

IN THE SUPREME COURT OF THE STATE OF NEVADA

REYNALDO J. AGAVO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48444

FILED

MAY 29 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of sexual assault of a child under the age of 14 and one count of lewdness with a child under the age of 14. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Reynaldo J. Agavo was sentenced to life in prison with the possibility of parole after 20 years for the sexual assault conviction and life with the possibility of parole after 10 years for the lewdness conviction, to be served consecutively.

On appeal, Agavo argues that the district court violated his constitutional right to confront his accuser and to cross-examine witnesses against him by precluding any reference to the victim's prior allegation of abuse and that the prosecutor committed misconduct by misrepresenting the facts and vouching for witnesses.¹ For the reasons set forth below, we

¹Agavo also argues that: (1) the district court erred when it did not permit Dr. Chambers to render an expert opinion; (2) the district court judge's conduct prejudiced Agavo and deprived him of his right to a fair trial, amounting to cumulative error warranting a new trial; (3) the district court erred by referring to V.D. as a victim throughout the proceedings; (4) the district court erred by allowing witnesses to testify about statements V.D. made to them; (5) the district court erred in

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conclude that Agavo's constitutional challenge fails and that the instance of prosecutorial misconduct does not constitute reversible error. Therefore, we affirm the judgment of conviction.

The parties are familiar with the facts and we do not recount them except as pertinent to our disposition.

Prior allegation of abuse in California

Agavo argues that the district court erred in precluding all reference to the victim's prior sexual abuse allegation against him in California (California allegation), which deprived him of his constitutional right to confront his accuser and to cross-examine witnesses against him. We conclude this argument is without merit.

We review a district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). A decision that "exceeds the bounds of law or reason," or is "arbitrary and capricious" constitutes an abuse of discretion. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "The Sixth Amendment right to confront and cross-examine witnesses is applicable to the states through the Fourteenth Amendment's Due Process Clause." Kaczmarek v. State, 120 Nev. 314, 335, 91 P.3d 16, 31 (2004). However, the district court "retains wide discretion to limit cross-examination based

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denying Agavo's requested jury instructions regarding character evidence; and (6) the State failed to present sufficient evidence to support the convictions. We have considered these arguments and conclude that each of these additional challenges fails.

on considerations such as harassment, prejudice, confusion of the issues, and relevancy.” Id.

At trial, Agavo attempted to bring in the California allegation to impeach the victim’s mother’s credibility. He claimed that the State opened the door to the California allegation, despite the district court’s previous ruling to preclude all references to the California allegation, when the State submitted into evidence a transcript of a conversation between the victim and a Child Protective Services employee that referenced the California incident. However, the district court corrected this error by having the reference removed from the transcript, thereby striking all references to the California allegation. Agavo argued that after the State introduced the issue at trial, his constitutional right to a fundamentally fair trial and Sixth Amendment right to cross-examine witnesses allowed him to raise the issue. Agavo wanted to show that the victim’s mother knew of her child’s prior sexual abuse allegation against Agavo, and therefore, was not acting in her child’s best interest when she subsequently decided to move into Agavo’s trailer. However, while the California allegation was reported to the police, no charges were filed.

Additionally, Agavo argues that the district court violated his constitutional right to confront his accuser and to cross-examine witnesses against him by precluding all references to the California allegation. As noted, the California allegation was never proven false, nor were charges ever brought. Thus, the district court could have concluded that a large portion of the trial would be consumed with the parties trying to prove or disprove the California allegation. Pursuant to NRS 48.035(1), the district court could have properly excluded the California allegation because the “probative value is substantially outweighed by the danger of unfair

prejudice, of confusion of the issues or of misleading the jury.” Therefore, we conclude the district court did not abuse its discretion by precluding any reference to the California allegation.

Prosecutorial misconduct

Agavo also argues that the State engaged in gross prosecutorial misconduct by misleading the jury, referring to matters outside the record, and by continuously vouching for the victim’s mother, as well as other witnesses. We conclude that the State improperly vouched for witnesses, but that error does not warrant reversal.²

During closing arguments the State referred to the mother of the victim as “very credible” and said she was “[a]cting like a mother bear.” The State also said the victim was “very credible” and called the State’s expert “extremely honest.” This was clearly improper vouching by the State.

“It is improper for a prosecutor to vouch for the credibility of a government witness.” United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). This court has held that:

[s]uch an injection of personal beliefs into the argument detracts from the “unprejudiced, impartial, and nonpartisan” role that a prosecuting attorney assumes in the courtroom. By stepping out of the prosecutor’s role, which is to seek justice, and by 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.

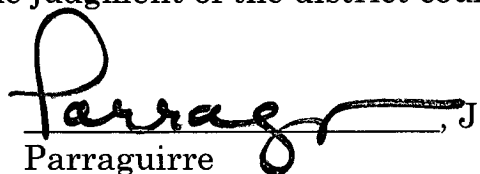
²Agavo’s remaining arguments relating to prosecutorial misconduct are without merit.

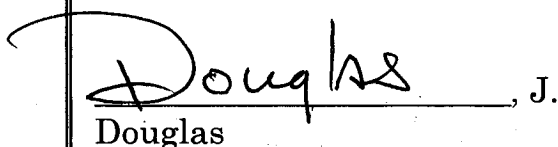
Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (citations omitted).

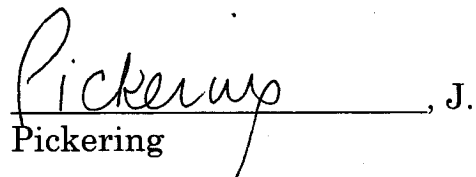
Where a prosecutor has committed misconduct, “the relevant inquiry is whether the prosecutor’s statements so infected the proceedings with unfairness as to make the results a denial of due process.” Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). This court considers prosecutorial statements in context, and “a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone.” Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (quoting Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)).

While we admonish the State’s attorney for vouching for government witnesses and conclude that her actions were improper, the misconduct does not rise to the level of reversible error and a new trial is not warranted. The prosecutor’s statements did not so infect the proceedings with unfairness as to make the results a denial of due process. However, we note that this was a very close case and such improper vouching in the future will warrant reversal as the district attorney’s office has now been warned. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre


Douglas


Pickering

cc: Hon. Jackie Glass, District Judge
Karen A. Connolly, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk