

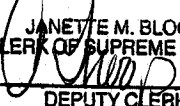
IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD EARL BARBER A/K/A
RICHARD E. BARBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48900

FILED

OCT 16 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving while under the influence of intoxicating liquor (DUI). Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant Richard E. Barber to serve a term of 12 to 48 months in prison.

Barber argues that the district court erred in denying his motion to dismiss the charge because his two prior DUI convictions constituted an inadequate basis for charging the instant offense as felony DUI. Barber pleaded guilty to first offense DUI in February 2000, and had been previously convicted of DUI in 1999. He argues that his February 2000 conviction cannot be used to enhance the present offense because the oral plea agreement allowed him to plead guilty to first offense DUI.

In State v. Crist,¹ Perry v. State,² and State v. Smith,³ we held that a second DUI conviction may not be used to enhance a conviction for a third DUI to a felony where the second conviction was obtained pursuant to a plea agreement specifically permitting the defendant to enter a plea of guilty to a first offense DUI and limiting the use of the conviction for enhancement purposes. The decisions in those cases were "based solely on the necessity of upholding the integrity of plea bargains and the reasonable expectations of the parties relating thereto."⁴ Accordingly, the rule that we recognized in those cases is not applicable where "there is no plea agreement limiting the use of the prior conviction for enhancement purposes."⁵

In the instant case there is no evidence that the use of the February 2000 conviction was limited, pursuant to the plea agreement, for enhancement purposes. We therefore conclude that the district court did not err in denying Barber's motion to dismiss the charge.

Barber next contends that the prosecutor improperly disparaged his theory of defense by characterizing Barber's challenge to the blood evidence as "ridiculous." A prosecutor may not disparage legitimate defense tactics.⁶ However, prosecutorial misconduct will be

¹108 Nev. 1058, 843 P.2d 368 (1992).

²106 Nev. 436, 794 P.2d 723 (1990).

³105 Nev. 293, 774 P.2d 1037 (1989).

⁴Speer v. State, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000).


⁵Id.

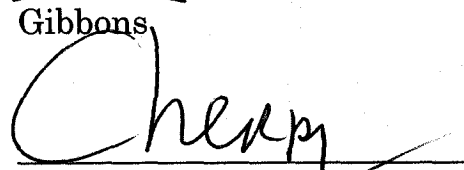
⁶Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987); see Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991).


deemed harmless where there is overwhelming evidence of guilt.⁷ Here, considering the challenged comment in context, we conclude that it reflected the prosecutor's position that Barber's claim that his blood sample had been contaminated or mixed up with another sample was unreasonable. To the extent the comment may be deemed improper, the error was harmless in light of the overwhelming evidence of Barber's guilt.

Having considered Barber's claims and concluded that they are without merit, 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

⁷Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997).