

SUPREME COURT OF NEVADA

State v. Eighth Judicial Dist. Court of Nev.

412 P.3d 18 (Nev. 2018) · Decided March 1, 2018

SUMMARY

The Nevada Supreme Court held that a defendant had an adequate opportunity to cross-examine a witness at a preliminary hearing when the defendant voluntarily waived the remainder of the hearing immediately after the witness's direct examination. The court concluded that admitting the unavailable witness's prior testimony at trial did not violate the Sixth Amendment and granted the State's petition for a writ of mandamus.

CASE DETAILS

COURT	Supreme Court of Nevada
WRITING FOR THE COURT	Stiglich, J.; Douglas, C.J.; Cherry, J.; Gibbons, J.; Pickering, J.; Hardesty, J.; Parraguirre, J.
JURISDICTION	Nevada
DECIDED	March 1, 2018
DISPOSITION	writ_granted
PROCEDURAL POSTURE	The State petitioned for a writ of mandamus challenging the district court's denial of its motion to admit the transcript of an unavailable witness's preliminary-hearing testimony at Baker's criminal trial.
STANDARD OF REVIEW	Mandamus relief is discretionary and may be used to compel performance of a legally required act or control a manifest abuse or arbitrary or capricious exercise of discretion. The court reviewed the district court's Confrontation Clause ruling for manifest abuse of discretion in the context of the mandamus petition.
PRECEDENTIAL VALUE	Published Nevada Supreme Court opinion; precedential
PARTIES	State of Nevada v. Eighth Judicial District Court of Nevada, Jeffrey Baker, real party in interest

TOPICS

[sixth amendment](#)[criminal procedure](#)[evidence](#)[appellate procedure](#)[standard of review](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether a defendant has an adequate prior opportunity for cross-examination under the Sixth Amendment when the defendant was represented by counsel, had relevant discovery, was offered the opportunity to cross-examine a preliminary-hearing witness, but voluntarily waived the remainder of the hearing without conducting cross-examination.
2. Whether the district court manifestly abused its discretion by refusing to admit the unavailable witness's preliminary-hearing testimony at trial.
3. Whether the State could obtain mandamus relief because it lacked an adequate ordinary appellate remedy from the evidentiary ruling.

HOLDINGS

1. A defendant who is offered an opportunity to cross-examine a preliminary-hearing witness, possesses discovery sufficient to conduct cross-examination, and voluntarily declines to cross-examine the witness has nevertheless received an adequate prior opportunity for cross-examination. Admission of the witness's prior testimony at trial therefore does not violate the Sixth Amendment merely because the defendant chose not to exercise the opportunity.
2. Mandamus was an appropriate remedy because the State could not appeal the district court's evidentiary ruling after a final criminal judgment and therefore lacked a plain, speedy, and adequate remedy in the ordinary course of law.
3. The district court manifestly abused its discretion by denying admission of C.J.'s preliminary-hearing testimony on the ground that Baker lacked an adequate opportunity to cross-examine her.

KEY QUOTATIONS

“The Confrontation Clause guarantees an opportunity to cross-examine; it does not bestow upon defendants a sword to strike adverse testimony that the defendant declined to contest.” (412 P.3d at 18)

“The Confrontation Clause guarantees defendants an opportunity to cross-examine witnesses who testify against them. It does not give defendants a sword to strike adverse testimony that the defendant chose not to contest.” (412 P.3d at 23)

FACTUAL BACKGROUND

Jeffrey Baker was charged with sexually motivated coercion and eight counts of lewdness with a child under fourteen. At the preliminary hearing, C.J., Baker's cousin, gave detailed testimony concerning two alleged attempts by Baker to engage her in sexual activity; Baker had relevant discovery, including police reports and statements. When the justice court invited cross-examination, Baker's attorney instead announced that Baker would unconditionally waive the remainder of the preliminary hearing. C.J. later committed suicide, and the State sought to use her preliminary-hearing testimony at trial.

PROCEDURAL HISTORY

Baker was charged in district court with sexually motivated coercion and eight counts of lewdness with a child under fourteen. At his preliminary hearing, the alleged victim testified, but Baker waived the remainder of the hearing immediately after the State's direct examination and did not cross-examine her. After the witness later committed suicide, the district court denied the State's motion to admit her preliminary-hearing testimony, concluding that Baker lacked an adequate opportunity to cross-examine her. The State sought mandamus relief, which the Nevada Supreme Court granted.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The clerk was directed to issue a writ of mandamus instructing the district court to vacate its order denying the State's motion to admit C.J.'s testimony and enter an order consistent with the opinion. The stay entered on December 1, 2016, was lifted.

CASES CITED

- Chavez v. State, 125 Nev. 328, 337-42, 213 P.3d 476, 482-86 (2009)
- Gonzalez v. Eighth Judicial Dist. Court, 129 Nev. 215, 217, 298 P.3d 448, 449-50 (2013)
- State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931-32, 267 P.3d 777, 779-80 (2011)
- Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)
- Estes v. State, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006)
- Hinojos-Mendoza v. People, 169 P.3d 662, 668 (Colo. 2007)
- Clark v. State, 808 N.E.2d 1183, 1189-90 (Ind. 2004)
- State v. Nelson, 725 P.2d 1353, 1357 (Utah 1986)
- Hernandez v. State, 124 Nev. 639, 645, 188 P.3d 1126, 1130 (2008)
- Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1969)
- Grant v. State, 117 Nev. 427, 432 & n.5, 24 P.3d 761, 764 & n.5 (2001)
- Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997)
- Aesoph v. State, 102 Nev. 316, 320, 721 P.2d 379, 381-82 (1986)
- Armenta-Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013)

OPINION

STIGLICH, J.

By the Court, STIGLICH, J.: At issue in this petition is a defendant's Sixth Amendment right to confront a witness who testifies against him. In *Chavez v. State*, we held that when a witness testifies against a defendant at a preliminary hearing but subsequently becomes unavailable to testify at trial, the witness's prior testimony is admissible at trial so long as the defendant had "an adequate opportunity" to cross-examine the witness at the preliminary hearing.

125 Nev. 328, 337, 213 P.3d 476, 482 (2009). The question presented in this petition is whether a defendant had "an adequate opportunity" to cross-examine a witness when, immediately after the State's direct examination at the preliminary hearing, the defendant waived his right to continue the preliminary hearing.

We answer in the affirmative because the Confrontation Clause guarantees an opportunity to cross-examine; it does not bestow upon defendants a sword to strike adverse testimony that the defendant declined to contest. **FACTS AND PROCEDURAL HISTORY** Real party in interest Jeffrey Baker stands accused of one count of sexually motivated coercion and eight counts of lewdness with a child under the age of 14.

At the preliminary hearing, Baker's cousin, C.J., testified in detail regarding two instances in which Baker attempted to engage her in sexual activity. The first instance occurred when C.J. was 11 years old; the second when she was 13. Baker was well into his 20s on both occasions. During the preliminary hearing, when C.J. finished testifying, the justice court said, "All right.

Cross." Instead of beginning cross-examination, Baker's attorney asked for the court's indulgence as he conferred off the record with the prosecutor. He then announced: "Today pursuant to negotiations, Mr. Baker will unconditionally waive his preliminary hearing.

In district court he'll plead guilty to one count of attempt[ed] lewdness with a minor." After canvassing Baker, the justice court accepted his unconditional waiver of the remainder of the preliminary hearing. At the district court arraignment two weeks later, Baker presented his signed guilty plea agreement.

The court questioned Baker as to whether he understood the consequences of pleading guilty; he indicated that he did. Then the court asked if Baker was pleading guilty because he in fact attempted to commit a lewd act upon C.J. Baker equivocated before answering in the negative: "It's not true."

The court rejected Baker's guilty plea and ordered the State to prepare an amended information reinstating the original charges. One week later, C.J. committed suicide. The State moved to admit at trial the transcript of C.J.'s testimony at the preliminary *21hearing.

The district court denied the motion, finding that Baker did not have an adequate opportunity to cross-examine C.J. at the preliminary hearing. The State challenges that order in the present writ petition. **DISCUSSION** We exercise our discretion to consider the State's petition "[B]ecause a writ of mandamus is an extraordinary remedy, the decision to entertain a petition for the writ lies within our discretion."

Gonzalez v. Eighth Judicial Dist. Court, 129 Nev. 215, 217, 298 P.3d 448, 449-50 (2013). "A writ of mandamus is available to compel the performance of an act that the law requires... or to control

a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011).

The writ is appropriate when "there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. Because the State cannot appeal a final judgment in a criminal case, see NRS 177.015(3), the State has no remedy in law to challenge the district court's evidentiary ruling. See *Armstrong*, 127 Nev. at 931, 267 P.3d at 780.

We therefore exercise our discretion to consider the State's petition. The Confrontation Clause does not prohibit the admission of C.J.'s testimony. The State argues that the district court arbitrarily and capriciously exercised its discretion when it denied the State's motion to admit C.J.'s testimony from the preliminary hearing.

For the reasons set forth below, we agree. The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. amend. VI.

In accordance with that right, prior testimony from a witness unavailable at trial is admissible only if the defendant had "a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In *Chavez v. State*, we held "that a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to *Crawford*." 125 Nev. 328, 337, 213 P.3d 476, 482 (2009). "The adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed."

Id. Applying that test to the facts in *Chavez*, in which a victim of sexual assaults died after testifying at a preliminary hearing but before trial, we noted that "nearly all the discovery was complete" at the time of the hearing, "and the magistrate judge allowed Chavez unrestricted opportunity to confront [the witness] on all the pertinent issues." *Id.* at 341, 213 P.3d at 485-86.

We therefore concluded that admitting the witness's testimony at trial did not violate Chavez's Confrontation Clause rights. See *id.* at 341-42, 213 P.3d at 486. The tragic facts of this case are similar to those in *Chavez*. When C.J. testified against Baker at the preliminary hearing, discovery was nearly complete. Baker had transcripts of C.J.'s statements to law enforcement, a copy of the Declaration of Arrest, the crime report, the victim's mother's handwritten voluntary statement, and the detective's case report.

In sum, the discovery was sufficient for Baker to have cross-examined C.J. See *Estes v. State*, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006) ("As [the defendant] obtained the police report

during discovery, he had the opportunity to cross-examine [the victim] on the report's contents....").

The sole relevant difference between this case and Chavez is that Baker chose not to cross-examine the witness who testified against him at the preliminary hearing. He was not denied an opportunity to do so; there is nothing in the record to suggest that the court impeded or discouraged cross-examination.

We see no reason to differentiate between a defendant who cross-examines a witness at the preliminary hearing-like the defendant in Chavez -and a defendant, like Baker, who chooses not to. "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and *22to whatever extent, the defense might wish."

Chavez, 125 Nev. at 338, 213 P.3d at 483 (internal quotation marks omitted); see also Hinojos-Mendoza v. People, 169 P.3d 662, 668 (Colo. 2007) ("[W]here a defendant chooses not to take advantage of the opportunity to cross-examine a witness, the defendant has not been denied his constitutional right to confrontation."); Clark v. State, 808 N.E.2d 1183, 1189-90 (Ind.

2004) ("[A]lthough the accused must have an opportunity to cross-examine the witness during the face-to-face confrontation, the opportunity does not have to be seized or successful..." (internal quotation marks omitted)); State v. Nelson, 725 P.2d 1353, 1357 (Utah 1986) ("It is the opportunity to cross-examine that is guaranteed by the state and federal constitutions, not whether that opportunity is exercised.").

We recognize that this court has previously indicated that three conditions must be met before testimony from a preliminary hearing may be used at a criminal trial: "first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial."

Hernandez v. State, 124 Nev. 639, 645, 188 P.3d 1126, 1130 (2008) (quoting Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970)); see also Grant v. State, 117 Nev. 427, 432, 24 P.3d 761, 764 (2001); Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997); Aesoph v. State, 102 Nev. 316, 320, 721 P.2d 379, 381-82 (1986). All of these cases derive from Drummond, in which we tried to reconcile dicta from two United States Supreme Court cases decided in the 1960s.

86 Nev. at 7, 462 P.2d at 1014. But neither Drummond nor the cases cited above addressed the issue of whether an opportunity to cross-examine suffices when no actual cross-examination occurred. See Grant, 117 Nev. at 432 n.5, 24 P.3d at 764 n.5 ("[W]hether mere opportunity is sufficient has not been addressed since in most cases, the witness was actually cross-examined.").

Therefore, because those cases did not turn on whether an opportunity to cross-examine is sufficient for confrontation purposes, statements addressing that issue are noncontrolling dicta. See *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (declining to apply the doctrine of stare decisis to statements from a prior opinion that "went beyond answering the limited question that was before the court").

We see no reason to adhere to that dicta when the Supreme Court has since clarified that prior testimony from a witness unavailable at trial is admissible as long as the defendant had "a prior opportunity for cross-examination."¹ *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354 (emphasis added). Our holding today is a straightforward application of *Chavez*: when deciding whether a preliminary hearing afforded a defendant "an adequate opportunity to confront witnesses against him," key factors include the amount of discovery available to the defendant at the time of the hearing and the extent to which the "judge allowed the defendant a thorough opportunity to cross-examine the witness."

Chavez, 125 Nev. at 337, 339, 213 P.3d at 482, 484. Today we hold that, when a defendant declines an opportunity to cross-examine a witness at a preliminary hearing, the defendant was not denied "a thorough opportunity to cross-examine." *Id.* at 339, 213 P.3d at 484.

Because the justice court offered Baker an opportunity to cross-examine C.J., and Baker possessed all discovery relevant to her testimony, Baker had "an adequate opportunity to confront" C.J. at the preliminary hearing such that admitting her testimony at trial does not violate his Sixth Amendment rights. *Id.* at 342, 213 P.3d at 486.

In denying the State's motion to admit C.J.'s testimony on Sixth Amendment grounds, the district court misapplied *Chavez* and, in so doing, manifestly abused its discretion. See *Armstrong*, 127 Nev. at 931-32, 267 P.3d at 780. CONCLUSION The Confrontation Clause guarantees defendants an opportunity to cross-examine *23witnesses who testify against them. It does not give defendants a sword to strike adverse testimony that the defendant chose not to contest.

Baker received ample discovery at the time of the preliminary hearing, and he was not denied an opportunity to cross-examine C.J. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying the State's motion to admit C.J.'s testimony and enter an order consistent with this opinion.² We concur: Douglas, C.J. Cherry, J. Gibbons, J. Pickering, J. Hardesty, J. Parraguirre, J. We do not disturb the remaining two conditions set forth in *Drummond*.

The first condition-that the defendant be represented by counsel at the preliminary hearing-is consistent with *Chavez* in that an unrepresented defendant is unlikely to have had "an adequate opportunity to confront witnesses against him." 125 Nev. at 337, 213 P.3d at 482.

The third condition-that the witness be unavailable at the time of trial-is mandated by statute. NRS 51.325(1). Having resolved this writ petition, we lift the stay entered on December 1, 2016.

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