IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY VAN BERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49629

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 open or gross lewdness. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. The district court sentenced appellant Troy Van Berry to a jail term of 6 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed 18 months.

First, Berry contends that the prosecutor committed misconduct by attempting to elicit testimony from the arresting officer about Berry's invocation of his right to remain silent.[1] We disagree. When the prosecutor asked the officer why Berry was not drug-tested, defense counsel objected and the district court instructed the prosecutor to move on to his next question. The officer was not given the opportunity to answer the question, so the jury never heard that Berry had invoked his right to remain silent when he was asked to voluntarily take a blood test. Therefore, we conclude that (1) Berry has failed to demonstrate that he

[1]See Doyle v. Ohio, 426 U.S. 610 (1976); see also Washington v. State, 112 Nev. 1054, 1059, 921 P.2d 1253, 1257 (1996).

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was prejudiced by the prosecutor's question, and (2) even if the prosecutor's question was improper, it was harmless beyond a reasonable doubt.[2]

Second, Berry contends that the prosecutor committed misconduct during rebuttal closing argument by expressing personal opinions about the trial testimony.[3] Berry claims that the prosecutor's statements improperly influenced the jury to rely upon his expertise rather than objectively weighing the evidence. We disagree.

"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."[4] 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.'"[5]

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[2]See Sampson v. State, 121 Nev. 820, 830, 122 P.3d 1255, 1261 (2005) ("references to a defendant's exercise of her Fifth Amendment rights are harmless beyond a reasonable doubt and do not require reversal of a conviction if, '(1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence, or (2) there is overwhelming evidence of guilt'") (quoting Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996)).

[3]See Aesoph v. State, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986) (holding that prosecutors must not inject their personal beliefs and opinions into their arguments to the jury).

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

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

We conclude that the prosecutor's comments were permissible inferences drawn from the evidence presented.[6] Moreover, the district court reminded the jurors several times that it was their recollection of the facts that mattered and that the personal opinion of the attorneys should not be considered. The district court also similarly instructed the jury prior to deliberations. Therefore, we conclude that Berry has failed to demonstrate that the prosecutor committed misconduct resulting in a denial of due process.

Third, Berry contends that the prosecutor committed misconduct during rebuttal closing argument by disparaging the defense theory of the case. Berry claims the prosecutor "was attempting to belittle" his reason for playing the videotape of his interrogation for the jury. Berry objected to the following statement by the prosecutor:

> But what is on that tape both Mr. Arrascada and I agree is admissible evidence and we stipulated to the admissibility for two very, very different reasons. I'll submit to you the reason Mr. Arrascada wanted the tape in –

(Emphasis added.) The district court sustained Berry's objection and the prosecutor rephrased his argument.

This court has stated that "it is . . . inappropriate for a prosecutor to make disparaging remarks pertaining to defense counsel's ability to carry out the required functions of an attorney."[7] Nevertheless, this court has also stated that it is permissible for the prosecutor to argue

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[6]See Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989).

[7]Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991).

evidence before the jurors and suggest reasonable inferences that might be drawn from it.[8]

In this case, we conclude that Berry has failed to demonstrate that the remarks above amounted to prosecutorial misconduct or prejudiced him in any way amounting to reversible error. Berry's objection was sustained, and prior to deliberations, the district court instructed the jury that "[w]hen the court has sustained an objection to a question, the jury is to disregard the question and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer." We further note that the jury was properly instructed only to consider as evidence the testimony of witnesses, exhibits, and facts admitted or agreed to by counsel. The jury was also instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence.

Fourth, Berry contends that the prosecutor committed misconduct during rebuttal closing argument by vouching for the credibility of the victim. Specifically, Berry claims the following statement by the prosecutor was improper:

> What she told him (the security officers) was the truth as she related it to him to the best of her ability on the day in question under oath as she's in front of you and across the street at the preliminary hearing.

Berry concedes that defense counsel did not contemporaneously object to the statement above, but instead argues that the alleged misconduct

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[8]See Klein, 105 Nev. at 884, 784 P.2d at 973.

amounts to plain error.[9] We disagree.

It is improper for a prosecutor to vouch for the credibility of a government witness.[10] In this case, taken in context, the prosecutor was not vouching for the victim, but rather he was explaining that, despite the inconsistencies in her testimony, the victim did "the best" she could considering her age and circumstances.[11] Therefore, we conclude that Berry has failed to demonstrate that the prosecutor's comment affected his substantial rights or prejudiced him in any way amounting to reversible plain error.[12]

Fifth, Berry contends that the prosecutor committed misconduct during rebuttal closing argument by commenting on Berry's truthfulness by implying that he was lying when he told the arresting officer that he drank a beer prior to the incident at Circus Circus. Once again, Berry concedes that he did not object to the prosecutor's comments, but claims that the alleged misconduct amounts to reversible plain error. We disagree.

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[9]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993) (holding that the failure to object to prosecutorial misconduct generally precludes appellate consideration).

[10]See United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980).

[11]See Knight, 116 Nev. at 144-45, 993 P.3d at 71.

[12]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that when conducting a review for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice").

This court has had a long-standing rule that prohibits a prosecutor from calling a defendant's witnesses or the defendant a "liar."[13] In Rowland v. State, we relaxed this prohibition and set a new standard for determining when the prosecutor's characterization of the credibility of a witness amounts to misconduct. We explained that "[a] prosecutor's use of the words 'lying' or 'truth' should not automatically mean that prosecutorial misconduct has occurred. But condemning a defendant as a 'liar' should be considered prosecutorial misconduct."[14] For situations that fall somewhere between these extremes, a case-by-case analysis is required and "we must look to the attorney for the defendant to object and the district judge to make his or her ruling."[15] In the instant case, we conclude that the prosecutor's statement did not affect Berry's substantial rights or have a prejudicial impact on the verdict, and therefore, did not amount to reversible plain error.[16]

Sixth, Berry contends that the prosecutor committed misconduct during rebuttal closing argument by disparaging the defense witnesses. Specifically, Berry challenges the following statement made by the prosecutor:

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[13]See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990); see also Rowland v. State, 118 Nev. 31, 39 n.6, 39 P.3d 114, 119 n.6. (2002).

[14]Rowland, 118 Nev. at 40, 39 P.3d at 119.

[15]Id.

[16]See NRS 178.602.

> Everybody has those kind of character witnesses come in, ladies and gentlemen, and sometimes good people do stupid things.

Again, as Berry concedes, defense counsel did not object. However, in this instance, the district court interrupted the prosecutor and stated:

> The jury will disregard the statement by their counsel as to what everybody has in terms of witnesses. You're to focus your attention on the testimony of the witnesses and the evidence at this trial. Please proceed.

Therefore, because the district court admonished the jury to disregard the prosecutor's comment and this court "presume[s] that the jury followed the district court's orders and instructions,"[17] we conclude that Berry has failed to demonstrate that his substantial rights were affected or that he was prejudiced in any way amounting to reversible plain error.

Finally, Berry contends that the district court erred by denying his motion for a new trial.[18] Specifically, Berry argues that the victim's testimony was inconsistent and that the evidence presented of his good character "demonstrated that [he] was not guilty of this act." We disagree.

Although there were inconsistencies in the testimony of the State's witnesses, both the victim and an eyewitness positively identified Berry as the individual who committed the lewd act. The jury could reasonably infer from the evidence presented that Berry committed the crime for which he was convicted beyond a reasonable doubt. This court

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[17]Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

[18]See NRS 176.515(4); Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996).

has repeatedly stated that it is for the jury to determine the weight and credibility to give witness testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.[19] Therefore, we conclude that the State presented sufficient evidence to sustain the conviction and that the district court did not err by denying Berry's motion for a new trial.

Having considered Berry's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Brent T. Adams, District Judge
Arrascada & Arrascada, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[19]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).