



IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR HUMBERTO URBINA-  
ACOSTA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 89401

*ORDER OF REVERSAL AND REMAND*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault of a child under the age of fourteen years and lewdness with a child under the age of fourteen years. Second Judicial District Court, Washoe County; Lynne K. Jones, Judge.

The State charged appellant Oscar Humberto Urbina-Acosta with touching and digitally penetrating the vagina of twelve-year-old S.V. , the daughter of Urbina-Acosta's girlfriend. At trial, S.V. testified that Urbina-Acosta penetrated her vagina with his finger twice on the same night—once in a shared bedroom and later in a Sparks alleyway. Urbina-Acosta testified that he touched either the surface of S.V.'s genital s or her underwear on both occasions but denied penetration occurred. Urbina-Acosta also denied having sexual intent while touching S.V., stating that he was instead examining S.V. for signs that she and her brother engaged in sexual conduct together. In addition to S.V.'s testimony, the State presented evidence that Urbina-Acosta's DNA was found on an internal swab of S.V.'s vagina and surveillance video showing S.V. and Urbina-Acosta entering the alley S.V. described on the night in question. A jury convicted Urbina-Acosta of both sexual assault of and lewdness with S.V.

The district court imposed an aggregate sentence of 45 years to life in prison. Urbina-Acosta raises seven issues on appeal.

*Consumption of DNA evidence did not warrant dismissal*

Urbina-Acosta argues that the State violated his right to due process by performing two DNA tests on swabs collected from S.V. during a sexual assault examination, the second of which fully consumed the samples. Urbina-Acosta thus contends that the district court abused its discretion by failing to dismiss the charges based on the State's destruction of evidence. To establish that loss or destruction of evidence constitutes a due process violation, a defendant must demonstrate either (1) "that the State acted in bad faith," or (2) that the defendant experienced "undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed." *Leonard v. State*, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001).

Initially, the forensic division of the Washoe County Sheriff's Office (WCSO) performed a Y-Screening assay on S.V.'s swabs, which did not identify the presence of male DNA. Later, the lab performed a more sensitive Y-STR extraction. This retest resulted from a change in WCSO policy, applied across criminal cases, which was intended to provide more thorough DNA evidence. The results of the second test indicated that Urbina-Acosta could not be excluded as the contributor of a single DNA profile on S.V.'s vestibular swab and revealed the DNA of at least two unidentified males on S.V.'s perineal swab.

Urbina-Acosta argues that the State acted in bad faith because the prosecutor sent an e-mail notifying defense counsel that the swabs were "being retested," implying that the process had already begun and could not be stopped. We disagree. The prosecutor simply relayed the wording used



by the assigned criminalist to describe WCSO's change in policy. *See State v. Hall*, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989) (concluding that a chemist did not act in bad faith by disposing of a blood sample "in accordance with . . . routine practice and for a legitimate purpose"). The record contains no evidence that this correspondence was intended to mislead or discourage counsel from seeking a court order to preserve the swabs. *See California v. Trombetta*, 467 U.S. 479, 488 (1984) (observing no evidence of bad faith where the record "contain[ed] no allegation of official animus towards [the defendant] or of a conscious effort to suppress exculpatory evidence"). Therefore, we discern no bad faith on the part of the State.

Nor has Urbina-Acosta demonstrated that he suffered undue prejudice from the second DNA test. *See Leonard*, 117 Nev. at 68, 17 P.3d at 407 ("Where there is no bad faith, the defendant has the burden of showing prejudice."). Undue prejudice occurs only when "it could be reasonably anticipated that the evidence sought would be exculpatory and material to the defense." *Sheriff v. Warner*, 112 Nev. 1234, 1240, 926 P.2d 775, 778 (1996) (citation modified).

Urbina-Acosta first asserts that the consumption of the swabs caused undue prejudice because independent testing might have revealed that Urbina-Acosta's DNA was not present on the vestibular swab collected from the victim. Urbina-Acosta was provided the reports, bench notes, and underlying data from both DNA tests. After reviewing this information, Urbina-Acosta's proposed expert, Dr. Ruth Ballard, testified that she would have used the same procedures and considered the State's results to be trustworthy. Therefore, Urbina-Acosta presents no evidence that the DNA found on the vestibular swab was a false-positive or that an independent test would have produced more favorable results. *See id.* (stating that a



defendant cannot demonstrate prejudice by showing that a merely “hoped-for conclusion” could have resulted from examination of the destroyed evidence).

Urbina-Acosta also contends that additional testing might have shown that one of the two male DNA profiles found on S.V.’s perineal swab belonged to her teenaged brother , buttressing Urbina-Acosta’s claim that he suspected the siblings had engaged in sexual conduct. But the State’s expert testified that there was not enough male DNA on the perineal swab to conclusively match to any person. Given the trace amounts of DNA, it is unlikely a third test could have reliably linked one of the DNA profiles to S.V.’s brother. Therefore, Urbina-Acosta has failed to demonstrate that the consumed swabs would have yielded exculpatory evidence. Because Urbina-Acosta has not established that the State acted in bad faith or that he was prejudiced by the consumption of the DNA swabs, the district court did not abuse its discretion in declining to dismiss the charges on this basis.

*The district court abused its discretion in excluding expert testimony*

Urbina-Acosta next argues that the district court abused its discretion by precluding Dr. Ballard from testifying at trial due to counsel ’s failure to properly disclose Dr. Ballard’s expert report in discovery. We review a district court’s resolution of expert discovery issues for an abuse of discretion. *Acosta v. State* , 141 Nev., Adv. Op. 40, 573 P.3d 1258, 1268 (Aug. 21, 2025).

A defendant charged with a felony must provide written notice of intent to call an expert witness at least twenty-one days before trial. NRS 174.234(2). This notice must include “[a] copy of all reports made by or at the direction of the expert witness.” NRS 174.234(2)(c). An expert is prohibited from testifying “if the court determines that the party acted in



bad faith by not timely disclosing [the] information” required under the discovery statute. NRS 174.234(3)(b); *see also Taylor v. Illinois* , 484 U.S. 400, 415 (1988) (acknowledging that the “drastic” remedy of preclusion of witness testimony is warranted when a discovery violation is “willful and motivated by a desire to obtain a tactical advantage”). For omissions of expert discovery not made in bad faith, the district court may also grant a continuance, order the offending party to produce the required information, or enter another order as appropriate. NRS 174.295(2); *see also Grey v. State*, 124 Nev. 110, 119-20, 178 P.3d 154, 161 (2008).

Here, Urbina-Acosta provided timely notice that the defense might call Dr. Ballard as an expert in DNA transfer. This notice generally complied with NRS 174.234(2) but did not include any reports. While testifying at a subsequent *Hallmark*<sup>1</sup> hearing, Dr. Ballard asked to reference her report. When asked why Urbina-Acosta had not provided a copy of the report to the State, defense counsel explained that he was unaware a report existed. Counsel proffered that the defense had neither requested nor paid for a report and he did not think to ask whether Dr. Ballard prepared one for her own reference. After becoming aware of this oversight, Urbina-Acosta took only one day to obtain and file the missing document. Because no evidence in the record indicates that Urbina-Acosta knew of the report before the *Hallmark* hearing or purposefully violated discovery requirements, we discern no evidence of bad faith.

Additionally, the late disclosure of Dr. Ballard’s report did not create a danger of “trial by ambush” or provide Urbina-Acosta with any tactical advantage. *Turner v. State* , 136 Nev. 545, 553, 473 P.3d 438, 446

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<sup>1</sup>*See Hallmark v. Eldridge* , 124 Nev. 492, 189 P.3d 646 (2008) (providing requirements for qualification of a witness as an expert).



(2020). The State already had its own DNA expert and was on notice that Urbina-Acosta intended to call Dr. Ballard to discuss potential sources of the DNA identified on S.V.'s swabs. During the *Hallmark* hearing, Dr. Ballard testified to, and was subject to cross-examination regarding, the same opinions on DNA transfer contained in her report. The underlying data was also already known to the State as Dr. Ballard analyzed results produced by the WCSO crime lab. Finally, due to an unrelated continuance, trial did not begin for another five months, during which the State would have had ample time to prepare and consult its expert. Thus, preclusion of Dr. Ballard's testimony was not necessary to remedy any obvious prejudice to the State. See *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002) (considering whether "the severe sanction of total exclusion of testimony" was proportionate to the harm to the government).

Most significantly, the exclusion of Dr. Ballard's testimony impacted Urbina-Acosta's ability to present a defense. See *Sampson v. State*, 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005) (recognizing "a strong presumption to allow the testimony of even late-disclosed witnesses," particularly when evidence "goes to the heart of the case"). To support a conviction for sexual assault of a child, the State was required to prove beyond a reasonable doubt that Urbina-Acosta engaged in sexual penetration by placing his fingers inside S.V.'s vagina. See NRS 200.366(1)(b). In closing argument, the State asserted that penetration provided the only explanation for the presence of Urbina-Acosta's DNA on S.V.'s vestibular swab and therefore this evidence "exactly corroborated" S.V.'s testimony. But at the *Hallmark* hearing, Dr. Ballard opined that it was "not just possible but reasonable—that this DNA got there through innocuous routine DNA transactions because [S.V. and Urbina-



Acosta] . . . share[d] a common space.” Dr. Ballard’s testimony would have lent significant authority to Urbina-Acosta’s otherwise counterintuitive theory that his DNA could have been present in S.V.’s vagina due to innocent transfer from the home environment. While Urbina-Acosta was able to elicit general testimony about secondary transfer on cross-examination of the State’s expert, this witness did not have the specialized research experience to opine regarding the likelihood that DNA found within S.V.’s vagina could have gotten there by non-sexual means. The district court therefore abused its discretion when it prevented Dr. Ballard from testifying on this issue.

The State alternately contends that even if the district court erred in excluding Dr. Ballard’s testimony based on the discovery violation, the result was nonetheless correct because Dr. Ballard’s proffered testimony was not the product of reliable methodology. The district court found that Dr. Ballard qualified as an expert but did not explicitly assess whether Dr. Ballard’s testimony would satisfy NRS 50.275’s assistance requirement. *See Hallmark*, 124 Nev. at 500, 189 P.3d at 651 (stating that expert testimony assists the trier of fact when it is relevant and the product of reliable methodology). Based on Dr. Ballard’s proffers during the *Hallmark* hearing, it appears her opinions arose from an area of research that is generally recognized by biologists and subject to peer review and testing. *See id.* at 500-01, 189 P.3d at 651-52 (discussing factors relevant to whether expert testimony is based in reliable methodology). Dr. Ballard runs an academic laboratory at an accredited university. Researchers at the laboratory have conducted numerous experiments involving indirect transfer of trace DNA, particularly small amounts of DNA found in shed skin cells. Dr. Ballard indicated that this research is conducted using the



same instruments, techniques, and standards applied in crime labs and is subject to both internal and external review. She further noted that there is a significant amount of literature on this subject, including over 2,000 published papers. Additionally, Dr. Ballard's opinions about the possibility of innocuous transfer of Urbina-Acosta's DNA to S.V. were sufficiently particularized, as they were based upon Dr. Ballard's review of the DNA report prepared by the WCSO crime lab, analyzed through the lens of existing trace DNA transfer research. Therefore, there was sufficient evidence in the record from which Urbina-Acosta could have demonstrated that Dr. Ballard's testimony would have assisted the jury.

Having concluded that there was no basis for precluding Dr. Ballard's testimony, we turn to whether this error was harmless. At trial, S.V. testified that Urbina-Acosta penetrated her vagina with his finger on two occasions. Urbina-Acosta admitted to touching S.V. but denied penetration occurred. Evidence that DNA consistent with Urbina-Acosta's DNA profile was found on S.V.'s vestibular swab provided the only physical evidence corroborating S.V.'s claims of penetration and was a significant focus of closing argument. Furthermore, Urbina-Acosta's defense rested heavily on the credibility of his testimony. To the extent the DNA evidence indicated that Urbina-Acosta lied about the issue of penetration, it made the remainder of his testimony less credible as well. Therefore, the error in excluding Dr. Ballard's testimony was not harmless. *See Pundyk v. State*, 136 Nev. 373, 378, 467 P.3d 605, 609 (2020) (holding that error in excluding expert testimony was not harmless where there was a reasonable probability that the testimony would have affected the outcome of the trial). Accordingly, we conclude that reversal for a new trial is warranted.



*Limitation of Urbina-Acosta's intent testimony constituted harmless error*

Urbina-Acosta asserts that the district court erred in sustaining an objection to Urbina-Acosta's testimony about whether he had sexual intent while touching S.V. A defendant who elects to testify "has a right to explain his acts and sayings, and declare his intent." *State v. Maynard*, 19 Nev. 284, 288, 9 P. 514, 516 (1886). A defendant's explanation of his or her own state of mind at the time of the offense does not usurp the jury's function or otherwise render the defendant's testimony inadmissible. *Cf.* NRS 50.295 (stating that otherwise admissible opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"); *Pundyk*, 136 Nev. at 377, 467 P.3d at 608 (holding that district court improperly prevented expert from opining as to whether defendant had mental state constituting an element of the charged offense). Therefore, the district court abused its discretion in limiting Urbina-Acosta's testimony. We conclude, however, that the error was harmless, as the district court allowed Urbina-Acosta to testify to whether he was thinking sexual thoughts while touching S.V., thereby allowing Urbina-Acosta to argue the issue of intent in closing.

*Remaining claims of error*

Urbina-Acosta also argues that the district court erred by admitting Urbina-Acosta's statements to police because the statements were involuntary and/or Urbina-Acosta was not properly advised of his *Miranda* rights; excluding evidence that S.V. alleged Urbina-Acosta victimized another minor family member; excluding evidence that S.V.'s brother allegedly committed prior sexual misconduct; and refusing Urbina-Acosta's proposed jury instruction on character evidence. Because we



reverse and remand for a new trial based on the preclusion of Dr. Ballard 's testimony, we need not examine the remaining claims raised on appeal. See *Angle v. State*, 113 Nev. 757, 763-64, 942 P.2d 177, 182 (1997). Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



Herndon, C.J.



Bell, J.



Cadish, J.

cc: Hon. Lynne K. Jones, District Judge  
Washoe County Public Defender  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

