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Chasing Horse (Nathan) v. Dist. Ct. (State)., 140 Nev. Adv. Op. 63 (Sept. 26, 2024)

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Chasing Horse (Nathan) v. Dist. Ct. (State)., 140 Nev. Adv. Op. 63 (Sept. 26, 2024)[1]

THE NEVADA SUPREME COURT HELD THAT THE STATE MUST NOT PROVIDE AN IMPROPER INSTRUCTION TO THE GRAND JURY THAT DOES NOT EXPLAIN AN ESSENTIAL ELEMENT OF AN OFFENSE NOR PROVIDE AN EVIDENTIARY BASIS AND THE STATE MUST FOLLOW ITS OBLIGATION TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY, EVEN IF THEY CHARACTERIZED THEM AS MERELY INCONSISTENT STATEMENTS.

Summary

It is an error of the State to give an instruction to the Grand Jury that is not supported by evidence and which does not address a necessary element, which in this case must be under NRS 172.095(2)[2]. The State exceeded its statutory duty in the case at hand and gave the grand jury an instruction on grooming that was improper and prejudicial. As a result, and because the State failed to provide exculpatory evidence, the district court abused its discretion in denying pretrial habeas corpus relief. The petitioned relief is affirmed.

Background

Petitioner Chasing Horse is accused of using his status to sexually assault young women among the Lakota Tribe. Chasing Horse was accused of sixteen counts of sexual assault against two alleged victims. In both cases, Chasing Horse and the young female victims were of the Lakota Tribe. Chasing Horse held a prominent position within the community as a performer of sacred ceremonies and possessed the ability to communicate with ancestral spirits to heal members of the Lakota Community. It is alleged that Chasing Horse leveraged these abilities against the victims in question to get them to perform sexual acts with him.

After seeing a post from one of the victims, detailing some of her experiences with Chasing Horse, as well as outlining a recent request by him for her to engage in sexual activities with other men, the State sought an indictment against Chasing Horse. The victim, C.C.H., believed that complying with Chasing Horse's demands was the single way to assist her ailing mother. These charges were brought before a grand jury and, during grand jury proceedings, the State presented testimony from four witnesses, including the two alleged victims. The State did not present an expert testimony on the clinical concept of "grooming" and provided an instruction instead on the term "grooming." The grand jury returned an indictment charging Chasing Horse with nineteen felonies, including first-degree kidnapping of a minor, open or gross lewdness, trafficking in a controlled substance, six counts of sexual assault, and ten counts of sexual assault of a victim under sixteen years of age.

Chasing Horse, in response, filed a pretrial petition for a writ of habeas corpus. This petition challenged the indictment on the grounds that the State offered an improper instruction to the grand jury on grooming and further failed to introduce exculpatory evidence that it was aware of. The district court dismissed the indictment for trafficking in a controlled substance but denied Chasing Horse's pretrial habeas petition. Chasing Horse filed a petition seeking writ relief, and a panel of the court declined to entertain the petition. Chasing Horse's subsequent petition for en banc consideration, under NRAP 40A, was granted.

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[1] By Tyler Hurst, Junior Staffer — NLJ Vol. 25.

[2] NEV. REV. STAT. § 172.095(2) (2022).

Discussion

This court's review by way of mandamus is warranted

The court, in this case, determined that a writ of mandamus was warranted. The court stated that the ordinary remedy, given the decisions contended by Chasing Horse, would not be adequate because the error at hand is one that would not be harmless to the final conviction.[3] The court held this because (1) both issues "present purely legal questions that may not be adequately addressed after a conviction" And; (2) both issues, that being the State's prejudicial instruction and the failure to release exculpatory evidence, present "important legal issues in need of clarification." A previous case, *Schuster v. Eighth Jud. Dist. Ct.*, addressed a similar issue wherein the State failed to provide a grand jury with the statutory definition of an important element of a charged offense.[4] In the present case the State is potentially charged with misinstruction of a grand jury. This is an important issue which the court cannot ignore and would provide insight and guidance to lower courts.

The district court manifestly abused its discretion in denying the pretrial habeas petition

The court believes that the district court had a duty to grant the pretrial habeas petition and dismiss the indictment. The court gave two reasons (1) the grooming instruction was improper and prejudicial and; (2) the prosecution failed to submit exculpatory statements to the grand jury. The court relied on two statutes for this conclusion. The first, NRS 172.235(1)(a)[5] gives prosecutors the privilege to attend grand jury proceedings and the second, NRS 172.095(2)[6] requires the prosecutor to "inform the grand jurors of the specific elements of any public offense which they may consider as the basis of the indictment." Furthermore, NRS 172.145(2)[7] requires that the State present any exculpatory evidence. The State's failures in its basic duties to disclose exculpatory evidence to the court can undermine the integrity of the grand jury process.

The State failed in its duty to properly instruct the grand jury

The court held that the State "gave the grand jury a definition of grooming that was wholly unsupported by competent evidence" and that "Chasing Horse was prejudiced by the error, which inexorably tainted the grand jury's deliberative process." The State's improper definition of grooming demands the remedy that a violation of NRS 172.095(2)[8] requires, that being dismissal if the instruction error would likely lead to the grand jury returning an indictment on less than probable cause.[9] NRS 172.095(2)[10] further requires that the State "inform the grand jury as to the law," those being the specific elements that the grand jurors must consider.[11] Essentially, the state

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[3] Schuster v. Eighth Jud. Dist. Ct., 123 Nev. 187, 190, 160 P.3d 873, 875(2007).
[4] Clay v. Eighth Jud. Dist. Ct., 129 Nev. 445, 450, 305 P.3d 898, 901 (2013).
[5] NEV. REV. STAT. § 172.235(1)(a) (2023); *See also* NEV. REV. STAT. § 172.095 (2023).
[6] *Supra* note 2.
[7] NEV. REV. STAT. § 172.145(2) (2023).
[8] *Supra* note 2.
[9] *Supra* note 4; *See Also Clay*, 129 Nev. at 450, 305 P.3d at 901.
[10] *Supra* note 2.
[11] *Id.*

needed to establish nonconsent for the sexual assault (which it did) under NRS 200.366(1)(a).[12] The State did not follow NRS 172.095(2)[13] by providing an expert definition's of a term of art not tied to any evidence, which blurred the lines between legal instruction and the law.

The court then turned to a case, *Perez v. State*, where relevant expert testimony was admissible on the issue of grooming in prosecutions of sexual offenses.[14] The court went on to explain how the term "grooming" was defined in the present case, explaining that instruction was taken verbatim from *Perez* but had no expert testimony. In presenting the grooming instruction in this way, the State turned an evidentiary issue into an instruction of law and blurred the line between legal instruction and evidence. It is argued that what the State did was akin to repackaging a "permissible expert opinion testimony as the law that the grand jury had to apply." The State, thus, provided an expert definition of a clinical term without any evidence to tie it too. While it was correct to find the instruction improper, the conclusion that it did not create prejudice against Chasing Horse was erroneous.

The State failed in its obligation to submit exculpatory evidence to the grand jury

The Court held that the district court's error created prejudice against Chasing Horse in the grand jury proceeding and the district court abused its discretion through multiple errors warranting a dismissal of the indictment without prejudice. It is argued that the State should have allowed for the victim's statements on social media to be introduced as exculpatory evidence because they undermine the essential element of nonconsent for the sexual assault charges. The State is required under NRS 172.145(2) [15] to submit any evidence to the grand jury that it is "aware of" and that "explain away the charge." Exculpatory evidence falls under this category of evidence. Whether or not evidence is exculpatory is determined by the district court.[16]

Whether the State believed that the social media comments were inconsistent or not, they are required to submit the evidence to the grand jury.[17] However, even if the statements were inconsistent, this does not mean they cannot be both inconsistent and exculpatory. Furthermore, the court cited in *Lay* that "the simple fact that a witness has contradicted himself in the past does not tend to explain away the charge, and therefore make the witness'[s] first statement exculpatory within the meaning of the exculpatory evidence statute."[18] While an inconsistent statement can also be exculpatory evidence, that does not mean that it always will be such. Here, the victim's online statements discuss the fact that she was proud of her decision, that she loved him, and that she eventually would initiate a marriage-like relationship with him. Thus, the victim's statements were relevant to consent.

A victim of a sexual offense's statements that indicate consent are of exculpatory value to the extent that nonconsent is an element being considered by the grand jury. Even if the statements only explain away some charges, they must be considered by the grand jury.[19] Both the BIA interview and the social media posts contained information and statements that a

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[12] NEV. REV. STAT. § 200.366(1)(a) (2007).
[13] *Supra* note 2.
[14] Perez v. State, 129 Nev. 850, 853, 313 P.3d 862, 864-65 (2013).
[15] NEV. REV. STAT. § 172.145(2) (2023).
[16] Ostman v. Eighth Jud. Dist. Ct., 107 Nev. 563, 564, 816 P.2d 458, 459.
[17] Lay v. State, 110 Nev. 1189, 1198, 886 P.2d 448, 453 (1994).
[18] *Id.* at 110 Nev. at 1198, 886 P.2d at 454.
[19] State v. Babayan, 106 Nev. 155, 172, 787 P.2d 805, 817 (1990).

reasonable fact finder might view as evidence of consent and because the State knew about both statements, they had a duty to submit them as evidence to the grand jury.

Conclusion

Thus, the sought remedy by Chasing Horse was not harmless and could not be properly met in later hearings if allowed to stand, the district court abused its discretion in denying the pretrial habeas petition. The court held that it was an error for the State to provide the grand jury with an "instruction that neither explained an essential element of an offense nor had any evidentiary basis." The court further held that "the State cannot avoid its obligation under NRS 172.145(2)[20] to present exculpatory evidence to the grand jury by characterizing such evidence as merely inconsistent statements." The writ petition is granted and the court will issue a writ of mandamus directed to the district court to enter an order granting the pretrial habeas petition and dismissing the indictment without prejudice.

Dissent – Parraguirre, J.

Justice Parraguirre dissented. First, Justice Parraguirre argued that, while it is the purview of the grand jury to "clear the innocent, no less than to bring to trial those who may be guilty"[21] it must do so with all of the facts. In this case, Justice Parraguirre argues that Chasing Horse hand-picked pieces of the exculpatory evidence to present which means that the full set of statements is not in the record nor can they be determined to be exculpatory without being viewed in their fullness, a necessity for a violation to have occurred under NRS 172.145(2)[22].[23]

Second, Justice Parraguirre argues that the provided summarized statements do not require that NRS 172.145(2) compel the district attorney to present the statements for a probable cause determination and, thus, should nullify the probable cause. NRS 172.145(2) demands that any evidence that will explain away the charge must be presented, but these statements at present do not clearly, nor directly, negate the determination by the grand jury. The statements factualize that one of the victims of sexual assault was proud to engage in the conduct with Chasing Horse, but "submission is not equivalent of consent."[24] These statements do not lack exculpatory value, it is unclear whether they would nullify the grand jury's probable cause determination and thus cannot clearly explain away the charges leveled at Chasing Horse.

Justice Parraguirre further raises contentions with the majority's decision to entertain the mandamus petition on the grooming instruction. Justice Parraguirre contends that, while the district court determined that the grooming instruction was improper, it also determined that the evidence was sufficient to indict even when the instruction was unconsidered. When an instruction is challenged, the court must determine if the instruction "likely caused the grand jury to return an indictment . . . on less than probable cause."[25] The evidence provided was indicative of grooming, but the concept would have been better introduced by expert testimony rather than instruction. The presence of ample evidence supported a finding of probable cause even if the grooming instruction was not considered. Thus, Chasing Horse has not demonstrated prejudice such that the indictment must be dismissed and thus district court discretion was not abused.

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[20] *Supra* note 7.
[21] McNair v. State, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992); *See also* NRS 200.366(1)(a).
[22] *Supra* note 7.
[23] Mayo v. Eighth Jud. Dist. Ct., 132 Nev. 801, 806, 384 P.3d 486, 489 (2016).
[24] McNair v. State, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992).
[25] *See Clay*, 129 Nev. at 458, 305 P.3d at 906-07.