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### Lipsitz v. State, 135 Nev. Adv. Op. 17 (June 6, 2019)

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## CRIMINAL LAW: COMPETENCY, AUDIOVISUAL TESTIMONY, EVIDENCE

### **Summary**

The Court reviewed an appeal from a defendant who was convicted of seven sexually related counts. The defendant challenged his conviction on three grounds: (1) that the district court erred in permitting the victim to testify via two-way audiovisual transmission; (2) that the district court abused its discretion in proceeding to trial after the State raised concerns about the defendant's competency; and (3) that the district court erred in convicting the defendant of both sexual assault and attempted sexual assault where both counts were based on the same incident.

The Court concluded that the district court properly permitted testimony via audiovisual transmission and adopted the *Craig* test to determine when audiovisual testimony is proper. The court further concluded that the district court did not abuse its discretion in allowing the trial to proceed despite questions regarding the defendant's competency, but that the district court erred in convicting the defendant of both sexual assault and attempted sexual assault.

### **Facts and Procedural History**

The defendant was charged with seven sexually related counts including both sexual assault and attempted sexual assault. The victim alleged that the defendant trespassed into a residential treatment facility where the victim was seeking treatment for trauma related to her previous experiences as a sex trafficking victim. At around 5 a.m., the victim awoke to find the defendant standing at the end of the couch, in the recreation room, upon which she had been sleeping. The defendant allegedly exposed himself to the victim and forced her to have sex with him. The defendant then attempted to force the victim to perform fellatio on him, but she was able to resist. Angry at her resistance, the defendant walked away. Another patient and facility staff members saw the defendant exiting the treatment center. Police officers found the defendant near the center.

After being indicted, the defendant invoked his right to a speedy trial. The defendant subsequently opposed a motion, brought by the State, to allow the victim to testify via two-way audiovisual transmission. The district court granted the State's motion, because the victim was a patient at an out-of-state treatment center and because the defendant had refused to allow a continuance of the trial until the victim was released from the treatment facility. Thus, the district court ruled, the only way for the victim to testify on the preset trial dates was by deposition or by audiovisual transmission.

During a pretrial hearing, the State raised concerns regarding the defendant's competency. The defendant's counsel refuted any competency concerns and, after the court engaged in a "lengthy canvas" of the defendant, the court found no basis to doubt his competency. The next day, the court again canvassed the defendant and again found him competent to proceed to trial. The district court again questioned the defendant's competency when, on the first day of trial, the defendant refused to change into a suit despite concerns that appearing before the jury in jail clothes might prejudice the jury against him. After conferring with the defendant's counsel, the district court once again found the defendant to be competent for trial.

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<sup>1</sup> By Jordan Gregory Cloward.

During trial, the defendant repeatedly rebuked the court for permitting the victim to testify via audiovisual transmission. The defendant was angered, it appeared, by a misunderstanding over how the audiovisual technology worked – the defendant thought that the victim’s testimony had been prerecorded and was being presented to the court via YouTube. Eventually, the defendant waived his right to appear at trial and the district court ordered his removal from the courtroom.

The jury found the defendant guilty on all counts except for one count of sexual assault. The district court sentenced the defendant to 20 years to life in prison.

## **Discussion**

*The district court did not abuse its discretion in proceeding to trial after the State expressed concerns about the defendant’s competency*

The Court reviewed the district court’s refusal to order a competency evaluation under an abuse of discretion standard of review.<sup>2</sup> While whether there is a doubt as to a defendant’s competency is within the discretion of the trial court, where there is “substantial evidence that the defendant may not be competent to stand trial,” the trial court must hold a competency hearing.<sup>3</sup>

The Court concluded that the trial court did not abuse its discretion in proceeding to trial because there was substantial evidence that the defendant was competent to stand trial. The trial court relied on assurances from the defendant’s counsel, its own interactions with the defendant, and the defendant’s responses to the court’s canvass in concluding that the defendant was competent for trial. While the defendant’s behavior was “obstinate,” the record did not provide enough evidence to support a conclusion of discretion of abuse by the trial court.

*Allowing the victim to testify via simultaneous audiovisual transmission, pursuant to the procedure set forth in Nevada Supreme Court Rules Part IX-A(B), did not violate the defendant’s rights under the Confrontation Clause*

The Court reviewed *de novo* whether the trial court violated the defendant’s rights under the Confrontation Clause in permitting the victim to testify via two-way audiovisual transmission.<sup>4</sup> The Sixth Amendment’s Confrontation Clause provides criminal defendants the right to cross-examine witnesses who testify against them.<sup>5</sup> However, face-to-face confrontation at trial may be denied where “denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”<sup>6</sup>

The Court took the opportunity to adopt the Supreme Court’s test presented in *Craig v. Maryland*, to determine whether permitting a witness to testify via audiovisual transmission violates a defendant’s right to confrontation.<sup>7</sup> The Court concluded that the district court properly

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<sup>2</sup> See *Olivares v. State*, 124 Nev. 1142, 1148 (2008) (“A district court abuses its discretion and denies a defendant his right to due process when there is reasonable doubt regarding a defendant’s competency and the district court fails to order a competency evaluation”).

<sup>3</sup> *Melchor-Gloria v. State*, 99 Nev. 174, 180 (1983); *Olivares*, 124 Nev. at 1148.

<sup>4</sup> See *Chavez v. State*, 125 Nev. 328, 339 (2009) (“whether a defendant’s Confrontation Clause rights were violated is ‘ultimately a question of law that must be reviewed *de novo*’” (citations omitted)).

<sup>5</sup> *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

<sup>6</sup> *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

<sup>7</sup> Under the *Craig* test, two-way video testimony is permitted if (1) it “is necessary to further an important public policy,” and (2) “the reliability of the testimony is otherwise assured.” *Id.*

permitted the victim to testify via two-way transmission because the decision (1) promoted “important public policy” by protected the victim’s well-being and ensuring the defendant’s right to a speedy trial, and (2) the transmission permitted the jury to hear and observe the victim and permitted the defendant to cross-examine the victim.

*The defendant’s conviction for both sexual assault and attempted sexual assault based on the same conduct was in error, and there was insufficient evidence to uphold the sexual assault charge*

The defendant argued, and the state conceded, that the convictions of both sexual assault and attempted sexual assault based upon a single act – namely, the defendant touching his penis to the victim’s closed mouth – could not stand simultaneously. The defendant argued that the Court should vacate the sexual assault conviction because there was no penetration, while the State argued that the conviction of sexual assault was valid, based upon the definition of fellatio presented in the jury instructions.<sup>8</sup> The Court agreed that both convictions could not stand, and reviewed the record to determine whether there was sufficient evidence to support a conviction of the greater of the two charges – sexual assault.

The Court conducted its analysis under a sufficiency of evidence standard of review.<sup>9</sup> As relevant to the case, NRS 200.364(9) defines sexual penetration as “fellatio, or any intrusion, however slight, of any part of a person’s body.”<sup>10</sup> To prove attempted sexual assault, the prosecution must establish “that (1) [the defendant] intended to commit sexual assault; (2) [the defendant] performed some act toward the commission of the crime; and (3) [the defendant] failed to consummate its commission.”<sup>11</sup> Thus to affirm the defendant’s conviction, there must have been sufficient evidence that he consummated the act of fellatio.

While fellatio does not require penetration, it does require “obtaining sexual satisfaction by oral stimulation of the penis.”<sup>12</sup> Here, because the victim had testified that the defendant had pressed his penis against her closed lips “just once,” the Court held that there was insufficient evidence to support a conviction of sexual assault. Rather, the defendant had attempted a sexual assault and had failed.<sup>13</sup> As such, the Court vacated the sexual assault conviction and remanded the case to the district court with instructions to amend its judgment consistent with the Court’s opinion.

## **Conclusion**

The Court concluded that the district court did not err in its decision to allow the victim to testify via two-way audiovisual transmission and that the district court did not abuse its discretion in allowing the defendant to proceed to trial despite concerns regarding his competency. The Court

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<sup>8</sup> The jury instruction regarding the definition of fellatio was, “[o]ral stimulation of the penis for sexual satisfaction.”

<sup>9</sup> “[W]hether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979); *see also* Origel-Candido v. State, 114 Nev. 378, 381 (1998),

<sup>10</sup> Nev. Rev. Stat. § 200.364(9).

<sup>11</sup> Van Bell v. State, 105 Nev. 352, 354 (1989) (citing NRS 193.330).

<sup>12</sup> Maes v. Sheriff, 94 Nev. 715, 716 (1978) (citation omitted) (concluding that the State met its burden of proving sexual assault where the defendant licked the victim’s penis because there was oral stimulation, even in absence of penetration).

<sup>13</sup> *See* Crawford v. State, 107 Nev. 345, 351 (1991).

further concluded that the district court erred in convicting the defendant of both sexual assault and attempted sexual assault based upon the same conduct, and that there was insufficient evidence for a conviction of sexual assault.