

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR ANTHONY RAMOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52258

FILED

MAY 29 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, of attempted murder with the use of a deadly weapon, discharging a firearm out of a motor vehicle, and discharging a firearm at or into a structure, vehicle, aircraft or watercraft. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On appeal, appellant Victor Ramos argues that his convictions should be reversed as a result of prosecutorial misconduct and that two of his convictions violate double jeopardy. For the following reasons, we conclude that Ramos' arguments fail and therefore affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Prosecutorial misconduct

Ramos contends that his convictions should be reversed because the prosecutor improperly disparaged his defense tactics and shifted the State's burden of proof. We disagree.

When analyzing alleged prosecutorial misconduct, we engage in a two-step process: first, we must determine whether there was misconduct, and second, we must determine whether any improper conduct requires reversal. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008).

Comments directed at Ramos' defense tactics

Upon responding to Ramos' closing argument that he fired his weapon in self-defense, the prosecutor stated that the defense's theory of self-defense only "exist[ed] . . . in the imagination of . . . three [] extremely clever defense attorneys." Having sustained Ramos' contemporaneous objection, the prosecutor rephrased his comment, emphasizing that the evidence did not support Ramos' self-defense theory, and stated that, "I listened to [Ramos' counsel] up here talking about what the witnesses said, and I'm wondering if we were in the same courtroom."

Here, the prosecutor's rephrased comment legitimately exposed the weakness of defense counsel's argument, and thus did not rise to the level of prosecutorial misconduct. Cf. Pascua v. State, 122 Nev. 1001, 1008, 145 P.3d 1031, 1035 (2006). Moreover, while the prosecutor's first comment was improper because it implied that the defense's theory was fictitious, and was thus disparaging, see Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 72 (2008), we conclude that in light of the overwhelming evidence of Ramos' guilt, the error was harmless. Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004) (stating that "[w]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error." (citation omitted)).

The prosecutor did not shift the State's burden of proof

Ramos also alleges that the prosecution improperly shifted its burden of proof by stating that Ramos did not provide any evidence that he was aware of the victim's violent propensities. However, because the prosecutor merely pointed out that Ramos did not substantiate his claim that the victim was a violent person, we conclude that the prosecutor's comments were not improper. See People v. Kelly, 800 P.2d 516, 538 (Cal.

1990) (concluding that it is not improper for a prosecutor to point out when a defendant does not substantiate one of his defenses).

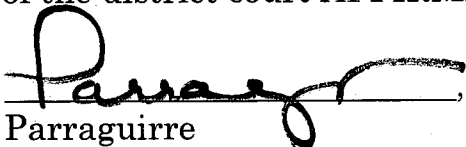
Double jeopardy

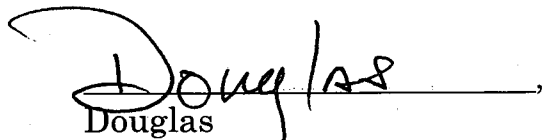
Ramos alleges that his conviction for unlawfully discharging a firearm at a vehicle under NRS 202.285, and his conviction for unlawfully discharging a firearm within a vehicle under NRS 202.287, violate double jeopardy. We disagree.

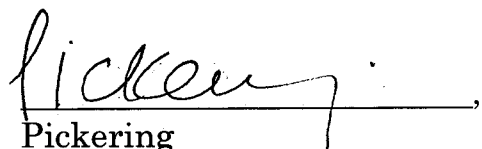
Unless "the elements of one offense are entirely included within the elements of a second offense," double jeopardy is not implicated. Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). Here, although similar, NRS 202.285 prohibits discharging a firearm at or into a vehicle, whereas NRS 202.287 prohibits discharging a firearm within or from a vehicle. Accordingly, each statute contains separate and distinct elements. Therefore, we conclude that Ramos' two convictions do not implicate double jeopardy.

For the reasons set forth above, we conclude that Ramos' arguments on appeal lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Valorie Vega, 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