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# Summary of Knipes v State, 124 Nev. Adv. Op. No. 79

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## CRIMINAL LAW – REVIEW OF JUROR QUESTION SAFEGUARDS

### Summary

Appeal from a conviction of driving under the influence causing death on the basis that the district court failed to follow the procedural safeguards for juror questioning.

### Disposition/Outcome

Affirmed the district court's conviction holding failure to follow procedural safeguards for juror questioning is reviewable under harmless error review and clarified one of the procedural safeguards for juror questioning.

### Factual and Procedural History

On the morning of June 6, 2006, appellant Michael Knipes and his friend Adam Wintch were involved in a single vehicle rollover accident after drinking at a bar the evening before. Wintch suffered fatal injuries. In the ambulance on the way to the hospital, Knipes told the emergency medical technician he only wished he had been driving. He told a state trooper at the hospital and later in a voluntary statement that he had been driving. His blood was drawn at the hospital and his blood alcohol concentration (BAC) was 0.14 and had traces of marijuana metabolite.

At Knipes trial, the district court allowed the jury to ask witnesses multiple questions. The district court determined the admissibility of most of these questions in unrecorded bench conferences with the jury still seated. However the district court held no bench conference on the admissibility of four jury questions aimed at the licensed practical nurse that drew Knipes blood at the hospital that night. The jury asked her the following four questions: (1) whether she smelled alcohol on Knipes; (2) whether her initials were on the vials of Knipes' blood; (3) whether she saw Wintch at the hospital that night; and (4) whether she saw the color of Wintch's hair. She answered no to the first and fourth questions and yes to the second and third questions.

### Discussion

#### The Admissibility Hearings

Knipes argues that the hearings concerning the admissibility of juror questions should be on-the-record. The court agrees stating that any hearing concerning the admissibility of a juror question to which one side or the other has objected to the district court must conduct on-the-record.

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<sup>1</sup> By Miranda Mahe

The court first allowed juror questions in *Flores v. State*<sup>2</sup>, but established seven procedural safeguards to prevent prejudice.<sup>3</sup> One of those procedural safeguards was to allow each side to object to a juror question and have the court hear the admissibility of that question outside the presence of the jury so as not to offend the juror responsible for the question.<sup>4</sup>

In order to preserve the record for appeal, the district court must conduct admissibility hearings concerning juror questions on-the-record. The court requires the district courts hear similar determinations in other situations on-the-record as well. Because the court only hears issues established in the record of the district court, by holding hearings on admissibility of juror questions off-the-record the district court shields these hearings from appellate review. Thus the court holds that the district court in this case abused its discretion by not holding such hearings on-the-record.

Additionally, the court held that the district court abused its discretion by not conducting admissibility hearings on four juror questions because it violated two Lopez safeguards for juror questions by not holding a hearing and by not allowing either party to object to any of the questions.

### The Harmless Error Review

Knipes argues a violation of the Lopez safeguards is structural in nature and is not subject to harmless-error review. However, the court concludes a violation of the Lopez safeguards is an evidentiary matter and not a structural error because it “is not the sort of error that would ‘necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’”<sup>5</sup> While the Lopez safeguards were established to protect against prejudice, there is no proof that juror questions will result in prejudice. Furthermore, harmless-error review is allowed in bad act evidence appeals and that kind of evidence is more vulnerable to prejudice. Additionally, the few jurisdictions that do not allow juror questions do so out of separation of powers concerns.

Therefore failure to follow the Lopez safeguards is subject to harmless error review under NRS 178.598. The proper test in determining whether such an error was harmless is to look at “whether the error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’”<sup>6</sup> In applying this test, the court found the failure to hold the admissibility hearings on-the-record were harmless because the district court did so in an attempt to comply with one of the other Lopez safeguards. The court also found that the four juror questions admitted without a hearing was harmless because none of these questions would have resulted in an inference of guilt. Additionally, a reasonable juror considering all the other evidence together could have found Knipes guilty.

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<sup>2</sup> *Flores v. State*, 114 Nev. 910, 965 P.2d 901 (1998).

<sup>3</sup> *Id.* at 913, 965 P.2d at 902-903.

<sup>4</sup> *Id.*

<sup>5</sup> *Knipes v. State*, 124 Nev. Adv. Op. No. 79, 4 (2008) (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)).

<sup>6</sup> *Id.* at 4 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

## **Conclusion**

The court extended the Lopez safeguards for juror questions to include the requirement that admissibility hearings be heard on-the-record to allow such hearings to be appealable. The court also found that violations of the Lopez safeguards shall be subject to harmless-error review. Therefore, the court held that the district court abused its discretion by not holding admissibility hearings for juror questions on-the-record and by not holding admissibility hearings on four juror questions at all, but that these abuses of discretion were harmless and the conviction was affirmed.