

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY BRIAN BARLOW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52709

FILED

DEC 23 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of felony reckless driving. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant Larry Brian Barlow to serve two consecutive prison terms of 24 to 72 months, suspended execution of the sentence, and placed Barlow on probation for a fixed period of five years.¹

Double Jeopardy

Barlow contends that the district court violated the double jeopardy clauses of the United State and Nevada constitutions by allowing the State to proceed with reckless driving charges after the justice court

¹The district court later entered an order revoking Barlow's probation and an amended judgment of conviction reducing the sentence to two consecutive prison terms of 24 to 60 months. See NRS 176A.630.

had convicted him of vehicular manslaughter. Barlow argues that jeopardy attached when testimony began during his vehicular manslaughter case, the counts of vehicular manslaughter and reckless driving are the same offense for double jeopardy purposes, and his conviction for vehicular manslaughter barred further prosecution of this offense. We agree that the Double Jeopardy Clause barred prosecution of one of the two reckless driving counts.

The State charged Barlow with two felony counts of reckless driving and misdemeanor counts of vehicular manslaughter, driving without a valid license, and operation of a vehicle without security. One of the reckless driving counts (Count 1) and the vehicular manslaughter count alleged that Barlow drove his vehicle in a manner that proximately caused the death of Luis Rodriguez-Silva. The justice court conducted a preliminary hearing on the felony charges and a trial on the misdemeanor charges in the same proceeding. The justice court ordered Barlow to answer for the felony charges in the district court, adjudicated Barlow guilty of vehicular manslaughter, denied the State's untimely motion to dismiss the vehicular manslaughter charge, and dismissed the remaining misdemeanor charges for lack of evidence. Barlow moved to dismiss the reckless driving charges in the district court, claiming that further prosecution of this offense violated the Double Jeopardy Clause. The district court conducted a hearing on the motion, determined that the State was entitled to seek a conviction for the greater offense, and denied Barlow's motion. Barlow was subsequently tried and convicted of both counts of reckless driving.

We conclude that the vehicular manslaughter count was a lesser-included offense of the reckless driving offense as alleged in Count 1 because the reckless driving offense could not be committed without committing vehicular manslaughter, McIntosh v. State, 113 Nev. 224, 226, 932 P.2d 1072, 1073 (1997), and therefore the district court violated the Double Jeopardy Clause by allowing the State to proceed with the greater offense after the State had already obtained a conviction for the lesser-included offense in the justice court, Ohio v. Johnson, 467 U.S. 493, 501 (1984) (“the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense”). Accordingly, we vacate Barlow’s conviction for Count 1 and remand this case to the district court with instructions to enter a corrected judgment of conviction.

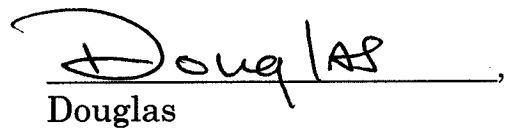
Prosecutorial Misconduct

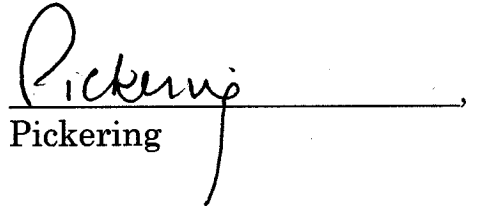
Barlow also contends that the prosecutor committed misconduct by improperly denigrating the defense theory and disparaging defense counsel during rebuttal argument. However, Barlow did not object to the prosecutor’s comments. As a general rule, the failure to object to prosecutorial misconduct precludes appellate review absent plain error. Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987). We have considered the prosecutor’s comments in context and we conclude that they do not constitute plain error.

Having considered Barlow’s contentions and for the reasons discussed above, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Eighth Judicial District Court Dept. 7, 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