IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN QUENTIN JOHNSON A/K/A JACK JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45733

FILED

JUL 19 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of sexual assault of a minor, one count of first-degree kidnapping, and one count of battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Johnson contends that the State committed misconduct during closing argument, which deprived him of a fair trial. We agree.

Invited response

The State alleges that the comments of the defense attorney invited its response in the closing argument. In United States v. Young, the Supreme Court discussed at length the concept of inappropriate statements by the prosecutor in conjunction with the "invited response" doctrine.[1] The Court stated that

> [i]nappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. . . . [T]he remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the

[1]470 U.S. 1 (1985).

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> Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant. Indeed most [courts] . . . have refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray.[2]

The Court continued:

> In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.[3]

We apply this standard.[4] Accordingly, we examine the prosecutor's statements in the context of the trial, taking into consideration the defense counsel's attacks on the State's case. We conclude that the prosecutor did more than merely "right the scale."

Belittling and ridiculing Johnson and interjecting personal opinion

We first address Johnson's argument that the prosecutor, Craig L. Hendricks, inappropriately belittled him and asked the jury to

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[2]United States v. Young, 470 U.S. at 11-12 (citations omitted).

[3]Id. at 12-13.

[4]See Ybarra v. State, 103 Nev. 8, 15, 731 P.2d 353, 358 (1987).

rely on the prosecutor's personal knowledge and experience. During the course of its closing argument, the defense made the following statements:

> [The prosecutor] made [Johnson] look like the shiftiest, snakiest, weaselest guy. He didn't even know how many weeks he had been in Las Vegas. . . .
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> . . . [Johnson] didn't have to sit up here and take what he took; he didn't have to sit up here and get badgered and made to look like a weasel and a snake by [the prosecutor], but he did it.

Defense counsel also stated that the victim was "dishonest."

During the State's rebuttal closing argument, the prosecutor made the following two statements:

> [Johnson] did not have to take the stand, but he did. What he told you was absolutely ridiculous. Now, I appreciate [defense counsel's] compliment to me, but it didn't take Einstein or even a decent attorney to fail to show you that the Defendant was so full of garbage and being untruthful, it was comical, absolutely comical.
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> . . . .
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> [Defense counsel] also talked about incredible witnesses, and wouldn't that also include the Defendant, 'cause he was a witness, also? And as I told you, that was one of the most ridiculous and outrageous explanations . . . ever . . . spoken in a courtroom here in Nevada.

The prosecutor has a "duty not to inject his personal beliefs into argument and . . . not to ridicule or belittle the defendant or the case."[5] "A prosecutor may not offer his personal opinion of the guilt or

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[5]Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995) (condemning a prosecutor's statement calling the defendant's testimony "malarkey").

character of the accused."[6] "[B]y invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney."[7] However, counsel "is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence."[8]

We conclude that the prosecutor's comments about Johnson and his testimony, set forth above, were not appropriate. Although Johnson failed to object to these statements, the error was plain and affected Johnson's substantial rights.[9] The comments improperly belittled Johnson and asked the jury to rely on the prosecutor's greater knowledge and experience to reach the conclusion that Johnson's testimony was ridiculous and outrageous compared to other defendants' explanations. The defense did not, by praising the prosecutor's cross-examination of Johnson, invite the prosecutor to call Johnson names or compare his testimony to that of other criminal defendants.

Improperly calling legitimate defense tactics "red herrings"

We next address the following six statements made by the prosecutor:

1. The defense team has "thrown out red herring after red herring in a blatant attempt to mislead you, to confuse you."

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

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

[8]Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001).

[9]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); see also NRS 178.602.

2. "And lastly, just so you're not thrown off by a red herring in this case, that: [no semen was found on the victim; ejaculation is not necessary to find rape]."

3. "[W]atch out for those red herrings . . . . [The] Stovalls were a red herring. . . . [Larry's girlfriend], she's a red herring. Why is she a red herring? . . . She's a red herring, and the Defendant's a red herring."

4. "Red herrings. Let me see what I can throw at you -- a whole bunch of different things; see what you grab on to and just forget about your common sense."

5. "Larry and Jonathan Stovall. You found out it's not about them at all. That is that red herring."

6. "As of [defense counsel] just trying to beat up on this victim, and that's why it's so pleasant for rape victims to come into . . . court, not only do they have to get raped . . . [Objection]."

Here, Johnson objected to the State's use of the words "red herring" during closing argument to describe the defense's case, which the district court overruled. In Pickworth v. State, this court held that the use of the phrase "red herring" was "highly improper" and that the "prosecution should not disparage legitimate defense tactics."[10] We conclude that the State's use of these words improperly disparaged legitimate defense tactics.

Attacking defense counsel's credibility

We next address the assertion that the State accused Johnson's theory of the case of being unbelievable. The State cannot

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[10]95 Nev. 547, 550, 598 P.2d 626, 627 (1979).

accuse defense counsel of "making stuff up."[11] Here, during opening statements, the defense stated that "the bottom line" in the case was "whether [the Stovalls] will be hidden from you these entire proceedings. And as they are hidden from you, . . . whether Jack Johnson is gonna have to face the music for something that he didn't do." At trial, the Stovalls testified. In his closing argument, Johnson's counsel asked rhetorically, "Why would Larry make up this confession, who's he covering for? Who are these people making up these ridiculous stories for?" In its rebuttal closing argument, the State argued that "[the Stovalls] walked in there and testified, didn't they? That's why you can't believe anything that'[s] coming from [the defense], because it's ridiculous." Although Johnson lodged an objection to this statement, the district court did not directly rule upon the objection.

We conclude that the prosecutor's remark was improper. It did not merely rebut the defense's statements; it asserted the conclusion that everything the defense presented could not be believed.

Appealing to sympathy

We now turn to the prosecutor's following statement:

> [Defense counsel was] just trying to beat up on this victim, and that's why it's so pleasant for rape victims to come into . . . court, not only do they have to get raped . . . [Objection] . . . because she ran away from home, you know what? She deserves to be raped and beaten. That's what he wants you to believe, and you know what? Sympathy is not -- sympathy's not to play . . . [Objection]."

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[11]Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991).

We have concluded that "[a]ny inclination . . . to inflame the passions of the jury must be avoided. Such comments clearly exceed the boundaries of proper prosecutorial conduct."[12] The prosecutor cannot disavow certain prohibited techniques while at the same time engaging in them.[13] Here, Johnson objected to the prosecutor's appeal to sympathy. The objection was overruled. We conclude that the prosecutor's argument improperly inflamed the jury's passions. That is especially true given the fact that the victim was in fact beaten up and raped. The unpleasantness associated with a rape victim having to publicly accuse her attackers is the natural result of Johnson having exercised his right to a jury trial, competent counsel, and confrontation. The prosecutor should avoid comments that are critical of the exercise of those rights. We further conclude that the prosecutor's statement asking that the jury not be affected by sympathy was inappropriate because it highlights the fact that the victim is properly the object of sympathy. Essentially, the prosecutor was disavowing a prohibited technique while engaging in that technique—a blatant error.

Making a "propensity argument" based on Johnson's prior convictions

We also conclude that the prosecutor improperly argued that Johnson was guilty based on his propensity to commit crimes. The prosecutor sarcastically stated: "The swell guy with two felony

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[12]Shannon v. State, 105 Nev. 782, 789, 783 P.2d 942, 946 (1989).

[13]Jacobs v. State, 101 Nev. 356, 359, 705 P.2d 130, 132 (1985) (concluding that a prosecutor's argument was improper when he told the jury, "I will not tell you to put yourselves in [the victim's] position looking down the barrels of this shotgun, because that would be improper").

convictions, one for assault and battery with a deadly weapon. What does that tell you about him? . . . Real kind and gentle type of guy. He would never do anything like this -- what he did to this young girl." Johnson objected to the prosecutor's statement, but the district court merely noted Johnson's objection for the record, without ruling on it. The prosecutor argues that Johnson opened the door to such comments by admitting evidence regarding his demeanor and treatment of women.

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."[14] The prosecutor went well beyond contradicting Johnson's evidence and asked the jury to infer that because Johnson had committed a crime in the past, he had a propensity for violence and destruction and acted in conformity therewith on the night that the victim in this case was assaulted. We conclude that the prosecutor's statement was a violation of NRS 48.045(2).

The prosecutor's misconduct was not harmless beyond a reasonable doubt

We have concluded that the prosecutor made numerous reprehensible statements, and we now must determine whether those statements denied Johnson of his right to due process.[15] We recognize that "'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[16] However, where there is a reasonable doubt as to whether the prosecutor's statements were

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[14]NRS 48.045(2).

[15]Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

[16]Id. (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

harmless, we must reverse.[17] Improper statements are "harmless beyond a reasonable doubt if" (1) the comments were merely passing in nature or (2) "there is overwhelming evidence of guilt."[18]

The prosecutor's comments were not made in passing

In this case, all the comments of which Johnson complains occurred during closing arguments. We conclude that the comments were not made in passing. The prosecutor filled his entire closing with inappropriate statements.

The State's case was not overwhelming

The State's case was not without its weaknesses. The following facts were testified to at trial: (1) no bruises were found on the victim's wrists, despite her testimony that Johnson pinned her down by forcibly holding her wrists; (2) Johnson's sister denied pounding on the bedroom and bathroom doors; (3) three people, Johnson's sister, a neighbor, and David Nuxall, denied that they heard the victim scream, yell, or otherwise call for help; (4) Johnson's sister and Nuxall denied that the victim's head or face was injured when she left the apartment; (5) the Stovalls, whose story was not consistent in each telling, testified only after being arrested, jailed, and offered immunity on their warrants; (6) evidence supports Johnson's theory that Larry Stovall wanted the victim to work as a prostitute; and (7) the Stovalls did not call the police at any time after the victim arrived at their apartment. The foregoing facts indicate that had the prosecutor not belittled Johnson, inflamed the jury's

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[17]Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991).

[18]Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996) (using the two-part test to determine whether references to the defendant's silence were harmless beyond a reasonable doubt).

passions, disparaged legitimate defense tactics, and made a propensity argument, the jury could have determined that there was reasonable doubt and found Johnson not guilty.

The State is held to a high standard of conduct

Having determined that the State made several inappropriate remarks, we take this opportunity to discuss the State and defense attorneys' roles in the prosecution of an accused. A prosecutor must assume an "'unprejudiced, impartial, and nonpartisan' role . . . in the courtroom."[19] The prosecutor's only goal is to seek justice[20] "as [a representative] of the people."[21] "'[He] has no obligation to win at all costs and serves no higher purpose by so attempting.'"[22]

> Indeed, a prosecutor's interest in a criminal case "is not that it shall win a case, but that justice be done. . . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[23]

Conversely, defense counsel has a different role to play. Namely, defense counsel is "to fairly and effectively pursue and present

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[19]Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (quoting State v. Rodriguez, 31 Nev. 342, 346, 102 P. 863, 864 (1909)).

[20]Id.

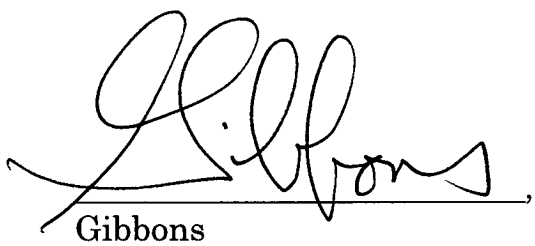
[21]Skiba v. State, 114 Nev. 612, 619, 959 P.2d 959, 963 (1998) (Young, J., concurring in part, dissenting in part).

[22]Id. (quoting Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir.1983)).

[23]Id. (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

the client's legal defenses."[24] "'[T]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate.'"[25] Defense counsel must "defend his or her clients 'fully, vigorously, and even with arguments which might be offensive or ultimately unsuccessful. This is particularly true . . . where the clients' liberties are at stake, and where the adequacy of the attorneys' representation can raise constitutional issues.'"[26] Accordingly, we

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



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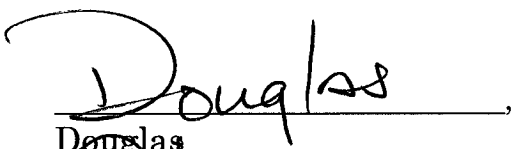

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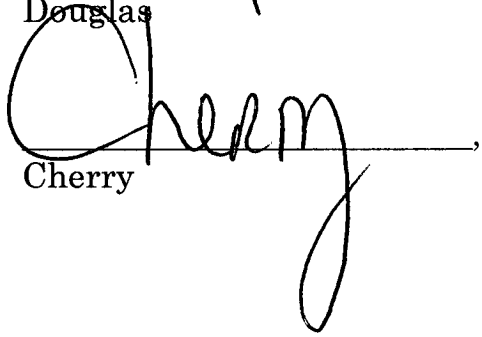
Douglas



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[24]Young v. District Court, 107 Nev. 642, 649, 818 P.2d 844, 848 (1991).

[25]Id. (quoting United States v. Cronic, 466 U.S. 648, 656 (1984) (internal quotation marks omitted)).

[26]Id. (quoting In re Order to Show Cause, 741 F. Supp. 1379, 1381 (N.D. Cal.1990)).

cc: Hon. Jackie Glass, District Judge
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