

IN THE SUPREME COURT OF THE STATE OF NEVADA

NOE MARTINEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47225

**FILED**

MAY 30 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT

ORDER OF REVERSAL AND REMAND BY S. Young  
DEPUTY CLERK

This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree murder with the use of a deadly weapon (count one), and attempted murder with the use of a deadly weapon (count two). Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

The district court sentenced Noe Martinez on count one to life in the Nevada State Prison with minimum parole eligibility in 20 years, plus an equal and consecutive term for the deadly weapon enhancement. As to count two, the district court sentenced Martinez to a maximum of 192 months, with minimum parole eligibility in 43 months, plus an equal and consecutive term for the deadly weapon enhancement. Count two is to run concurrent with count one, with 314 days credit for time served. The parties are familiar with the facts and procedural history of this case; therefore, we do not recount them in this order except as is necessary for our disposition.

The letter regarding Martinez's parenting skills

Martinez argues that the district court erred when, over his objection, it permitted the State to ask Edith Lillian Murietta if she had written a letter accusing Martinez of not being a good father. We agree.

We review a district court's decision to admit evidence under the abuse of discretion standard.<sup>1</sup>

“Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.”<sup>2</sup> NRS 50.085(3) provides that a party may not present extrinsic evidence to prove “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of [a] crime.” The collateral-fact rule limits the admissibility of extrinsic evidence of prior inconsistent statements and specific instances of conduct.<sup>3</sup> This court has concluded that “[c]ollateral facts are by nature ‘outside the controversy, or are not directly connected with the principal matter or issue in dispute.’”<sup>4</sup>

In this case, the State sought to impeach Murietta with prior inconsistent statements in a letter that the State asserted she had written to Martinez. Murietta denied writing the unsigned letter, and Martinez objected when the prosecutor read the letter aloud. As the letter discussed child care and did not concern any facts related to the murder, we conclude that it was collateral because it was not relevant to a fact of consequence or a “linchpin” fact.<sup>5</sup> We further conclude that the letter’s

---

<sup>1</sup>Collman v. State, 116 Nev. 687, 704, 7 P.3d 426, 437 (2000).

<sup>2</sup>NRS 48.035(1).

<sup>3</sup>Lobato v. State, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004).

<sup>4</sup>Id. at 518, 96 P.3d at 770 (quoting Black’s Law Dictionary 262 (6th ed. 1990)).

<sup>5</sup>See id. at 519 n.12, 96 P.3d at 770 n.12.

prejudicial effect substantially outweighed its probative value. There was doubt that Murietta actually wrote the letter, and the subject of the letter was not relevant to the crimes committed. Therefore, the district court abused its discretion when it admitted the letter, and we conclude that the error was not harmless beyond a reasonable doubt.

Photographs of shotgun evidence at Martinez's house

Martinez contends that the district court abused its discretion when, over Martinez's objection, it admitted photographs of shotgun ammunition, a shotgun barrel, and a gun cleaning kit found at his house because it was bad act evidence that "was highly prejudicial and outweighed any probative value." We agree.

We conclude that as the murder weapon was a .380 semi-automatic weapon, the shotgun evidence was not relevant to the crime. Therefore, we conclude that its probative value was substantially outweighed by its prejudicial effect. Accordingly, the district court abused its discretion when it admitted photographs of shotgun evidence, and we conclude that the error was not harmless beyond a reasonable doubt.

Evidence that Murietta signed the jail visitation log 44 times

Martinez argues that the district court abused its discretion when, over Martinez's objection, it admitted evidence regarding the jail visitation log because its prejudicial effect substantially outweighed its limited probative value. We agree.

Generally, if the State intends to show witness bias by proving that the witness visited the defendant in jail, the State may not refer to

the defendant's in-custody status.<sup>6</sup> While evidence used to prove a witness's bias is never collateral under the collateral-fact rule,<sup>7</sup> a prosecutor's reference to the defendant's in-custody status and jail visits is improper because "[i]nforming the jury that a defendant is in jail raises an inference of guilt."<sup>8</sup> Such reference "could have the same prejudicial effect as bringing a shackled defendant into the courtroom."<sup>9</sup>

We conclude that the prosecutor improperly referred to Martinez's in-custody status when the prosecutor mentioned the visitation log. We conclude that the prosecutor's use of the words "visitation log" instead of "jail log" do not remove the impropriety. The prosecutor could have impeached Murietta by merely asking her if she had visited Martinez 44 times since the preliminary hearing, instead of mentioning the visitation log. Therefore, the district court abused its discretion when it admitted this evidence, and we conclude that the error was not harmless beyond a reasonable doubt.

Reference to Martinez's right to remain silent

Martinez argues that the State improperly questioned him on his right to remain silent when the State asked him if he had told the police that he was not guilty. We agree.

---

<sup>6</sup>See Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991).

<sup>7</sup>Lobato, 120 Nev. at 519, 96 P.3d at 770.

<sup>8</sup>Haywood, 107 Nev. at 288, 809 P.2d at 1273.

<sup>9</sup>Id.

Where a defendant fails to object to the prosecutor's improper comment on the right to remain silent, this court may review admission of the comment for plain error.<sup>10</sup> The prosecution may not comment at trial "upon a defendant's election to remain silent following his arrest and after being advised of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966)."<sup>11</sup> While "mere reference" to the defendant's invocation of the right to remain silent is not reversible error,<sup>12</sup> this court has "held that reference during cross-examination of a defendant and closing argument to the defendant's post-Miranda silence is not harmless error 'when the defendant's credibility is crucial to his defense and the prosecutor's comments are deliberate and repetitious.'"<sup>13</sup>

In this case, the prosecution asked Martinez twice about the invocation of his right to remain silent, and Martinez failed to object. We conclude that the defense did not open the door to the State's questions about Martinez's decision to remain silent when Martinez testified on direct examination that he had told everyone he could that he was not guilty. Martinez's credibility was crucial to his defense as the case relied on his word against that of Guadalupe Bonilla. We conclude that the prosecutor's deliberate and improper references to Martinez's right to

---

<sup>10</sup>Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997).

<sup>11</sup>Neal v. State, 106 Nev. 23, 25, 787 P.2d 764, 765 (1990).

<sup>12</sup>Edwards v. State, 90 Nev. 255, 263, 524 P.2d 328, 334 (1974).

<sup>13</sup>Murray, 113 Nev. at 18, 930 P.2d at 125 (quoting McCraney v. State, 110 Nev. 250, 256, 871 P.2d 922, 926 (1994)).

remain silent constituted prosecutorial misconduct amounting to plain error.

Martinez's work records

Martinez argues that the State improperly shifted the burden of proof by asking him if he brought his work records to court to verify that he was working and did not have time to stalk Murietta. We agree.

This court has concluded that “[i]t is improper to suggest to the jury that it is the defendant’s burden to produce proof by explaining the absence of witnesses or evidence.”<sup>14</sup> For example, it is improper for the prosecutor to refer to “the defense’s failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense.”<sup>15</sup>

In this case, the prosecutor asked Martinez whether he had provided work records to prove that he was too busy to stalk Murietta. We conclude that the State improperly shifted the burden of proof to Martinez by asking him whether he had produced evidence to support his testimony.

Vouching

Martinez argues that the State committed prosecutorial misconduct by improperly eliciting vouching testimony. Martinez further argues that Detective Long improperly provided “personal assurances of the witnesses’ veracity” and presented himself as “a human lie detector.” We agree.

---

<sup>14</sup>Lisle v. State, 113 Nev. 540, 553-54, 937 P.2d 473, 481 (1997).

<sup>15</sup>Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996).

This court has concluded that “it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony.”<sup>16</sup> Accordingly, a lay witness may not give his or her opinion as to the veracity of the statement of another witness.<sup>17</sup> For example, a witness may not call another witness’s statement a “‘fairy tale’ . . . that he did not believe . . . for one second.”<sup>18</sup>

In this case, Martinez failed to object to the prosecution’s questions posed to Detective Long or his answers to those questions about Murietta’s truthfulness. We conclude that under DeChant v. State, Detective Long improperly commented on the veracity of Murietta’s statement to police when he testified, “I could tell [Murietta] was lying to me, I felt she was lying to me, but I couldn’t tell what she was lying about.” The State’s elicitation of this testimony constituted prosecutorial misconduct amounting to plain error.

Questioning of Murietta about whether she had agreed to take a polygraph test

Martinez argues that the prosecution committed misconduct when it questioned Detective Long and Murietta about whether she had agreed to take a polygraph test. We agree.

“The prevailing rule is that proof that a defendant in a criminal trial either refused to take a polygraph test or offered to submit

---

<sup>16</sup>Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

<sup>17</sup>DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000).

<sup>18</sup>Id. at 923, 10 P.3d at 111.

to one is inadmissible and incompetent evidence.”<sup>19</sup> This rule also applies “to the use of polygraph evidence ‘to impeach or corroborate the testimony of a witness.’”<sup>20</sup>

In this case, Martinez failed to object to the prosecution’s questions about the polygraph test. Whether Murietta agreed to submit to a polygraph test was inadmissible. Accordingly, we conclude that the prosecution committed prosecutorial misconduct amounting to plain error when it questioned Detective Long and Murietta about whether she had agreed to take a polygraph test.

#### Cumulative error

“The cumulative effect of errors may violate a defendant’s constitutional right to a fair trial even though errors are harmless individually.”<sup>21</sup> This court considers the following factors when evaluating a claim of cumulative error: “(1) whether the issue of [innocence or] guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.”<sup>22</sup>

As to the first cumulative error factor, we conclude that the issue of innocence or guilt was close. The State presented only one eyewitness, Bonilla, to identify Martinez, and the other eyewitness, Murietta, testified that Martinez was not the killer. Further, no physical

---

<sup>19</sup>Santillanes v. State, 102 Nev. 48, 50, 714 P.2d 184, 186 (1986).

<sup>20</sup>Aguilar v. State, 98 Nev. 18, 21, 639 P.2d 533, 535 (1982) (quoting Corbett v. State, 94 Nev. 643, 646, 584 P.2d 704, 706 (1978)).

<sup>21</sup>Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004) (quoting Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002)).

<sup>22</sup>Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).



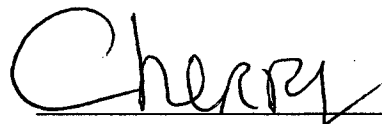

evidence tied Martinez to the scene of the crime. The State did not find the murder weapon, and Martinez's fingerprints were not at the murder scene. The State presented circumstantial evidence regarding Martinez's prior relationship with Murietta and his alleged anger at her for being with another man. Further, Martinez maintained that he was not guilty and was not even present at the scene of the crime. In sum, the State did not present overwhelming evidence of Martinez's guilt.

As to the second cumulative error factor, we conclude that the quantity and character of the errors were great. As previously discussed, we conclude that the following errors occurred: (1) the district court abused its discretion when it admitted the letter alleging child neglect, (2) the district court abused its discretion when it admitted evidence of shotgun materials found in Martinez's house, (3) the district court abused its discretion when it permitted the prosecutor to refer to Martinez's in-custody status, (4) the prosecutor improperly commented on Martinez's invocation of his right to remain silent, (5) the prosecutor improperly shifted the burden to Martinez to produce evidence of his work records, (6) the State committed prosecutorial misconduct by eliciting vouching testimony, and (7) the prosecutor improperly questioned Detective Long and Murietta about whether she had agreed to take a polygraph test. The district court admitted irrelevant and highly prejudicial evidence, affecting Martinez's right to a fair trial.

As to the third cumulative error factor, we conclude that the crimes of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon were very grave. Having considered all three factors, we conclude that the cumulative effect

of the errors requires reversal of Martinez's judgment of conviction.<sup>23</sup>  
Accordingly, we

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

  
\_\_\_\_\_, J.  
Cherry  
  
\_\_\_\_\_, J.  
Saitta

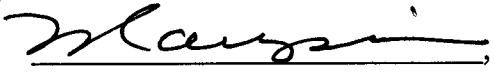
cc: Eighth Judicial District Court Dept. 6, District Judge  
Christopher R. Oram  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

---

<sup>23</sup>We conclude that Martinez's remaining arguments lack merit.

MAUPIN, J., concurring in part and dissenting in part:

I agree that this matter should be reversed for cumulative error. However, I would not find plain error with regard to the evidence admitted in arguable violation of Miranda v. Arizona,<sup>1</sup> to which no objection was made. I would likewise reject Martinez's claim that the prosecution improperly shifted its burden of proof when it questioned Martinez's concerning his employment records.

 J.  
Maupin

---

<sup>1</sup>384 U.S. 436 (1966).