IN THE SUPREME COURT OF THE STATE OF NEVADA

ERASMO MORENO PENA, A/K/A ERASMO PENA MORENO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44432

FILED

JUL 05 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

The parties are familiar with the facts, and we do not recount them except as necessary for our disposition.

Appellant Pena contends, among other things, that the State engaged in prosecutorial misconduct during closing argument at trial.

This court reviews a claim of prosecutorial misconduct de novo. The defendant has the right to a fair trial, but "not necessarily a perfect one."[1] "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[2] "It 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'"[3]

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[1]Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990).

[2]Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

[3]Darden, 477 U.S. at 181 (quoting Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983)).

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Commenting on the credibility of witnesses

During closing argument, the prosecution vouched for the credibility of all of its witnesses by making the following statement:

> They came into this court, they sat on that stand and they promised to tell the whole truth and nothing but, and that's what they did.

However, the defense did not object to this statement. Therefore, this court can only review this statement for plain error.[4] "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[5] Where the defendant fails to object to the alleged error or misconduct, the defendant has the burden "to show that the remarks made by the prosecutor were 'patently prejudicial.'"[6] The prosecution's remarks were highly prejudicial. The remark may not have resulted in a plain error in and of itself, but it does factor into the totality of the misconduct that occurred.

Additionally, the prosecution specifically vouched for the credibility of Ms. Sotelo, a State's witness:

> [Prosecutor]: [Ms. Sotelo] was prosecuted by a colleague in my office.
>
> [Defense Counsel]: Your Honor, I'm going to object to that. This is all from personal knowledge. There's no evidence of this.
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> THE COURT: Sustained. Disregard that.

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[4]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[5]NRS 178.602.

[6]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds by Libby v. Nevada, 516 U.S. 1037 (1996)).

> [Prosecutor]: It doesn't stretch the imagination to believe that she is no friend of the State. She clearly didn't want to be here and testify; however, she had no choice. We brought her here, she was under subpoena. And she certainly didn't want to identify the defendant and be labeled a snitch in prison.
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> [Defense Counsel]: Again, Your Honor, I'm going to object. This is not in evidence.
>
> THE COURT: Sustained.

Despite the fact that the district court sustained the defense's objection to the prosecutor's first statement regarding Ms. Sotelo, the prosecutor continued his argument by implying that because she was an inmate, Ms. Sotelo had nothing to gain by identifying the defendant, and in fact, that it would be in her best interest not to identify the defendant because if she did identify him then she would be labeled a "snitch" in prison.

Prosecutors should not vouch for their own witnesses because jurors "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled."[7] "[A]n injection of personal beliefs into the argument detracts from the 'unprejudiced, impartial, and nonpartisan' role that a prosecuting attorney assumes in the courtroom."[8] The prosecutor's role "is to seek justice, and by invoking the authority of his or her own supposedly greater experience and

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[7]United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985).

[8]Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985)).

knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney."[9]

The prosecution's comments were clearly an attempt to vouch for the veracity of its own witnesses, and were consequently improper.

Disparaging defense counsel

The prosecution made the following comment in regards to defense counsel:

> Forget that the title on the top of the page says State of Nevada versus Erasmo Pena. Make it all reasonable people versus the Police Department.
>
> And of course to do that, you've got to be flexible, you've got to kind of roll with the punches.
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> . . . .
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> That's how flexible you've got to be in holding the Police Department to an impossible and unrealistic burden that you as a Defense lawyer set up to make it harder for twelve people like you to convict the defendant.

Defense counsel subsequently objected. "Disparaging remarks directed toward defense counsel 'have absolutely no place in a courtroom, and clearly constitute misconduct.' And it is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics."[10]

The prosecution's statements disparaged defense counsel by implying that defense counsel was somehow holding the police department

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[9]Id. (internal citations omitted).

[10]Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (quoting McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1063-64 (1984)).

to an "impossible" and "unrealistic" standard. The jury is not required to, nor should it be encouraged to, "roll with the punches" of the police department's mistakes, nor should defense counsel be disparaged for making it "harder" for the jury "to convict the defendant." It is the defendant's freedom which is at stake; the jury does not owe the police department the benefit of the doubt. Defense counsel should be able to present the defense's theory of the case – including theories tending to show that the police department violated the defendant's constitutional rights – without disparagement from the prosecution, regardless of how implausible, unreasonable, or "unrealistic" the defense theories may be.

Therefore, the prosecution's disparagement of defense counsel was improper.

Belittling and disparaging the theory of the defense as a 'fairy tale'

This court has repeatedly held that the prosecutor has a "duty not to ridicule or belittle the defendant or his case."[11] It is also improper to ridicule or belittle a defense theory.[12] Further, prosecutors may not undermine the defense by making inappropriate and unfair characterizations.[13]

The prosecution analogized Pena's defense theory to a fairy tale:

> [Prosecutor]: [a] little girl once said to her daddy,
> 'Daddy, do all fairy tales start, 'Once upon a time?'
> And her daddy, who was a lawyer said to her: No

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[11]Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989).

[12]Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995); Barron, 105 Nev. at 779-80, 783 P.2d at 452.

[13]See Riley v. State, 107 Nev. 205, 212, 808 P.2d 551, 556 (1991).

> dear, some of the best ones start,' Ladies and gentlemen of the jury.
>
> During the 'fairy tale,' the prosecution generally described the evidence presented, based on Pena's testimony and the testimony of the State's witnesses. Defense counsel objected, and the district court responded: "[w]ell, I think – it's argument, it's argument. This jury heard the evidence. They'll make the right decision. Proceed." The prosecutor then ended the "fairy tale" with:
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> > And the little girl said: Yes, Daddy, and how did it come out? And he said the way it came out was that the jury decided that Eddie was not guilty and lived happily ever after. And the little girl looked up at her daddy and she said, as little girls will: Daddy, you're silly.
> >
> > [Defense Counsel]: Your Honor, I'm going to object again to his characterization. If they return a verdict of not guilty in this case, he's calling the jury silly for doing that. That is clearly objectionable and he cannot do that.
> >
> > THE COURT: Well, I don't think it is. That's your opinion, not mine. Overruled.
>
> The prosecutor's fairy tale comparison was improper. Not only did the prosecution compare Pena's defense theory to a fairy tale and imply that an acquittal would be "silly," but this misconduct was exacerbated by the manner in which the district court overruled the defense counsel's objection in front of the jury: "[w]ell, I don't think it is [objectionable]. That's your opinion, not mine." The district court's statement appeared to condone the prosecutor's fairy tale comparison.
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> We hold that the fairy tale comparison, combined with the district court's willingness to pardon the comparison, was highly improper.

Improperly commenting on the jury's duty to convict

Immediately after the district court overruled the defense's objection to the fairy tale's "silly" ending, the prosecutor made the following argument:

> [Prosecutor]: And to return a verdict of not guilty in a case where the evidence establishes a defendant's guilt beyond a reasonable doubt is silly.
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> [Defense Counsel]: Objection again, Your Honor.
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> [Prosecutor]: And wrong.
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> [Defense Counsel]: Objection.
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> [Prosecutor]: And irresponsible.
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> [Defense Counsel]: Objection.
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> [Prosecutor]: And a violation -
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> [Defense Counsel]: Objection.
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> [Prosecutor]: - of your oath.
>
> [Defense Counsel]: Objection.

The prosecution essentially told the jury – despite five objections from defense counsel – that it would be "silly," "wrong," "irresponsible," and a "violation" of the jurors' oaths to find Pena not guilty. After the prosecution finished its rebuttal argument, the district court admonished the jury to disregard the prosecution's improper statements.

The Sixth Amendment of the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." The Supreme Court of the United States "held that a prosecutor erred in trying 'to exhort the jury to 'do its job'; that kind of pressure . . . has no place in the

administration of criminal justice.'"[14] During a criminal trial, "'[t]here should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality.'"[15]

In Evans v. State, "[i]n rebuttal closing, the prosecutor asked, 'do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do your legal duty?'"[16] This court concluded that "[a]sking the jury if it had the 'intestinal fortitude' to do its 'legal duty' was highly improper."[17]

Similar to Evans, here the prosecution's remarks were highly improper. However, unlike Evans, the district court here appeared to condone the improper comments by the manner in which the court overruled the objections from defense counsel. Although the district court later admonished the jury, the damage had already been done, and Pena's rights had already been prejudiced by the prosecution's highly improper remarks.

Improper religious reference

Pena contends that the prosecutor improperly paraphrased a passage from the Bible, when the prosecutor stated:

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[14]Evans v. State, 117 Nev. 609, 633, 28 P.3d 498, 515 (2001) (quoting United States v. Young, 470 U.S. 1, 18 (1985)).

[15]Id. (quoting United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986)).

[16]Id.

[17]Id.

> Don't we all know from the time we're little children – I mean: The righteous man standeth like a lion and the guilty flee where no man pursueth.

Pena contends that the prosecutor pulled this statement from Proverbs 28:1: "The wicked flee when no man pursueth: but the righteous are bold as a lion."

Nonetheless, Pena did not object to this statement at trial. Therefore, this court can only review this statement for plain error.[18]

Prosecutors should not make religious references during closing argument; "[t]he obvious danger of such a suggestion is that the jury will give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law."[19]

However, this court recently held that a prosecutor citing a biblical passage during the penalty phase was improper, but did not constitute plain error.[20] Here, while the prosecutor's biblical reference did not constitute plain error in and of itself, it does weigh into the tally of cumulative errors in this case.

Cumulative error

Factors to consider in determining if cumulative error warrants reversal "include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime

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[18]Green, 119 Nev. at 545, 80 P.3d at 95.

[19]Sandoval v. Calderon, 241 F.3d 765, 776 (9th Cir. 2000).

[20]See Young v. State, 120 Nev. 963, 971-72, 102 P.3d 572, 578 (2004).

charged.'"[21] This court will not disturb a judgment of conviction supported by substantial evidence.[22] Even if the district court errs in admitting testimony, this court will not reverse if "evidence of appellant's guilt is overwhelming."[23]

First, the majority of the evidence against Pena was circumstantial. Pena was engaged in an altercation with the victim and allegedly pulled a gun on the victim in the middle of a party shortly before the victim was shot while he drove away with his guests. Although there was arguably one reliable eyewitness, and a reasonable jury could have convicted Pena based on the totality of the evidence, we must also account for the fact that a reasonable jury could have found Pena not guilty due to his own testimony and due to the largely circumstantial nature of the evidence presented against him. In a case where a jury might reasonably reach opposing verdicts, patently prejudicial errors cannot be ignored.

Second, the prosecution made several improper remarks and references during closing argument, including, as noted above: a brief reference to the credibility of the State's witnesses; a comment disparaging the tactics of defense counsel; framing the defendant's case as a fairy tale; commenting on the jury's duty to convict; and making a biblical reference about the defendant's flight. Reviewed separately, each

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[21]Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (quoting Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996)).

[22]Coffman v. State, 93 Nev. 32, 34, 559 P.2d 828, 829 (1977).

[23]Id.

of these errors were not necessarily prejudicial on their own.[24] Further, the defendant did not object to some of the prosecutorial misconduct he complains of. However, the defendant did object to the more prejudicial remarks. The quantity and character of the prosecutorial misconduct, taken as a whole, rises to the level of patent prejudice.

Finally, Pena was indeed charged with the grave crime of first-degree murder with a deadly weapon. The stakes were very high in his case, and there is little room for the types of prejudicial prosecutorial misconduct that occurred.

As a result of the patently prejudicial prosecutorial misconduct, we hold that Pena is entitled to a new trial. As to Pena's remaining arguments, we hold they are without merit, with the possible exception of his proposed jury instructions.[25] Accordingly, we

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[24]However, we do note that the fairy tale comparison combined with the prosecution's comment on the jury's duty to convict was a particularly prejudicial combination.

[25]With respect to Pena's proposed jury instructions, we note that the defendant is entitled "to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it." Peck v. State, 116 Nev. 840, 844, 7 P.3d 470, 472 (2000). The only exception to this rule is if the defendant's proposed instruction "is substantially covered by other instructions." Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). Otherwise, the district court must allow a defendant's proposed instructions to the extent that they are supported by at least some evidence.

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

Douglas, J.

Becker, J.

Parraguirre, J.

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk