IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDY DEAN PATINO A/K/A RANDY DIAZ PATINO,
Appellants,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56956

FILED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of lewdness with a child under 14 years of age and three counts of sexual assault of a child under 14 years of age. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. Appellant Randy Patino raises two issues.

Prosecutorial misconduct

Patino claims that several statements that the prosecutor made during closing and rebuttal arguments constituted misconduct warranting reversal of his convictions. We disagree. Because Patino failed to object to any of these asserted instances of prosecutorial misconduct, we review his claims only for plain error affecting his substantial rights.[1] See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

[1]Patino claims that he objected in one instance. However, the record reveals that he was objecting to a different statement the prosecutor made.

First, Patino claims that misconduct occurred when the prosecutor argued that Shayler Gheen—Patino's close friend—saw two used condoms on the floor of the bedroom where the assaults occurred. Patino asserts that this fact was not in evidence. The record belies this claim, as Gheen was impeached with an earlier statement where he admitted that he saw the condoms and stated that "if it's in the [earlier] statement, I'm sure I said it."

Second, Patino claims that the prosecutor committed misconduct when she implied that Patino was wearing a disguise during trial. During his testimony, Gheen stated that he could not identify Patino sitting at the defense table, despite the fact that they were lifelong friends. The prosecutor argued that this could be because Patino had altered his appearance by shaving his head before trial and wearing "fake glasses" while Gheen and a child witness were testifying. Because Gheen's apparent inability to recognize Patino strains credulity, we conclude that the prosecutor's comments were fair argument, not misconduct. See Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989).

Third, Patino claims that the prosecutor committed misconduct by implying that Patino was a serial rapist. Patino argued to the jury that the victim consented, and suggested that one possible indication of consent was that Patino wore condoms during the assaults as a measure to be considerate of the victim's health. In rebuttal, the prosecutor stated that, "everyone has heard of those . . . stranger rapes" where the only way to identify the assailant is with DNA evidence and posited that this "could have been the reason why he wore a condom." The mention of "stranger rape" is unnecessary and irrelevant to this case,

where the victim and Patino had a relationship before the assaults. However, given the strength of the evidence—including Patino's confession, the victim's disavowals of consent, and the corroborating testimony of the sexual assault examination nurse—we conclude that this did not amount to plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that when conducting plain error review, "the burden is on the defendant to show actual prejudice or a miscarriage of justice").[2]

Voluntariness of Patino's confession

Patino contends that the district court erred when it concluded that his confession was voluntary. At a Jackson v. Denno[3] hearing, the district court heard the testimony of three police officers, each of whom had read Patino his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). At the hearing, Patino testified that he was under the influence of a massive amount of alcohol and cocaine when his statements were taken and that the officers choked him and threatened his life. The officers testified that they had no indication that Patino was impaired and denied employing any excessive physical force. A recording of Patino's brief, 25-minute interview was played, and the district court noted that Patino's statements during that interview were coherent and lengthy and that he

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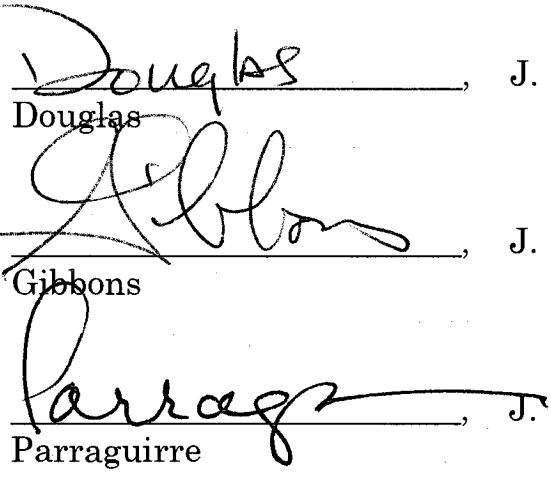
[2]Because we conclude that there was no prosecutorial misconduct constituting plain error, we reject Patino's claim that the district court was obliged to intervene sua sponte. Cf. Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (recognizing duty of district court to intervene when prosecutorial misconduct is "patently prejudicial" (internal quotations omitted)).

[3]378 U.S. 368 (1964).

had admitted to drinking only 2 beers. The district court found Patino's testimony to be self-serving and incredible and his confession to be voluntary. We conclude that the district court's conclusions are supported by substantial evidence and that it therefore did not err in admitting Patino's confession. See Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997).

Having considered Patino's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Douglas W. Herndon, District Judge
Nguyen & Lay
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk