

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT MICHAEL REIGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49359

FILED

OCT 22 2008

JACIE K. LINDEMAN
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 one count each of trafficking in a controlled substance and possession of a controlled substance with intent to sell. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. On appeal, appellant Robert Reiger challenges his convictions primarily based on certain instances in which the district court allegedly disparaged his defense. For the following reasons, however, we disagree that the district court's conduct warrants reversal and therefore affirm the district court's judgment of conviction.¹ The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Judicial misconduct—disparagement of the defense

¹Reiger also challenges his convictions based on the district court's failure to excuse three jurors (two for cause, the other due to possible tampering), several evidentiary rulings, the district court's refusal to add burden-of-proof and duty-to-acquit language to five jury instructions, the sufficiency of the evidence, one allegedly ridiculing remark by the prosecutor during closing arguments, and cumulative error. Separately, Reiger challenges his adjudication as a habitual criminal. Having carefully reviewed these separate challenges, we conclude that none warrant reversal.

According to Reiger, the district court exhibited a pattern of impatience with his defense during trial that prejudicially impacted the jury's verdict. Although Reiger allowed each alleged instance of misconduct to pass without objection at trial, we nevertheless review the conduct at issue for plain error given Reiger's strategic reasons for withholding his objections to the district court's remarks.²

Despite the tension between, on the one hand, a district court's duty to "provid[e] order and decorum in trial proceedings," and, on the other, to "protect the defendant's right to a fair trial," neither duty can be subordinated to the other.³ Accordingly, given "the profound effect it[s] conduct] can have upon the members of the jury,"⁴ a district court must take care that its conduct in controlling trial proceedings does not inadvertently prejudice the jury's view of the defense.

Reversals due to the inadvertent, though inappropriate, conduct of a district court are rare. Nevertheless, in Oade v. State, this court did not hesitate to reverse the defendant's convictions based on the impatient attitude of the district court, its repeated exhortations for

²See Oade v. State, 114 Nev. 619, 622, 960 P.2d 336, 338 (1998) (reviewing alleged instances of judicial misconduct for plain error since defense counsel's failure to object was reasonable to avoid antagonizing the judge and creating further prejudice).

³Rudin v. State, 120 Nev. 121, 140, 86 P.3d 572, 584 (2004) (internal quotation marks omitted); see NRS 50.115(1)(c) (a judge must "exercise reasonable control over the mode and order of interrogating witnesses"); Nevada Code of Judicial Conduct, Canon 3B (3)-(4) ("A judge shall require order and decorum in proceedings before the judge" as well as "be patient, dignified, and courteous" to litigants and counsel).

⁴Hernandez v. State, 87 Nev. 553, 557, 490 P.2d 1245, 1247 (1971).

decorum in the courtroom, habit of issuing warnings or levying fines against defense counsel for trivial offenses (including injecting argument in his opening statement and using his client's first name), and tendency to openly doubt the strength of the defense's case.⁵ Even though, individually, these displays of annoyance were relatively mild, viewed over the entirety of the proceeding, the court concluded that the district court's behavior may have adversely impacted the defense's credibility with the jury, thus entitling the defendant to a new trial.⁶

Here, the district court mocked defense counsel's impeachment of Kelly Souther, an eyewitness, regarding his ability to perceive the Crown Royal bag exit Reiger's driver's side window as Souther was sitting in his car. Attempting to clarify Souther's line of sight during cross-examination, defense counsel asked Souther: "your eyes are outside your [car] window, right?" Without any prompting, the district court interjected: "I don't know that his eyes were literally outside his window, Mr. Speed." The literal absurdity of defense counsel's question, however, would not have been detected by a rational juror had the court not gratuitously remarked upon it. Moreover, in this one-eyewitness case, the court's sarcasm was especially unwelcome since it came during Souther's impeachment, a critical point in the evidence for the defense given that Reiger's defense theory depended almost exclusively on raising doubts regarding Souther's perception of events.

⁵114 Nev. 623, 960 P.2d 336.

⁶Id. at 624, 960 P.2d at 339-40.

During Souther's cross-examination, the district court granted defense counsel's request to approach the witness, stating: "Please, go right ahead. Anything to move on." Further into the examination, the court remarked:

THE COURT: Okay. And Mr. Speed, I got to tell you I've heard the testimony over and over again. I need you to move in a forward direction and get through this testimony. At 12:00 noon, I'm taking a break, and this is – you need to progress.

While neither of these remarks is problematic on its own, viewed in relation to one another, and in the context of the district court's conduct as a whole,⁷ both evidence some irritation with defense counsel.

Finally, Reiger alleges that the district court repeatedly commanded his defense counsel to sit down after ruling on his objections, but refrained from using the same command with the prosecution. Upon review, the record confirms Reiger's assertion that the court directed this command disproportionately at the defense.

In view of the above, we agree that the district court's remarks raise concerns under Nevada Code of Judicial Conduct Canon 3B, which requires judges to be "patient, dignified and courteous" when interacting

⁷Indeed, even the State points to instances in which the district court, in its view, was impatient with its presentation at trial. While we reject the State's attempt to downplay the court's treatment of the defense based on its claim that the court may have disparaged both sides equally, the State's own unfavorable impressions support Reiger's characterization of the court's conduct.

with counsel and litigants.⁸ For the following reasons, however, we disagree that the district court's remarks in this instance would warrant reversal.

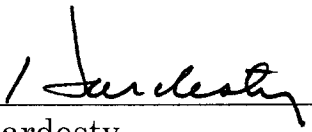
First, despite similarities in attitude and tone, unlike the district court in Oade, the district court in this case did not resort to fines to punish defense counsel's perceived infractions. Neither did it repeatedly call for decorum in the courtroom, which would imply that such was not being kept, or undermine the fairness of Reiger's trial by commenting on the merits of Reiger's defense in front of the jury. Second, the record reveals that the district court's exasperated tone was animated out of a concern for expeditiously concluding Reiger's trial rather than any true animus for the defense.⁹ Third, since the evidence against Reiger—including Souther's eyewitness testimony as well as the testimony of the four responding officers and the State's forensic chemist—was strong, we conclude that the conduct of the district court did not adversely impact the

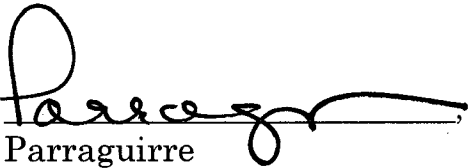
⁸We reject, however, Reiger's assertions that the district court treated two of his objections with disdain—one of which was based on Reiger's perception that the prosecutor was leading its witness, the other which was lodged on hearsay grounds—simply because the court could have overruled these objections without comment, but chose to explain its reasons for overruling the objections anyway. Having reviewed the record, the court's explanations served as a legitimate means of controlling the flow of trial proceedings since they were aimed at discouraging Reiger from continuing to challenge unobjectionable evidence.

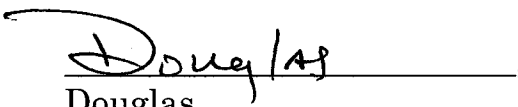
⁹Cf. Rudin v. State, 120 Nev. 121, 141, 86 P.3d 572, 585 (2004).

jury's verdict. Thus, although inappropriate at times, we conclude that the district court's conduct did not constitute plain error. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jackie Glass, 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