

IN THE SUPREME COURT OF THE STATE OF NEVADA

GABRIEL GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48887

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of level-three trafficking in a controlled substance. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge. The district court sentenced appellant Gabriel Gonzalez to serve a prison term of 10-25 years and ordered him to pay a fine of \$2,000.

First, Gonzalez contends that his due process rights were violated by the admission of accomplice testimony. Specifically, Gonzalez claims that the plea bargain entered into by his accomplice, Mario Williams, was coercive and improperly required him to testify against Gonzalez "according to a predetermined formula." Gonzalez concedes that trial counsel did not object to Williams' testimony, however, he claims the

due process violation amounted to reversible plain error.¹ We disagree.²

In Sheriff v. Acuna, this court stated that “it would be neither realistic nor fair to expect the State to enter into a bargain without assurances that the promisee’s trial testimony would be consistent with the information he or she provided to prosecutors as a basis for leniency.”³ The court held that “any consideration promised by the State in exchange for a witness’s testimony affects only the weight accorded the testimony, and not its admissibility.”⁴ The terms of the agreement “must be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction.”⁵

We conclude that Gonzalez’s due process rights were not violated by the admission of his accomplice’s testimony. During cross-

¹See Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006) (“Failure to object to the admission of evidence generally precludes review by this court, although the court may address plain error.”); see also NRS 178.602.

²Gonzalez also contends that Williams’ plea agreement does not comply with NRS 174.061. We conclude that Gonzalez has not demonstrated that he has standing to challenge the validity of his accomplice’s plea agreement.

³107 Nev. 664, 668, 819 P.2d 197, 199 (1991).

⁴Id. at 669, 819 P.2d at 200.

⁵Id.

examination by defense counsel, Williams stated that he was testifying truthfully and that his own criminal case had not yet been resolved. Counsel for Williams was present and informed the district court that, regarding Williams' plea negotiations, "there is no deal at this time." On redirect examination, Williams stated that it was his understanding that to provide substantial assistance to law enforcement personnel, he was required to "truthfully testify on the events that happened." Williams' testimony was consistent with the testimony provided at Gonzalez's preliminary hearing. Additionally, defense counsel thoroughly cross-examined Williams about his participation in the crime and his own plea negotiations with the State. And finally, the district court provided a cautionary instruction to the jury, prior to deliberations, regarding Williams' testimony:

In evaluating the testimony of Mario Williams, who has agreed to provide substantial assistance to the State, the subject of penalty or punishment for Mr. Williams is not to be discussed or considered by you, as that matter is one that lies solely with the Court and must not in any way affect your decision as to the innocence or guilt of the defendant.

However, in this case the evidence that Mario Williams may receive a reduced sentence under some future plea agreement with the State if he provides substantial assistance may be used by you in determining the believability of Mr. Williams and the weight to be given the testimony by Mr. Williams as identified in the previous instruction.

Therefore, based on all of the above, we conclude that Gonzalez has failed to demonstrate that the admission of Williams' testimony amounted to reversible plain error.

Finally, Gonzalez contends that the prosecutor committed misconduct during closing arguments by improperly referring to his invocation of the right to remain silent, and therefore, shifting the burden of proof. Specifically, Gonzalez claims that, on three occasions, the prosecutor commented about his failure to produce evidence. The State concedes that the prosecutor's comments were improper, but argues that the errors were harmless beyond a reasonable doubt.

"To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process."⁶ Additionally, "[a] prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"⁷ "[R]eferences to a defendant's exercise of [his] Fifth Amendment rights are harmless beyond a reasonable doubt and do not require reversal of a conviction if, '(1) at trial

⁶Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

⁷Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

there was only a mere passing reference, . . . or (2) there is overwhelming evidence of guilt.”⁸

We conclude that the prosecutor’s comments, while improper, were harmless beyond a reasonable doubt. The State presented substantial evidence of Gonzalez’s guilt. Additionally, the district court sua sponte interrupted the prosecutor, and after a discussion with counsel outside the presence of the jury, specifically instructed the jury as follows:

The second thing I want you to understand is that, during the course of argument, any indication that the defense has some duty to put on evidence is against the law.

The defendant has the absolute right to remain silent. The fact that he doesn’t testify or produce any evidence cannot in any way be used against the defendant. And you’re not to consider that in any fashion in determining your deliberations in this case.

If anything was said during closing argument with regard to the defendant not producing evidence or failing to do that, I instruct you to disregard that, because the defendant has absolutely no burden here. The entire burden rests with the State to prove their case beyond a reasonable doubt. And any wording to the contrary, I want you [to] disregard during closing argument.

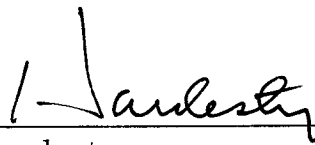
⁸Sampson v. State, 121 Nev. 820, 830, 122 P.3d 1255, 1261 (2005) (quoting Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996)).

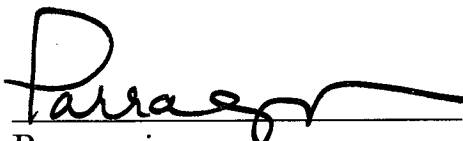
The defense is not required to produce evidence, not required to testify in any fashion. And so I want to be sure, during your deliberation, that that is not in any way considered by you.

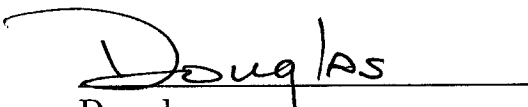
We further note that the jury, prior to deliberations, was generally instructed only to consider as evidence the testimony of witnesses, exhibits, and facts admitted or agreed to by counsel. The jury was also properly instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence.

Therefore, having considered Gonzalez's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.⁹


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

⁹We also reject Gonzalez's claim that cumulative error denied him his right to a fair trial. See Pascua v. State, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006).

cc: Hon. Richard Wagner, District Judge
State Public Defender/Carson City
Attorney General Catherine Cortez Masto/Carson City
Pershing County District Attorney
Pershing County Clerk