IN THE SUPREME COURT OF THE STATE OF NEVADA

GERARDO VALDOMINOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48641

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to jury verdict, of two counts of sexual assault. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In July 2006, Guadalupe Nuno agreed to listen to music with the appellant, Gerardo Valdominos, in his automobile. The pair eventually engaged in a sexual encounter, which resulted in substantial bruising of Nuno's body. The State filed criminal charges against Valdominos, and a jury convicted Valdominos of two counts of sexual assault, one via digital penetration, and one count via sexual intercourse.[1]

Among other arguments, Valdominos contends that statements by the prosecutor during closing argument constituted reversible prosecutorial misconduct and that the district court's refusal to give his proposed jury instruction on the legal effect of multiple sexual acts deprived him of his right to a fair trial. For the reasons stated below, we agree, and we therefore reverse the judgment of conviction and remand for further proceedings.

[1]The parties are familiar with the facts of this case, we do not recite them here except as necessary to our discussion.

Prosecutorial misconduct

"A criminal conviction is not lightly overturned on the basis of a prosecutor's comments standing alone."[2] Rather, the inquiry is whether the prosecutor's misconduct so infected the trial with unfairness as to deprive the defendant of his due process right to a fair trial.[3] This court balances the degree of misconduct against the evidence of guilt; even if the prosecutor uses condemnable tactics and "foul blows," a conviction supported by overwhelming evidence will not be overturned.[4] In addition, where a defendant does not object to a prosecutor's statements, this court reviews for plain error.[5] Under the plain error standard, this court reverses only if the prosecutor's statements were "'patently prejudicial.'"[6]

Among other prohibited conduct, it is inappropriate for a prosecutor to make remarks belittling or disparaging the defendant or his case.[7] Similarly, a prosecutor may not make improper attacks on a defendant's character or imply that the jury should consider evidence of a

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[2]Runion v. State, 116 Nev. 1041, 1053, 13 P.3d 52, 60 (2000).

[3]Darden v. Wainwright, 477 U.S. 168, 181 (1986).

[4]Yates v. State, 103 Nev. 200, 205-06, 734 P.2d 1252, 1255-56 (1987).

[5]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995).

[6]Id. (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)).

[7]Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995) (concluding that the prosecutor committed misconduct when he stated "[a]nd the stuff about, oh, I was so afraid he was going to do all the damage to me. You can tell from her own testimony, it was malarkey").

defendant's prior convictions in determining whether the defendant is guilty of the present offense.[8] A prosecutor also may not argue facts or inferences not supported by the evidence.[9]

Valdominos argues that the prosecutor engaged in reversible misconduct when he stated that

> [Nuno] talks to [a friend] every single day. Never mentions [Valdominos]. But [Valdominos' longtime girlfriend] has suspected [Valdominos of having an affair] for a year. Why? Trojan condoms in the car found in various places. She didn't know—or he didn't know [Nuno] a year before. Two months is what they—what the testimony was. That's the evidence you have before you, ladies and gentlemen. So the only conclusion you can draw from that is that either he is involved with somebody else, was, or he's raped somebody else in the past, or what? That he's an opportunist maybe? That he was in this case?

Valdominos did not object to this statement at trial. Even so, we conclude that the prosecutor clearly erred in insinuating that Valdominos had raped another woman, as this comment was irrelevant, unsupported by the record, and unfairly disparaged Valdominos by implying that he was a serial rapist. Given the highly inflammatory nature of the comment, we further conclude that it was "patently prejudicial," and warrants reversal.

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[8]McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984) (finding misconduct when the prosecutor referred to the defendant as an "'Aryan Warrior'" and stated that it was "'curious'" that a person with three prior felony convictions would be out "walking the streets").

[9]Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

In addition to the implication that Valdominos had raped other women in the past, we further conclude that the State engaged in prosecutorial misconduct by improperly shifting the burden of proof to Valdominos. Improper shifting of the burden of proof is constitutional error and warrants reversal, unless the error is harmless beyond a reasonable doubt.[10] Here, Valdominos takes issue with the prosecutor's statement that "[y]ou heard testimony in opening—excuse me, testimony—statements by the Defense in opening about what they were going to prove and what they weren't going to prove. Remember that?" Valdominos properly objected to this statement. We conclude that this statement improperly implied that the defense was obligated to prove something and had the effect of shifting the burden of proof. Combined with the prosecutor's other misconduct in this case, we cannot conclude that this error was harmless beyond a reasonable doubt. We therefore must reverse the judgment of conviction.[11]

Refusal to give Valdominos' proposed jury instruction

Valdominos further argues that the district court erred in refusing to give his proposed jury instruction on multiple sexual acts as part of a single criminal encounter. His proposed instruction provided that

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[10]Rippo v. State, 113 Nev. 1239, 1253-54, 946 P.2d 1017, 1026 (1997).

[11]See Chapman v. California, 386 U.S. 18, 21-24 (1967) (establishing that a court must reverse a conviction unless the alleged constitutional error is harmless beyond a reasonable doubt).

> Where a single act of sexual conduct is interrupted briefly for some reason and then resumed, a separate charge for the continuing sexual conduct will not lie for activity after the brief interruption.

This court has repeatedly recognized that "a defendant in a criminal case is entitled to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may appear to be."[12]

In Townsend v. State, this court acknowledged that distinct sexual acts that are part of a single criminal encounter may be charged as separate counts.[13] Even so, this court concluded that when a defendant spread lubricant around the vaginal area of a victim, took his finger away to put more lubricant on it, and then penetrated the victim's vagina, the State's decision to charge two separate counts could not stand.[14] This court observed that "[s]uch a hypertechnical division of what was essentially a single act is not sustainable."[15] In this case, Valdominos alleged that he only placed his fingers in Nuno's vagina to "guide" him to sexual intercourse. Accordingly, based on Townsend, we conclude that Valdominos was entitled to a jury instruction indicating that when a single instance of sexual conduct is briefly interrupted, a separate charge

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[12]Barger v. State, 81 Nev. 548, 552, 407 P.2d 584, 586 (1965).

[13]103 Nev. 113, 120, 734 P.2d 705, 710 (1987) (citing Wicker v. State, 95 Nev. 804, 603 P.2d 265 (1979)).

[14]Id.

[15]Id.

of misconduct will not lie.[16] Given the injurious effect that the failure to give this instruction potentially had on the jury's verdict, we further conclude that this error affected Valdominos' substantial rights and warrants reversal.[17]

Therefore, based on the instances of prosecutorial misconduct described above and the district court's failure to give Valdominos' proposed jury instruction, we

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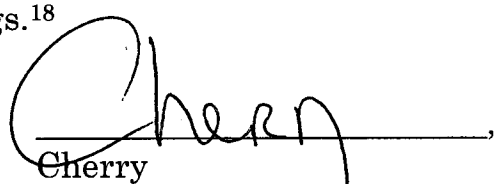
[16]See also Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285 (2004) (concluding that a defendant could not be convicted of both lewdness and sexual assault when he first "rubbed" a victim's penis outside his pants to arouse him and then performed fellatio).

[17]NRS 178.598 directs that any nonconstitutional error that does not affect a defendant's substantial rights must be disregarded. As indicated in Tavares v. State, the test to determine if error is harmless under that provision is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

ORDER the judgment of conviction REVERSED and REMAND for further proceedings.[18]



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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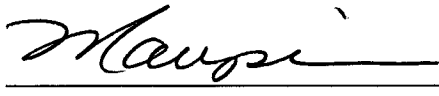
[18]We have examined Valdominos' other claims on appeal, including those related to other alleged instances of prosecutorial misconduct, exclusion of Nuno's prior statement to the police, double jeopardy violations, Brady violations, inclusion of a jury instruction on submission, and cumulative error, and conclude that they lack merit. We further conclude that Valdominos' conviction was supported by sufficient evidence.

MAUPIN, C.J., dissenting:

Although I agree that the State committed prosecutorial misconduct when it insinuated that Valdominos raped other women, and inappropriately attempted to shift the burden of proof, I would affirm his conviction.

As indicated by the majority, even if the prosecutor uses condemnable tactics and "foul blows," a conviction supported by overwhelming evidence will not be overturned.[1] In his statements to the police, Valdominos admitted that he had penetrated Nuno once digitally, and once using his penis. At trial, the jury convicted him of one count sexual assault via digital penetration, and one count of sexual assault involving penile penetration. The jury acquitted Valdominos of all other charges. Accordingly, the only factual dispute related to Valdominos' conviction was whether or not Nuno consented to the two instances of admitted penetration. Nuno's own testimony, as well as the testimony of the SANE Nurse regarding the extent of Nuno's bruising and injuries, clearly indicated that Nuno did not consent to Valdominos advances. Based on this overwhelming evidence, I would conclude that the statements by the State were harmless, and would affirm Valdominos' conviction.



Maupin, C.J.

Maupin

[1]Yates v. State, 103 Nev. 200, 205-06, 734 P.2d 1252, 1255-56 (1987).