

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROMERO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51828

**FILED**

NOV 02 2009

TRACIE 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,<sup>1</sup> of one count of assault with a deadly weapon. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court sentenced appellant David Romero to serve a prison term of 12 to 36 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed three years.

Romero contends that the district court erroneously denied his Batson challenge after the State exercised a peremptory challenge against a potential juror who was Hispanic. Batson v. Kentucky, 476 U.S. 79 (1986). Romero also contends that the prosecutor committed misconduct during rebuttal closing argument that warrants reversal of his conviction. We conclude that no relief is warranted.

<sup>1</sup>Our review of the judgment of conviction reveals a clerical error. The judgment of conviction states that Romero was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. Therefore, upon issuance of the remittitur, the district court shall enter an amended judgment of conviction that corrects the clerical error. See NRS 176.565.

## State's Peremptory Challenge

Romero contends that the district court erred by rejecting his Batson challenge because the prosecutor's explanation for striking the Hispanic venireperson was pretextual. Specifically, Romero claims that the prosecutor's explanation was belied by the record and that he failed to strike two similarly situated non-Hispanic venirepersons.

In Batson, the United States Supreme Court held that the State's use of peremptory challenges to remove potential jurors on the basis of race is a violation of the Equal Protection Clause of the United States Constitution and developed a three-step test for determining whether the State used its peremptory challenges in a discriminatory manner. Id. at 96-98.

In the first step, the defendant must make a prima facie showing that race-based discrimination has occurred based upon the totality of the circumstances. Diomampo v. State, 124 Nev. \_\_\_, \_\_\_, 185 P.3d 1031, 1036 (2008). Here, Romero challenged the prosecutor's use of a peremptory challenge to strike a Hispanic venireperson from the jury panel. Without waiting for the district court to rule on whether Romero had met his burden under the first step of the Batson analysis, the prosecutor offered race-neutral reasons for excusing the juror in question. Therefore, whether Romero made out a prima facie case is moot. See Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004).

In the second step, the burden shifts to the prosecution to provide a race-neutral explanation for the peremptory challenge. Diomampo, 124 Nev. at \_\_\_, 185 P.3d at 1036. Under this step, "the issue is the facial validity of the prosecutor's explanation." Walker v. State, 113 Nev. 853, 867, 944 P.2d 762, 771 (1997) (quoting Hernandez v. New York, 500 U.S. 352, 360 (1990)). At this stage, the State's reasons need not be

“persuasive, or even plausible,” and “[u]nless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.” Kaczmarek, 120 Nev. at 333, 91 P.3d at 29 (internal quotation marks and citations omitted). Here, the prosecutor offered the following explanation: “Watching him, the amount of time he spent staring at the floor, not paying attention, as well simply doing a search in my office’s computers, seeing a prior DUI, I’d elected to ask him not to serve.” Neither of the prosecutor’s reasons for the peremptory challenge contained an inherent intent to discriminate, and therefore the explanation was sufficient to satisfy the State’s burden under this step. See id.

In the third step, “the district court must determine whether the defendant in fact demonstrated purposeful discrimination.” Diomampo, 124 Nev. at \_\_\_, 185 P.3d at 1036. Under this step, “the persuasiveness of the State’s explanation is relevant.” Ford v. State, 122 Nev. 398, 404, 132 P.3d 574, 578 (2006). The district “court’s findings on the issue of discriminatory intent largely turn on evaluations of credibility.” Kaczmarek, 120 Nev. at 334, 91 P.3d at 30. Accordingly, the district court “should evaluate all the evidence introduced by each side on the issue of whether race was the real reason for the challenge and then address whether the defendant has met his burden of persuasion.” Id. “The trial court’s decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.” Walker, 113 Nev. at 867-68, 944 P.2d at 771-72 (quoting Hernandez, 500 U.S. at 364).

The district court found that Romero failed to demonstrate purposeful discrimination and denied his Batson challenge. Romero argues that the race-neutral explanation given by the prosecutor was

pretextual because the record did not reflect that the juror was staring at the floor and neither the defense nor the district court observed such conduct, and the prosecutor did not challenge two non-Hispanic jurors who also had prior convictions. First, while the district court judge stated that she did not observe the juror actually staring at the floor, she expressed concerns about his demeanor and observed that he seemed confused and unable to follow the proceedings. Second, the two jurors not challenged by the prosecutor are distinguishable. ~~Their convictions were remote in time,~~ while ~~the conviction of the juror at issue was local and more recent.~~ Additionally, <sup>These</sup> ~~the other~~ two jurors were engaged in the process, responded intelligently to voir dire questions, and expressed favorable views toward law enforcement. Therefore, we conclude the district court did not err in finding that the State did not purposefully discriminate in the exercise of its peremptory challenge.

#### Prosecutorial Misconduct

Romero contends that the prosecutor committed misconduct warranting reversal during rebuttal closing argument. Specifically, Romero contends that the prosecutor improperly (1) vouched for the credibility of a witness for the State, (2) disparaged legitimate defense tactics and Romero's theory of self-defense and shifted the burden of proof, and (3) referenced information not in evidence with the intent to inflame the jury's passion.

Defense counsel did not object to the prosecutor's comments. Failure to object during trial generally precludes appellate review of an issue; however, we may address an error sua sponte if it constitutes plain error. NRS 178.602; Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001). In conducting a plain error analysis, this court must consider whether error exists, "whether the error was plain or clear, and whether

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the error affected the defendant's substantial rights.” Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (internal quotation marks and citation omitted). The defendant has the burden to demonstrate that the error actually prejudiced him or resulted in a miscarriage of justice. Id.

Prosecutorial misconduct constitutes plain error when it 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.” Rose v. State, 123 Nev. 194, 208-09, 163 P.3d 408, 418 (2007) (internal quotation marks and citation omitted), cert. denied, \_\_\_ U.S. \_\_\_, 129 S.Ct. 95 (2008). “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, 121 Nev. at 516, 118 P.3d at 187. “This court must consider the context of such statements, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.” Id. (internal quotation marks and citation omitted).

### Vouching

Romero contends that the prosecutor committed misconduct by vouching for the credibility of a witness for the State when he made the following statements during rebuttal closing argument: “Mr. Dieringer wasn't up there lying to you, telling you that, you know, I kind of liked her, I just wanted to be cool. His perceptions were accurate.”

It is well-settled that a “prosecutor may not vouch for the credibility of a witness.” Id. Nevertheless, the prosecutor should be given reasonable latitude to argue witness credibility when the outcome of the case depends on which witnesses are telling the truth. See, e.g., Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). Further, “prosecutors

must not inject their personal beliefs and opinions into their arguments to the jury.” Aesoph v. State, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986). However, an opinion statement made by the prosecutor during argument may be permissible, provided the statement was “made as a deduction or conclusion from the evidence introduced at trial.” See, e.g., Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971). In the instant case, the prosecutor’s statements were made in the context of comparing the witness’s testimony to a videotape of the events that corroborated the witness’s statements. Therefore, we conclude that the comments amounted to an appropriately offered conclusion on a contested issue and constituted proper argument concerning inferences supported by the evidence. See Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997).

Disparaging the defense and shifting the burden of proof

The prosecutor made two statements during rebuttal closing arguments that Romero complains improperly disparaged legitimate defense tactics and his theory of self-defense and impermissibly shifted the burden of proof. One of the issues at trial was whether the initial aggressor was Romero or the security officers. Defense counsel argued in closing that the videotape did not clearly show Romero initiating the aggressive physical conduct, and he questioned the three officers’ credibility and suggested a motive for them to lie. Romero contends that because he was not required to prove that his view of the evidence was more reasonable than the State’s, the prosecutor committed misconduct and shifted the burden of proof when he made the following statements:

You’ve been given an interpretation by the defense. Ask yourself: Is it reasonable? If you want to go that far and say, yeah, I think this whole self-defense thing is more reasonable, I don’t think the Sears guys --I think they started it,

I don't think the defendant started it, only then do you get to self-defense.

Look at the self-defense instructions. He was the initial aggressor. It's not available to him.

In a related argument, Romero also complains that the prosecutor improperly characterized his self-defense argument as mere speculation and impermissibly asserted that the defense had asked the jury to violate the instruction against speculation when he made the following statements:

You were asked to speculate what was in the defendant's mind. There's a jury instruction on intent and how it's proven. No. 13: Intent may be proved by circumstantial evidence and can rarely be established by any other means. Witnesses may see and hear and must be able to give direct evidence of what a defendant does or fails to do. There can be no eyewitness accounts to the state of mind which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent.

He bucked the system from the go, acted inappropriately from the go, refused to leave from the go, escalated the case from the go. His intent is clear.

And I brought that up in the context of speculation. Instruction No. 28: You may draw reasonable inferences which you feel are justified by the evidence keeping in mind that should not be based on speculation or guess. And you're asked to speculate, well, you don't see the chest bump. It must never have happened. You don't see this first stab, must never have happened. No, we don't see him. We do see a jerky -- a jerky video. We don't see the first stabbing but I will show you what we do see.

It is improper for the State to disparage legitimate defense tactics or to direct disparaging comments towards defense counsel. See

Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004); see also Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987). It is also improper to ridicule or denigrate a defense theory. U.S. v. Sanchez, 176 F.3d 1214, 1225 (9th Cir. 1999). A prosecutor may, however, "argue inferences from the evidence and offer conclusions on contested issues" during closing argument. Jones, 113 Nev. at 467, 937 P.2d at 63. We conclude that the challenged statements do not amount to prosecutorial misconduct. The prosecutor's statements constituted appropriate rebuttal argument, and his comments regarding self-defense and speculation neither disparaged the defense nor shifted the burden of proof.

Reference to facts not in evidence

During rebuttal, the prosecutor was reviewing the incident that prompted the security officers to approach Romero when he made the following comments:

Subsequently -- and we're talking about a 16-year-old girl once again. REMSA is called. Mr. Rogers thought it might have something to do with diabetes. I have no idea if blood has anything to do with the situation or if it was diabetes. But it's bad enough that REMSA is called. Her parents are called to take her home.

This is not relevant. What's relevant is what did the defendant do, what was its effect on Mr. Rogers. Did the defendant place him in fear? Did he place him in fear or reasonable apprehension of bodily harm and did he do it with a weapon? Yes he did.

Romero contends that the prosecutor's statements about diabetes, blood, and the girl's parents being called to take her home were improper references to facts that were not in evidence. The State concedes that the prosecutor referred to facts not in evidence. We note that the statements were not relevant to the jury's ultimate determination of guilt because the



girl was not a victim of the assault and was not a witness at the trial. Accordingly, despite the prosecutor's error, we conclude that when viewed in context the statements did not inflame the passions of the jury or have a prejudicial impact on the verdict. See Shannon v. State, 105 Nev. 782, 789, 783 P.2d 942, 946 (1989). Therefore, we conclude that the prosecutor's comments did not rise to the level of plain error and no relief is warranted.

Having reviewed Romero's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

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