

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN ZAMORA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48290

FILED

FEB 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of assault with a deadly weapon and one count of domestic battery with a deadly weapon. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Juan Zamora to serve a prison term of 13 to 60 months for the assault and a concurrent term of 24 to 96 months for the battery.

Zamora contends that he was denied a fair trial due to prosecutorial misconduct. Zamora claims that the prosecutor improperly commented on his failure to call witnesses, thereby impermissibly shifting the burden of proof from the State to the defense. Zamora specifically points to comments the prosecutor made during the following colloquy:

MS. DRUCKMAN: . . . the defense certainly could have investigated, talked to the other individuals at the house and produced any of those

witnesses, if they had something favorable to say about the defendant in this case. They could have called those people. And they didn't do that either.

Why do you think that is?

Why didn't they call anybody else from the barbecue or anybody else who was inside the house, such as the defendant's sister, if those people would be favorable evidence for the defendant?

The State's contention is the reason that that wasn't done is there wasn't somebody else who had favorable evidence to give on behalf of the defendant in this case.

MS. PUSICH: Objection, your Honor. The only person with an obligation to present witnesses in evidence is Miss Druckman.

THE COURT: That's right, counsel.

MS. DRUCKMAN: That's right. They don't have to present evidence. But, likewise, if they want to say to you that -- that you should consider the absence of evidence, they have the right to bring you positive evidence on his part. They can elect not to do that. But you are free to weigh the evidence that's been submitted here.

And, ladies and gentlemen, they have just as much right to produce evidence and witnesses as the State does. And they haven't done that.

THE COURT: Ladies and gentlemen, the defendant in a criminal case, as counsel said, has

a right. They have no obligation to produce any evidence in a trial. That is the law.

MS. DRUCKMAN: And that's because the defense could stand on the evidence as produced. But what I am just trying to emphasize to you is they don't have to, but they can.

If they had something favorable -- they could have produced it.

"[I]t is generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense."¹ However, so long as the prosecutor does not comment on the defendant's decision not testify, the prosecutor may comment on the defendant's failure to substantiate his theory of the case with supporting evidence and make reasonable responses to the defendant's closing argument.²

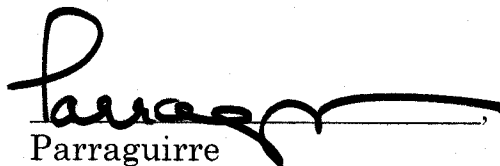
Here, Zamora's theory of the case was that he did not use a deadly weapon to commit the assault and battery. During closing argument, defense counsel argued that the State failed to present the testimony of "disinterested witnesses" and suggested that the State did

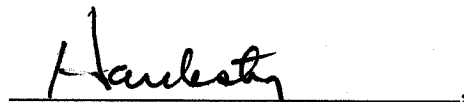
¹See Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996).

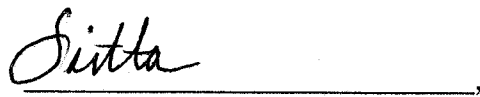
²Evans v. State, 117 Nev. 609, 630-31, 28 P.3d 498, 513 (2001); see also Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001).

not call the men at a nearby barbecue as witnesses because their testimony would have substantiated Zamora's theory of the case. We conclude that the prosecutor's comments were a reasonable response to the defense counsel's arguments, and that the district court removed any confusion as to the burden of proof with its immediate curative instruction. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Hardesty

 J.
Saitta

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