

526 P.3d 717
Supreme Court of Nevada.

Vernon NEWSON, Jr., Appellant,
v.
The STATE of Nevada, Respondent.

No. 83335
|
Filed March 30, 2023

Synopsis

Background: Defendant was convicted in the District Court, Clark County, Douglas W. Herndon, J., of offenses including first-degree murder with the use of a deadly weapon. Defendant appealed. On reconsideration en banc, the Supreme Court, Silver, J., 136 Nev. 181, 462 P.3d 246, remanded for new trial. On remand, after granting State's motion to allow two witnesses to testify via an in-court, live video-conference call, and after denying defendant's motion for mistrial based on technical difficulties during such testimony, the District Court, Clark County, Tierra Danielle Jones, J., entered judgment on verdict convicting defendant for first-degree murder with the use of a deadly weapon. Defendant appealed.

Holdings: The Supreme Court, Stiglich, C.J., held that:

a district court must make case-specific findings as to why remote testimony is necessary in light of the COVID-19 pandemic in order to allow remote testimony on the basis of the pandemic; and

remote testimony violated defendant's right to confrontation; but

testimony of witnesses who appeared remotely was reliable; and

error in permitting witnesses to testify remotely without a finding of necessity was harmless beyond a reasonable doubt.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection; Pre-Trial Hearing Motion.

*718 Appeal from an amended judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Attorneys and Law Firms

Darin F. Imlay, Public Defender, William M. Waters, Chief Deputy Public Defender, and Ryan J. Bashor, Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Alexander G. Chen and Taleen Pandukht, Chief Deputy District Attorneys, Clark County, for Respondent.

BEFORE THE SUPREME COURT, EN BANC.¹

¹ The Honorable Douglas W. Herndon, Justice, is disqualified from participation in this matter. Although not present at oral argument, the Honorable Patricia Lee, Justice, and the Honorable Linda Marie Bell, Justice, reviewed the oral argument in their consideration of this matter.

OPINION

By the Court, STIGLICH, C.J.:

*719 In this opinion, we examine whether a district court's invocation of general, as opposed to case-specific, concerns related to the COVID-19 pandemic justifies dispensing with a defendant's right to in-person confrontation. We conclude it does not. The right to confront one's accuser in person at trial is sacrosanct. As both this court and the United States Supreme Court have explained, remote testimony by way of video-conferencing satisfies the right to confrontation only if (1) the district court finds that permitting a witness to testify remotely is necessary to further a compelling public policy interest, and (2) the testimony is otherwise reliable. 

Maryland v. Craig, 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *Lipsitz v. State*, 135 Nev. 131, 136, 442 P.3d 138, 143 (2019).

While we acknowledge that efforts to curtail the spread of the COVID-19 virus and protect the public health constitute compelling public policy interests, to satisfy procedural safeguards a district court must make specific findings as to why permitting a witness to testify remotely is necessary to further this interest. Concerns of convenience, cost-savings, or efficiency generally do not justify permitting remote testimony. Because the district court did not make the required findings of necessity before allowing two witnesses to testify remotely at appellant's murder trial, we conclude that appellant's right to confrontation was violated. Nevertheless, because this constitutional error was harmless beyond a reasonable doubt, we affirm the judgment of conviction.

BACKGROUND

Appellant Vernon Newson, Jr., fatally shot his girlfriend Anshanette McNeil in a car in which two children were present. The State charged Newson with murder with the use of a deadly weapon; two counts of child abuse, neglect, or endangerment; and ownership or possession of a firearm by a prohibited person. At his first trial, the district court declined to give Newson's proffered voluntary manslaughter instruction, and Newson was convicted on all counts. On appeal, this court reversed Newson's first-degree murder conviction, concluding that the district court abused its discretion by failing to give the voluntary manslaughter instruction, affirmed the remaining convictions, and remanded the matter for a new trial. *Newson v. State*, 136 Nev. 181, 462 P.3d 246 (2020).

Before the second trial, the State moved to have two of its witnesses, Zaharia Marshall and Officer Boris Santana, testify via an in-court, live video-conference call. Regarding Marshall, the State explained that she worked almost every day, could not afford to appear for trial other than by video, and lived in Phoenix, Arizona. As to Officer Santana, the State explained that he had commenced a new job, had mandatory training during the pendency of the trial, and now lived in Pasadena, California. The State did not point to any

COVID-19-related concerns for either witness. Regardless, the State justified its motion by referencing an administrative order of the Eighth Judicial District Court, *In the Administrative Matter Regarding All Court Operations in Response to Covid-19*, Administrative Order (AO) 21-04, to support the remote appearances. The order, which was entered in June 2021 to update court procedures during the pandemic, states, in relevant part, "For trials, District Court Judges should, to the extent possible, accommodate requests to appear by alternative means for any attorney, party or witness who is considered a vulnerable person [as to COVID-19] under current CDC guidelines." AO 21-04 at 4.

Newson argued that the State failed to explain why either Marshall or Officer Santana was considered a vulnerable person under CDC guidelines. Rather, Newson pointed out that the State merely offered reasons why Marshall and Officer Santana would find it inconvenient to testify at trial, like cost and vocational concerns, which did not fit within AO 21-04's parameters. He also argued that AO 21-04 is unconstitutional.

*720 The district court granted the State's motion, stating that it would ask the remote witnesses under oath to confirm that they were alone in the room from which they would be testifying. The district court did not make any findings as to why it was necessary for the witnesses to testify remotely. Indeed, the court did not hear at any point from either Marshall or Officer Santana as to why it was necessary for them to testify remotely.

Both witnesses testified at trial via a video-conferencing platform. Marshall testified that McNeil was her godsister and that she babysat McNeil's two youngest children every day. She testified that on the night of the shooting, McNeil called her. On the phone call, McNeil told Marshall that she and Newson had engaged in an argument and that she would drop off her children at Marshall's house, but McNeil never arrived. Rather, Marshall testified that a frantic Newson arrived and pulled into her driveway with McNeil's children. In the vehicle, she saw that one of the children's pants and the car seat were stained with blood. Newson gave the children to Marshall, along with McNeil's purse. After Newson left her house in the vehicle, Marshall found bullets in her driveway. Marshall called McNeil, but she did not answer. On cross-examination, Marshall testified that

Newson and McNeil often argued in the car and fought almost every day.

Officer Santana recounted that he was called to an on-ramp to Interstate 15 responding to a report that someone had been shot. By the time he arrived at the scene, McNeil had already been transported to the hospital. He testified that he helped other officers secure the location and preserve evidence. At the scene, he saw bullet shell casings, a cellphone, and a pool of blood. Newson did not cross-examine Santana.

Newson moved for a mistrial, taking issue with certain technical difficulties that occurred during Marshall's video-conference testimony. He argued that Marshall's audio kept cutting in and out, which “really affected this jury's ability to assess her demeanor and credibility.” Newson also pointed out that a smoke alarm chirped throughout the testimony, Marshall moved around her house while testifying, and she retrieved her baby, who made noises in the background. In moving for a mistrial, Newson also renewed his argument that the State's reasons for justifying the witnesses testifying remotely were due to convenience and did not arise out of concerns related to COVID-19.

The district court denied Newson's motion for a mistrial. In so doing, it invoked the COVID-19 pandemic generally, observing,

Well, I mean this is the situation we're in. While it's not ideal to have any witnesses testifying via audio/visual technology, it's a different time that we're living in, and we have people under different circumstances. And in light of everything that has happened in the last year, the Court has specific orders that are in place by our chief judge that allows for this type of audio/visual testimony as well as there are statutes that allow for this. This issue has been brought before the legislature, and that is absolutely allowed.

Thereafter, Newson testified to the following facts: while he was driving and McNeil was riding in the seat behind him, McNeil started a confrontation with him. In the ensuing moments, McNeil reached forward from the backseat and started choking Newson. He slowed the car to a stop, at which point McNeil stated that Newson was “dead” and

began rummaging in her purse, in which Newson knew she had a gun. Newson retrieved his gun from the vehicle's center console and pointed it behind him at McNeil. When she pulled her hand from her purse, Newson closed his eyes and fired his gun until it ran out of bullets.

The jury convicted Newson of first-degree murder with the use of a deadly weapon. This appeal followed.

DISCUSSION

The district court violated Newson's right to confrontation by permitting Marshall and Officer Santana to testify remotely Newson argues that the district court violated his constitutional right to confrontation by permitting Marshall and Officer Santana to testify via video. Newson maintains that the witnesses' convenience does not justify *721 permitting remote testimony. Newson further argues that the district court should not have summarily ordered that the witnesses may appear remotely without making any case-specific findings. We agree.

“[W]hether a defendant's Confrontation Clause rights were violated is ultimately a question of law that [we] review[] de novo.”  *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (internal quotation marks omitted). “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him” U.S. Const. amend. VI; Nev. Const. art. 1, § 8(1). We have observed that “[f]ace-to-face confrontation is the foundation upon which the United States Supreme Court's Confrontation Clause jurisprudence evolved.”  *Chavez*, 125 Nev. at 337, 213 P.3d at 483. The right to confrontation is satisfied by remote testimony if (1) having a witness testify remotely “is necessary to further an important public policy,” and (2) “the reliability of the [witness's] testimony is otherwise assured.”  *Lipsitz*, 135 Nev. at 136, 442 P.3d at 143 (applying the standard set forth in  *Craig* to two-way audiovisual communication); see SCR Part IX-A(B) Rule 2. Remote testimony may only be used after the trial court hears evidence and makes a case-specific finding that remote testimony is necessary.  *Lipsitz*, 135 Nev. at 136-37, 442 P.3d at 143. Remote testimony, as set forth in Nevada

Supreme Court Rules Part IX-A(B), is generally reliable—it allows the witness to swear under oath, the defendant to cross-examine the witness, and the court and jury to observe the witness's demeanor and judge her credibility.  *Id.* at 138, 442 P.3d at 144.

Case-specific findings, as opposed to general concerns related to the COVID-19 pandemic, are required before permitting witnesses to testify remotely

The district court failed to make the requisite finding under  *Lipsitz* that remote testimony was necessary to further a compelling public policy interest. See  *id.* at 136-37, 442 P.3d at 143. The State nevertheless argues that preventing the spread of COVID-19 is a compelling public policy interest supporting the remote testimony in this case. We disagree.

We are not the first court to consider a defendant's confrontation right in light of the COVID-19 pandemic. Other courts that have considered this issue agree that a trial court must make a case-specific finding of necessity prior to invoking the pandemic to justify a witness testifying remotely. This case-specific finding could be witness-specific; for example, that a witness has a particular susceptibility to the COVID-19 virus. See, e.g.,  *C.A.R.A. v. Jackson Cty. Juvenile Office*, 637 S.W.3d 50, 65-66 (Mo. 2022) (reversing the adjudication of a juvenile as delinquent because the trial court failed to make specific findings as to why an enhanced risk to COVID-19 necessitated remote witness testimony). Or the case-specific finding could relate to the state of the pandemic in the trial court's locality at the time of the defendant's trial. See, e.g.,  *People v. Hernandez*, 488 P.3d 1055, 1058 (Colo. 2021) (upholding trial court order allowing remote testimony where order contained detailed findings regarding the county's high COVID-19 incident rate, lack of hospital beds, and a statewide mask mandate).

 *C.A.R.A.* and  *Hernandez* reflect the conclusion that courts around the country have reached in considering a defendant's confrontation rights in light of the pandemic—that a trial court must make case-specific findings related to COVID-19 before citing that pandemic as a justification for permitting a witness to testify remotely. See also, e.g.,  *State v. Comacho*, 309 Neb. 494, 960 N.W.2d 739, 754-56,

cert. denied, — U.S. —, 142 S. Ct. 501, 211 L.Ed.2d 303 (2021); *State v. Stefanko*, 193 N.E.3d 632, 639 (Ohio Ct. App. 2022);  *State v. Milko*, 21 Wash.App.2d 279, 505 P.3d 1251, 1256 (2022). Abstract concerns related to the pandemic generally are not an adequate justification for dispensing with a defendant's right to in-person confrontation. Although preventing the spread of COVID-19 constitutes a compelling public policy interest, we find these cases persuasive. Accordingly, we hold that a district court must make case-specific findings as to why remote testimony is necessary in light of the pandemic.

*722 Here, to the extent that the district court relied on the pandemic to justify permitting remote testimony, such reliance was impermissibly based on general concerns related to the virus. The court did not make specific findings as to why the pandemic necessitated remote testimony in this case. While we acknowledge that COVID-19 may have justified taking remote testimony from certain witnesses under specific circumstances, the district court did not identify any such circumstances in this case.

Convenience, efficiency, and cost-savings generally do not justify permitting witnesses to testify remotely

We turn then to the reasons the State proffered below to justify Marshall's and Officer Santana's remote appearances. Despite invoking AO 21-04 in its motion, the State listed reasons related to the witnesses' ability to travel and other personal or job-related concerns. These reasons sound primarily in witness convenience. Indeed, at oral argument before this court, the State admitted that convenience was the proffered justification for the remote testimony. The State conceded that its request for remote testimony was inadequate and that it failed to include pandemic-related justifications—for example, that travel could subject Marshall's newborn child to the virus—in its request. To that end, we find nothing in the record to indicate that the State ever discussed any pandemic-related concerns with either witness.

“There is ... a general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face confrontation.” *State v. Rogerson*, 855 N.W.2d 495, 507 (Iowa 2014); see also Ayyan Zubair, Note,

Confrontation After Covid, 110 Calif. L. Rev. 1689, 1699, 1714-15 (2022) (collecting cases that hold that mere efficiency or cost-saving concerns are insufficient for a finding of necessity under [Craig](#)). Here, the district court did not make a finding of necessity related to any of the concerns the State raised in its motion as to why its witnesses needed to testify remotely. Neither witness testified as to why any of those concerns necessitated remote appearances. And neither general concerns related to the COVID-19 pandemic nor concerns of convenience, efficiency, or cost-savings justify permitting the remote testimony. Accordingly, to the extent that the district court relied upon these factors in permitting the witnesses' remote testimony, such was a violation of Newson's right to in-person confrontation.

Although the district court erred in permitting the witnesses' remote appearances, we note that the witnesses' testimony was reliable: the witnesses were sworn under oath, Newson had the opportunity to cross-examine each, and the court and jury were able to observe the witnesses' demeanor and judge their credibility. See [Lipsitz](#), 135 Nev. at 138, 442 P.3d at 144; see also [Craig](#), 497 U.S. at 851, 110 S.Ct. 3157 (“Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.”).

Reversal is not warranted because the district court's error was harmless beyond a reasonable doubt

The State argues that even if the district court erred by allowing the witnesses to testify via video, we should nevertheless affirm Newson's conviction. The State argues that Marshall's testimony supported Newson's theory of the case and disallowing it would have been detrimental to him. Newson counters that permitting Marshall to testify via video was not harmless because her testimony was critical to his defense. He argues the effectiveness of that testimony was impaired because the jury's ability to assess Marshall's credibility was compromised due to technical issues during her testimony.

Where a Confrontation Clause error has occurred, “reversal is not required ‘if the State could show beyond a reasonable *723 doubt that the error complained of did not contribute to the verdict obtained.’ ” [Medina v. State](#), 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (quoting [Sullivan v. Louisiana](#), 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (internal quotation marks omitted)); see also [Chapman v. California](#), 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (creating this standard). To determine whether an error contributed to the verdict obtained, we consider the following factors: “the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, ... and, of course, the overall strength of the prosecution's case.” [Medina](#), 122 Nev. at 355, 143 P.3d at 477 (omission in original) (quoting [Delaware v. Van Arsdall](#), 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). The State bears the burden of demonstrating that a constitutional error was harmless beyond a reasonable doubt. See [Polk v. State](#), 126 Nev. 180, 183 n.2, 233 P.3d 357, 359 n.2 (2010).

We conclude that permitting Marshall and Officer Santana to testify remotely was harmless beyond a reasonable doubt because the jury's verdict was unattributable to the error. The defense conceded that Newson shot McNeil, and thus the issue at trial was whether Newson was guilty of murder or voluntary manslaughter. Compare NRS 200.010(1) (defining “murder”), with NRS 200.050(1) (defining “voluntary manslaughter”). The record demonstrates that Newson wanted Marshall to testify and viewed her testimony as being critical to his defense. Newson cross-examined Marshall and elicited from her the same testimony she provided in his first trial—specifically the testimony that could have implicated a verdict of voluntary manslaughter. Importantly, Newson testified at trial. The jury therefore had the opportunity to assess his demeanor and credibility, in addition to Marshall's testimony.

As noted above, we conclude that Marshall's testimony was reliable for the purposes of [Craig](#) and [Lipsitz](#). Furthermore, we are not persuaded that any technical issues during Marshall's testimony downplayed the importance of her testimony. Newson complains that a fire alarm chirped periodically in Marshall's home, that Marshall moved

throughout her home several times prior to being admonished by the district court to stay in one place, and that Marshall retrieved a baby from its nap during her testimony. Each of these minor issues were addressed to the extent needed by the district court to ensure that they had minimal impact on the delivery of Marshall's testimony. And the district court gave both the State and Newson the time needed to fully elicit Marshall's testimony. Accordingly, we conclude that the error of permitting Marshall to testify remotely did not contribute to the jury's verdict and was therefore harmless beyond a reasonable doubt.²

² We also conclude that the error of permitting Officer Santana to testify remotely was harmless beyond a reasonable doubt. Officer Santana's testimony regarding the state of the crime scene was largely duplicative of two other witnesses who testified in person at Newson's trial, and Newson concedes on appeal that Santana's testimony likely did not contribute to the jury's verdict.

CONCLUSION

The COVID-19 pandemic impacted many aspects of our criminal justice system. We acknowledge that case-specific concerns related to the virus may constitute a public policy justification for dispensing with a criminal defendant's right to in-person confrontation. However, general concerns related to the spread of the virus are not sufficient to dispense with this vital constitutional protection. Nor were the State's concerns related to convenience, cost-savings, or efficiency sufficient to justify the witnesses' remote testimony in this case. Here, the district court erred in permitting two witnesses to testify remotely without making the requisite findings of necessity and, therefore, violated Newson's right to confrontation. Nevertheless, we conclude that the district court's error was harmless beyond a reasonable doubt in light of the testimony's nature, the fact that the jury was able to assess Newson's credibility in light of his own testimony, and because it did not contribute to the *724 jury's verdict. Accordingly, we affirm Newson's judgment of conviction.

We concur:

Cadish, J.

Pickering, J.

Lee, J.

Parraguirre, J.

Bell, J.

All Citations

526 P.3d 717, 139 Nev. Adv. Op. 9

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.