

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMON DELAMORA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51084

FILED

MAY 20 2009

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 sexual assault. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. The district court sentenced appellant Ramon Delamora to serve a prison term of life with the possibility of parole after ten years.

Delamora's sole contention on appeal is that prosecutorial misconduct requires reversal of his conviction. He contends that comments by the State denigrated the defense, improperly diluted the reasonable doubt standard, and referred to evidence that was not introduced at trial.

In particular, Delamora challenges two portions of the State's rebuttal argument. First, Delamora argues that the following argument disparaged defense counsel:

The world definitely is not right. I agree with [codefendant's counsel] on that at least. The world isn't right when a 16-year old girl, no 17, has to come into a court of law, get up on the stand and be bullied by these two defense attorneys in every statement, every word that she said be twisted and used against her. Attempted, no.

Bite on the neck, no. You need not ask yourself again why a woman wouldn't report a rape. I think you've seen exactly why she wouldn't report a rape. To be subjected to this? That's what [sic] so interesting when they argue that this is a lie by this victim. She made this up all so she wouldn't get in trouble from her parents. And for the benefit of that, she gets to be hauled down in the middle of the night to a scene, interviewed, she then gets to take a trip to the hospital and be subjected to that SART experience, and then she gets to get another interview with another detective and go over the facts one more time. And then, to top it all off, she gets to come into court and testify in front of 12 people she doesn't know, strangers in the audience, defense attorneys that are literally salivating on every word she says to be used against her at a later point. All because she didn't want to tell her parents she was drinking.

The State further argued, "[t]he defense has offered what we commonly call a shotgun approach, meaning you just throw everything up on the wall and see what sticks," and that other aspects of the defense were disorganized and part of the shotgun approach. Delamora objected to the comments below and the district court overruled the objection.

"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." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). 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.'" 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 recognize that the State's comments improperly disparaged defense counsel and legitimate defense tactics. See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991). However, we conclude that the error does not warrant reversal of Delamora's conviction.

The jury was properly instructed prior to trial that the statements of the attorneys were not evidence in the case and that the jury should only consider the testimony received and exhibits that are admitted during trial. Further, there was significant evidence of Delamora's guilt. In particular, the victim testified that co-defendant Christopher Quintana and Delamora dragged her across the floor, held her down, and forcefully stripped her pants and underwear. Quintana then restrained her while Delamora sexually assaulted her. Biological evidence recovered from the victim's neck and a comforter on the floor of the apartment contained Delamora's DNA. Therefore, although Delamora demonstrated error, based on the evidence supporting his guilt and the district court's instructions, we conclude that the comments did not so infect the proceedings with unfairness as to result in a denial of due process.

Second, Delamora challenges the following argument on the grounds that it mischaracterized the burden of proof and alluded to evidence the State did not present:

To talk about the burden. The burden isn't beyond all doubt. It is a reasonable doubt. There is doubt in every case. Every case our office prosecutes, there is doubt. Does it mean it's reasonable? No. And I wish we could have brought in all 30 or 40 witnesses on that board, we would have been here another four weeks, and then maybe there would be absolutely no doubt.

Beyond a shadow. But this is the evidence that we have presented to you.

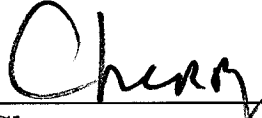
Delamora failed to object to the challenged comment. Generally, the failure to object to prosecutorial misconduct precludes appellate review. Gaxiola v. State, 121 Nev. 638, 653-54, 119 P.3d 1225, 1236 (2005). However, “we may consider sua sponte plain error which affects the defendant’s substantial rights, if the error either: ‘(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.’” Id. at 654, 119 P.3d at 1236 (quoting Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002)).

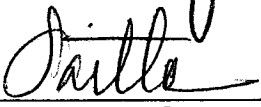
We conclude that the prosecutor’s comments did not mischaracterize the burden of proof. Moreover, the jury was properly instructed that Delamora was presumed innocent and was also provided the statutory reasonable doubt instruction. See NRS 175.211. Therefore, the prosecutor’s argument did not constitute plain error.


We recognize, however, that the State’s comment about other witnesses improperly alluded to facts not supported by the evidence adduced at trial. See Rippo v. State, 113 Nev. 1239, 1254-55, 946 P.2d 1017, 1027 (1997). Nevertheless, we conclude that Delamora failed to demonstrate that these comments had a prejudicial impact on the verdict in the context of the trial as a whole in light of the substantial evidence of guilt discussed above. Further, the jury was properly instructed that the statements of the attorneys were not evidence and that the jury should only consider the testimony received and exhibits that are admitted during trial. Therefore, we conclude that Delamora failed to demonstrate plain error that affected his substantial rights.

Accordingly, having considered Delamora's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Washoe County Alternate Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk