

IN THE SUPREME COURT OF THE STATE OF NEVADA

HERIBERTO TORIBIO-RUIZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45823

FILED

JUN 07 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, upon a jury verdict, of sexual assault of a child and lewdness with a child under the age of fourteen. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court sentenced appellant Heriberto Toribio-Ruiz to life with the possibility of parole after twenty years and life with the possibility of parole after ten years, with the sentences to run consecutively.

Ruiz advances three arguments on appeal: (1) that his confession should have been suppressed because it was taken in violation of his Miranda rights;¹ (2) that the district court erred in preventing Ruiz from presenting his complete theory of defense; and (3) that the district court erred in denying his motion for a mistrial based upon prosecutorial misconduct. We disagree. The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

Ruiz's Miranda rights

Ruiz contends that his confession should have been suppressed because it was taken in violation of his Miranda rights. Ruiz

¹Miranda v. Arizona, 384 U.S. 436 (1966).

claims that he was subjected to a custodial interview. Ruiz also contends that Detective Lampert used deception and coercion to obtain Ruiz's confession and that the place of interrogation was police-dominated. Ruiz contends that Detective Curtis Lampert failed to offer him an interpreter before Ruiz made his inculpatory statements.

This court will not disturb the district court's determination of a defendant's custody status if the determination is supported by substantial evidence.²

The district court found for purposes of Miranda, that Ruiz was not in custody and that his confession was given in a knowing, voluntary and intelligent manner.³ The district court also found that Ruiz drove his own vehicle to the interview which was held in a building open to the public, and that Ruiz had a high degree of mastery of the English language. The district court also found that Detective Lampert did not use improper deception or otherwise coerce Ruiz into relinquishing his rights. Therefore, we conclude that the district court did not err in finding that Ruiz was not in custody for the purpose of Miranda. Accordingly, the district court correctly admitted Ruiz's confession.

Complete theory of defense

Ruiz contends that the district court erred in preventing him from presenting his complete theory of defense. Ruiz contends that the district court should have allowed Dr. Deborah Davis to testify about how false memories can be created in a "victim." Ruiz contends that Dr. Davis

²Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996).

³384 U.S. 436.

should have been allowed to provide specific examples proving that false confessions do actually occur.

We will not disturb a district court's decision to admit or exclude evidence unless it is manifestly erroneous.⁴ The district court correctly allowed Dr. Davis to testify that she saw indicia of a false confession in Ruiz's confession. The district court also would not allow Dr. Davis to testify on the false memory issue "unless and until there is an issue raised at the trial." Trial courts have considerable discretion in determining the relevance and admissibility of evidence.⁵ We conclude that the district court did not err in excluding the testimony.

Prosecutorial misconduct

Ruiz contends that the district court erred in denying his motion for a mistrial based upon prosecutorial misconduct. Ruiz alleges that the prosecutor engaged in misconduct by failing to inform the defense of an inculpatory statement purportedly made by Ruiz, and by eliciting that statement from a witness in front of the jury. Ruiz also argues that the prosecution compounded the prejudice against him when the prosecutor argued against the presumption of innocence by telling the jury that the defense was "smoke and mirrors," and by comparing Ruiz's defense to the notorious criminal "Ted Bundy's defense."⁶

⁴Lucas v. State, 96 Nev. 428, 431-32, 610 P.2d 727, 730 (1980).

⁵See Sterling v. State, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992).

⁶See Bundy v. State, 471 So.2d 9 (Fla. 1985).

The district court sustained Ruiz's objections regarding defense tactics and the comparison to Ted Bundy. The district court also gave jury instructions designed to cure the prosecutorial misconduct.

"[E]ven deliberate misconduct by the prosecutor does not necessarily make the error reversible."⁷ The district court concluded that the prosecutorial misconduct was harmless and did not impair the fairness of the trial in the face of the overwhelming evidence of Ruiz's guilt. "[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."⁸

We have carefully considered all issues raised by Ruiz and conclude that given the district court's prophylactic measures to cure the prosecutorial misconduct and the overwhelming evidence of Ruiz's guilt, any residual effect of the prosecutorial misconduct did not rise to the level necessary to reverse Ruiz's conviction. We therefore conclude that the district court did not commit reversible error.

Finally, we admonish prosecutor Steven M. Barker for not disclosing the inculpatory statement, making disparaging remarks about defense tactics, and likening Ruiz to Ted Bundy. This court has previously warned that "such toying with the juror's imagination is risky and the responsibility of the prosecutor is to avoid the use of language that might

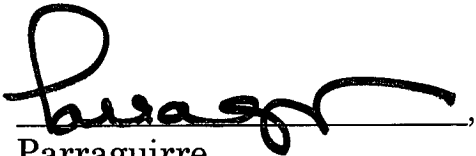
⁷Middleton v. State, 114 Nev. 1089, 1113, 968 P.2d 296, 312 (1998).

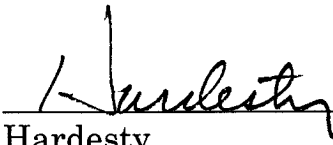
⁸King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).


deprive a defendant of a fair trial.”⁹ Further misconduct of this nature by Barker could lead to a referral to the State Bar of Nevada.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General Catherine Cortez Masto/Carson City
Washoe County Public Defender
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁹Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997) (quoting Pacheco v. State, 82 Nev. 172, 180, 414 P.2d 100, 104 (1966)).