

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY LYNN FRANKLIN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48848

**FILED**

DEC 27 2007

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court adjudicated appellant Jeffrey Lynn Franklin a habitual criminal and sentenced him to a life term in prison with the possibility of parole after ten years. This appeal followed.

Franklin argues that the prosecutor, Catherine Harris, committed misconduct by disparaging legitimate defense tactics during closing argument. Specifically, Franklin challenges the following statement:

What the counsel is trying to do with their questions of all the witnesses is to throw a red herring out. I don't know if you guys know what a red herring is. Basically, it was used during fox hunts. They'd use the smell of red herrings and sprinkle it around the trees to throw the foxes from, you know, finding them—or the horses from finding—

In response to counsel's objection, the district court stated that the prosecutor was not disparaging counsel but rather explaining the defense's theory of the case. The prosecutor continued her argument: "My red

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herring analogy is to being a smokescreen being thrown up to divert attention from the evidence of these drugs being found in that car, whether they were moved to the hood."

A prosecutor may not disparage legitimate defense tactics.<sup>1</sup> Moreover, we have specifically held such "red herring" remarks to be improper,<sup>2</sup> and we admonish the prosecutor, Catherine Harris, for engaging in such argument. However, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone."<sup>3</sup> Prejudice follows when the challenged statements "so infected the proceedings with unfairness as to make the results a denial of due process."<sup>4</sup>

Here, the evidence showed that Franklin appeared on a Las Vegas casino surveillance recording, lying partially outside the driver's side of his car. Several security officers responded to Franklin's location and discovered that he was highly intoxicated. The security officers noticed two plastic bags on the driver's side floorboard. One of the plastic bags held a leafy green substance and the other contained a powdery white substance, which later proved to be 11.5 grams of methamphetamine. Upon realizing the drugs had been discovered, Franklin became belligerent and kicked the car door, nearly hitting one of

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<sup>1</sup>Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004); see Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

<sup>2</sup>See Pickworth v. State, 95 Nev. 547, 550, 598 P.2d 626, 627 (1979).


<sup>3</sup>United States v. Young, 470 U.S. 1, 11 (1985).

<sup>4</sup>Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).


the security officers. Notwithstanding the improper comments, we conclude that a reversal is unwarranted here because the evidence against Franklin was overwhelming<sup>5</sup> despite his claim that the security officers or police planted the drugs in his car.

Having considered Franklin's arguments and concluded that no relief is warranted, we


ORDER the judgment of conviction AFFIRMED.

 \_\_\_\_\_, J.

Gibbons

 \_\_\_\_\_, J.

Cherry

 \_\_\_\_\_, J.

Saitta

cc: Hon. Stewart L. Bell, 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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<sup>5</sup>See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).