answer is obvious, any order broadly authorizing testimony *via* alternative means, without case-specific findings of necessity, would unquestionably violate a criminal defendant's right to confrontation.

"unquestionably had an important interest in furthering the public policy of keeping the community safe from the spread of COVID-19." RAB 22. The State further cites the district court's explanation at trial – after it had already authorized the remote testimony – that "*it's a different time that we're living in*" as proof the court relied upon Covid-19 to justify allowing Marshall and Santana to testify remotely. Id. citing AA IV 829-830. Additionally, the State argues AO 21-04's admonition that courts, "should, to the extent possible, accommodate requests to appear by alternative means for any attorney, party or witness who is considered a vulnerable person under current CDC guidelines" somehow did not "limit the district court in allowing appearances by alternative means only to those that are at high risk for COVID-19." RAB 23. Finally, the State suggests because limiting Covid-19 infection and spread is generally an important public policy, "[t]he district court is not required to make a finding that a witness has a high risk of COVID-19 to allow for the use of video testimony." Id. at 23-24. The State is incorrect on all counts.

Virus suppression could necessitate a policy that limits courtroom attendance. Indeed, throughout the Covid-19 pandemic this Court endorsed judicial administrative orders regarding Covid-19

mitigation. These administrative orders limited public access to courtrooms and suspended jury trials. See generally Chaparro, 497 P.3d at 1190 (discussing Second Judicial District Court Administrative Orders issued due to Covid-19); Belcher v. State, 2022 WL 1261300, * 5-6 (Nev. Sup. Ct. April 27, 2022) (unpublished) (discussing a pandemic related trial delay and courtroom mask mandate). However, Nevada's Covid-19 mitigation strategy had changed when the Eighth Judicial District Court issued AO21-04. Consequently, AO 21-04 relaxed certain restrictions which had been in place earlier in the pandemic.[4] Thus, while AO 21-04 reiterated the district court's concern about limiting viral spread, it acknowledged in-person jury trials could proceed without the sweeping Covid-19 restrictions previously imposed. Accordingly, AO 21-04 – contrary to the State's assertion otherwise – did limit the court's ability to authorize appearance by alternative means by explicitly exempting jury trials

[4] AO 21-04 exempted "fully vaccinated" individuals from mask-wearing in certain courthouse settings ostensibly because on April 5, 2021, all Nevadans 16 or 18 years or older were eligible for one of the three Covid-19 vaccines. See Covid-19: Vaccination scheduling opens to all Nevada Adults April 5, available at <https://thisisreno.com/2021/03/covid-19-vaccination-scheduling-opens-to-all-nevada-adults-april-5/>, accessed May 2, 2022.

and only creating an exception for any witness considered "vulnerable" under CDC guidelines. AA I 62.

Finally, nothing in AO 21-04 dispensed with the district court's obligation to make an explicit finding that a particular witness's appearance by alternative means at trial was necessary to further an important public policy. See Lipsitz v. State, 135 Nev. 131, 132 (2019) (citing Craig, 497 U.S. at 850). In fact, AO 21-04's allowance for remote testimony for vulnerable persons is proof that Newson's district court was required to find that allowing Marshall and Santana to testify remotely was necessary to protect them from potential covid exposure due to their vulnerabilities, which is inarguably an important public policy. Accordingly, to the extent the district court relied upon Covid-19 to allow Marshall and Santana's remote testimony, the court erred by not making a case-specific finding that the remote testimony was somehow necessary to further an important public policy.[5]

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[5] Newson reiterates because the district court failed to comply with Craig's requirement that it make a case specific finding that a particular witness's testimony *via* alternative means is necessary to further an important public policy, this Court need not consider whether the reliability of the testimony was otherwise assured. See U.S. v. Yates, 438 F.3d 1307, 1318 (11th Cir. 2006)

II. The District Court's Violation of Newson's Right to Confrontation Was Not Harmless.

The State argues that assuming the district court erred by allowing Marshall and Santana to testify remotely, the error was harmless because it did not have "a 'substantial and injurious effect or influence' on the jury in reaching their verdict." RAB 27 (quoting Knipes v. State, 124 Nev. 927, 935 (2008). The State relies upon NRS 178.598 which states, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." As this Court has noted, NRS 178.598 is identical to the federal harmless error statute, Fed. Rule Crim. Pro. 52(a). Knipes, 124 Nev. at 935. Because NRS 178.598 follows the federal rule, Nevada applies the federal harmless error test announced in Kotteakos v. U.S., 350 U.S. 750, 776 (1946), and determines whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Knipes, 124 Nev. at 935. However, this is the incorrect standard of review in Newson's case.

NRS 178.598 applies to non-constitutional trial error. The issue in Newson's case, denial of the right to confrontation, is constitutional trial error. See Medina v. State, 122 Nev. 346, 355 (2006); Coy v.

Iowa, 487 U.S. 1012, 1021-22 (1988). For constitutional error, this Court will reverse unless "the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Medina, 122 Nev. at 355 (citing Sullivan v. Louisiana, 580 U.S. 275, 279 (1993); Chapman v. California, 386 U.S. 18, 24 (1967)). Additionally, "[a]n assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence. Coy, 487 U.S. at 1021-22.

Here, although the State asserts the incorrect standard of review, it nevertheless argues that Newson's jury would have reached the same verdict had the witnesses testified in-person. See RAB 27-29. Admittedly, with respect to Santana, it is unlikely his remote testimony contributed to the verdict. As the State notes, Santana's testimony was largely a factual recitation regarding evidence collection at the scene where Newson's conceded he shot McNeil. In contrast however, Marshall's improper remote testimony absolutely contributed to the verdict.

Although Newson testified at trial, Marshall's testimony concerning Newson's demeanor shortly after McNeil's killing was important corroborative evidence to support Newson's defense theory. In fact, because Newson's testimony was essentially self-serving, Marshall's corroborative testimony took on greater significance. See Daniel v. State, 119 Nev. 498, 516 (2003) (citing State v. Daniels, 465 N.W.2d 633, 636 (WI. 1991), recognizing the importance of corroborative evidence in context of a defendant's self-serving claim of self-defense). Therefore, the jury's ability to assess Marshall's demeanor, free from distractions, was crucial to assessing her credibility and weighing her corroborative testimony. See generally McNair v. State, 108 Nev. 53, 56 (1992) ("The established rule is that it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."). However, the jury's ability to assess Marshall's credibility was compromised due to numerous distractions during her testimony. Specifically, a smoke alarm chirped, Marshall moved around her house, and a one point retrieved and attended to a baby.[6] See AA IV 827. Moreover, the

[6] As Newson noted in his Opening Brief, Marshall's behavior while testifying failed to comport with AO 21-04's admonition that

audio/visual technology the court used "kept going in and out during certain portions[.]" AA IV 827. These problems necessitated three (3) sidebars and an admonition from the court.[7] See AA IV 806, 807-808, 811. Without question these distractions affected the flow of Marshall's testimony which would undeniably impair the juror's ability to judge Marshall's credibility and properly weigh her corroborative testimony. Additionally, the mere fact that Marshall testified remotely, in addition to her behavior while testifying, signaled to the jury that her testimony was less important than other witnesses. However, Marshall was arguably the most important witness at Newson's trial, given the corroborative nature of her testimony. Basically, due to technical difficulties and other distractions the jury could not adequately assess Marshall's demeanor nor judge her credibility, which was essential to ensure Newson received a fair trial and fair consideration of his defense theory.

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testimony by alternative means "constitutes a court appearance" and "should be made from a quiet place free from distractions." AA I 62.

[7] The court admonished Marshall at one point, "Okay. And, Ms. Marshall, I apologize. **I know that there's some issues going on that affected your ability to travel.** But we need you to stay -- you have to stay in one place while you're testifying, because we have to treat this just like we would if you were here in court." AA IV 807-08. Notably, the court's reference to "issues affecting travel" is further proof that the court authorized Marshall's remote testimony due to convenience and not Covid-19.

Accordingly, the erroneous decision to allow Marshall's remote testimony inarguably contributed to the verdict obtained and mandates reversal.

CONCLUSION

Based upon the foregoing arguments, Newson respectfully requests this Court reverse his conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

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

DATED this 4th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of May, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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