IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO ALBERTO HERRADA-GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57582

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of murder with the use of a deadly weapon and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Mario Herrada-Gonzalez had an ongoing dispute with Melchor Bravo over an unpaid debt. Subsequently, Bravo was murdered in the parking lot of the Fort Cheyenne Casino in Las Vegas. Herrada-Gonzalez admitted during a police interrogation that he was at the casino on the night of the murder, but he maintained that his friends, Spooky and Shorty, shot Bravo. The police never found Spooky or Shorty. After a five-day jury trial, Herrada-Gonzalez was convicted of murder with the use of a deadly weapon and robbery with the use of a deadly weapon.

The issues on appeal are: (1) whether there was sufficient evidence to support Herrada-Gonzalez's convictions for murder and robbery; (2) whether the district court abused its discretion in failing to give Herrada-Gonzalez's proposed negative inference jury instruction; and (3) whether the district court abused its discretion in not granting Herrada-Gonzalez's motion for a mistrial based on prosecutorial

misconduct. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.[1]

Sufficiency of evidence

Herrada-Gonzalez contends that there was insufficient evidence to support his robbery and first-degree murder convictions. He argues that the State did not present evidence to show that a robbery actually occurred. Herrada-Gonzalez also argues that the State presented insufficient evidence to support the first-degree murder conviction because the only evidence of premeditation or lying in wait was his own statements. Additionally, Herrada-Gonzalez contends that the felony-murder theory cannot be supported because there was insufficient evidence to support the robbery conviction.

In order to determine "whether a verdict was based on sufficient evidence to meet due process requirements, this court will

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[1]Herrada-Gonzalez also raises the following issues on appeal: (1) whether the district court erred in denying his motion to suppress evidence without conducting an evidentiary hearing; (2) whether the district court erred in denying his motion to suppress his statements to police; (3) whether the district court abused its discretion in denying a mistrial after reference was made to his arrest on misdemeanor charges; (4) whether the district court erred in instructing the jury on the lying-in-wait theory of first-degree murder and by allegedly failing to instruct the jury that all elements must be proven beyond a reasonable doubt; (5) whether the district court abused its discretion in instructing the jury; (6) whether the district court abused its discretion in refusing to give his other proposed instructions; (7) whether sufficient evidence of the corpus delicti for murder and robbery, aside from his admissions, was presented; and (8) whether cumulative error warrants reversal. We conclude that these issues are without merit and will not discuss them further.

inquire 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Mitchell v. State,* 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (alteration in original) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell,* 124 Nev. at 816, 192 P.3d at 727. Further, a conviction may rest entirely on circumstantial evidence. *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

The State presented only three pieces of evidence to support its theory that Herrada-Gonzalez robbed Bravo of his cell phone and a small amount of money, namely (1) Herrada-Gonzalez's admission that he told his friends to take the cell phone, (2) the fact that Bravo's cell phone was missing from the crime scene, and (3) the fact that Herrada-Gonzalez tried to access Bravo's voicemail after the murder. There was no evidence presented that Herrada-Gonzalez or his friends took Bravo's cell phone by force or threat of force, as is required for robbery. *See* NRS 200.380(1) (establishing that force or threat of force is an element of robbery). Therefore, we conclude that the State failed to prove Herrada-Gonzalez's guilt beyond a reasonable doubt with respect to the robbery conviction. And, because there was insufficient evidence to support the robbery conviction, Herrada-Gonzalez is not guilty of murder under the felony-murder rule.

Nonetheless, the State met its burden as to first-degree murder and a reasonable jury could have convicted Herrada-Gonzalez on at least one of the other theories of murder presented. *Rhyne v. State*, 118

Nev. 1, 9-10, 38 P.3d 163, 169 (2002). Since first-degree murder can result either from lying in wait, premeditating and deliberating, or perpetrating a felony, NRS 200.030(1)(a)-(b), if sufficient evidence supports Herrada-Gonzalez's guilt under any of these theories, the conviction stands.

Lying in wait is a type of murder that "is defined as watching, waiting, and concealment from the person killed *with the intention* of killing or inflicting bodily injury upon that person." *Collman v. State*, 116 Nev. 687, 717, 7 P.3d 426, 445 (2000) (alteration in original) (citing *Moser v. State*, 91 Nev. 809, 813, 544 P.2d 424, 426 (1975)).

The State presented evidence that Herrada-Gonzalez went to the casino to wait for Bravo with the intent to accost him regarding the unpaid debt. It also presented evidence that Herrada-Gonzalez wanted Bravo beaten up and that a witness had heard Herrada-Gonzalez threaten Bravo with violence. Additionally, evidence demonstrated that Herrada-Gonzalez was at or near the casino when Bravo was murdered. Because we review the evidence in the light most favorable to the State and because there is sufficient evidence to support the first-degree murder conviction under the lying-in-wait theory, the jury's verdict of first-degree murder stands. *See Collman*, 116 Nev. at 717, 7 P.3d at 445; *Nolan v. State*, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006).

The district court did not abuse its discretion in refusing to give Herrada-Gonzalez's proposed negative inference instruction

Herrada-Gonzalez argues that it was gross negligence for the detectives investigating the murder not to obtain a copy of the casino's surveillance tapes from the night of the murder. As a result, Herrada-Gonzalez argues that he was entitled to an instruction requiring the jury to presume that any evidence not recovered was unfavorable to the State.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). We conduct a two-part test to determine what remedy, if any, a defendant is entitled to if the State fails to gather evidence. *Daniels v. State,* 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (citing *State v. Ware,* 881 P.2d 679 (N.M. 1994)). First, the district court must determine if the evidence was material, "meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." *Id.* If the evidence was material, then the district court must determine whether the failure to recover the evidence was a result of negligence, gross negligence, or bad faith. *Id.* "When mere negligence is involved, no sanctions are imposed, but the defendant can still examine the prosecution's witnesses about the investigative deficiencies. When gross negligence is involved, the defense is entitled to a presumption that the evidence would have been unfavorable to the State." *Id.* (citation omitted).

In this case, the district court determined that the State's failure to obtain copies of the surveillance videos was at most mere negligence because it was clear from the record that the police reviewed the tapes with Fort Cheyenne's manager and found nothing relevant on them. The manager and the detective testified that they reviewed the surveillance footage from the night of the crime and observed that, although the video cameras pointed in the direction of where the murder occurred, the exact location was too far away to be caught by the cameras. Additionally, they testified that the image was made even more unclear

because the area of the parking lot where the murder occurred was not well lit.

To obtain an adverse inference instruction about uncollected or destroyed evidence, a defendant must "show[ ] that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense." *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979). Because Herrada-Gonzalez has not demonstrated any reasonable expectation that the unrecovered surveillance tape would be either material or exculpatory, he was not entitled to an adverse instruction. Further, even if the surveillance video was material, Herrada-Gonzalez had sufficient opportunity to cross-examine the detective and casino manager who reviewed the surveillance videos. *See Daniels*, 114 Nev. at 267, 956 P.2d at 115. Therefore, the district court did not abuse its discretion in denying Herrada-Gonzalez's request for the instruction because he did not prove that the State acted with gross negligence.

Prosecutorial misconduct did not occur

Herrada-Gonzalez argues that a number of statements made during the prosecutor's rebuttal argument required the district court to order a mistrial. We address each statement individually.

In determining whether the State committed prosecutorial misconduct, we engage in a two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, we determine if the statements were improper. *Id.* This is done by considering the prosecutor's statements within the context that they were made. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Second, if the statements were improper, we determine whether they warrant reversal. *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. If the errors are not

of a constitutional nature, they are subject to harmless error review and do not require reversal if the error did not substantially affect the jury's verdict. *Id.* at 1188-89, 196 P.3d at 476. Alternatively, if the errors were of a constitutional nature, the State must prove, "beyond a reasonable doubt, that the error did not contribute to the verdict." *Id.* at 1189, 196 P.3d at 476. If an error was not objected to at trial, we employ plain-error review, rather than harmless-error review. *Id.* at 1190, 196 P.3d at 477. Thus, "an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Id.* (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

The travesty of justice comment was not improper

Herrada-Gonzalez takes issue with the prosecutor's use of the phrase "travesty of justice" in arguing that the jury must convict him of first-degree murder. Herrada-Gonzalez relies on our decision in *Evans v. State*, where we explained that asking the jury to "do its job" or follow through with its "legal duty" was improper because these phrases stirred the jury's passion and led the jury to believe that it had to find in a certain way. 117 Nev. 609, 633, 28 P.3d 498, 515 (2001) (internal quotations omitted).

However, this reliance on *Evans* is misplaced because the context demonstrates that the prosecutor was arguing about the weight of the evidence and not attempting to convince the jury that it had a duty independent of the evidence to convict the defendant. The prosecutor made the "travesty of justice" comment after stating that Herrada-Gonzalez "is guilty of it under every single theory pled by the State in this case." She then discussed specific evidence that supported her conclusion.

Thus, the context shows that the "travesty of justice" comment was part of an argument to the jury that the State had presented evidence to meet its burden of proof on all of the theories of guilt presented to the jury. Since the comment was part of the prosecutor's argument about how it met its burden of proof, the comment was not improper.

The prosecutor did not express her personal opinion

Herrada-Gonzalez claims that the prosecutor injected her personal opinion into the argument. It is improper for the prosecutor to inject personal opinion into her discussion of the defendant's guilt. *Aesoph v. State*, 102 Nev. 316, 322-23, 721 P.2d 379, 383-84 (1986). Prosecutors, however, must be able to comment on the evidence that was developed at trial. *Jimenez v. State*, 106 Nev. 769, 773, 801 P.2d 1366, 1368 (1990).

In commenting on evidence developed at trial, a prosecutor's "occasional use of the first person does not constitute misconduct" so long as the prosecutor is not suggesting a "secret knowledge of facts not in evidence." *State v. Luster*, 902 A.2d 636, 651, 654 (Conn. 2006); *see also United States v. Jones*, 468 F.3d 704, 708 (10th Cir. 2006) (holding that "[t]he prosecutor's occasional use of the first person" in closing argument is not improper). In *Luster*, the defendant appealed a conviction for manslaughter after he shot and killed a man with whom he was fighting. 902 A.2d at 643-44. With regard to the fight that led to the shooting, the *Luster* prosecutor stated during closing, "Was [the victim] trying to cause serious physical injury? *I don't think so.*" *Id.* at 654 (alteration in original). The Connecticut Supreme Court reasoned that the limited use of the pronoun "I" is appropriate because "the use of the word 'I' is part of our everyday parlance" and because the prosecutor "should not be put in the rhetorical straightjacket of always using the passive voice, or continually emphasizing that he is simply saying I submit to you that this

is what the evidence shows." *Id.* (internal quotations omitted). As a result, the *Luster* court held that this was not an expression of opinion because "the prosecutor merely used a rhetorical device to suggest an inference that could be drawn from the evidence." *Id.* Thus, a prosecutor's occasional use of phrases such as "I think" is not improper if the prosecutor is commenting on the admitted evidence.

Here, the prosecutor argued, "The one thing that cannot be corroborated is Spooky and Shorty. Do I think that Spooky exists[?] Yeah." She then stated, "Does Spooky exist[?] He does. He is sitting right in this courtroom." The prosecutor made these statements after she argued that other facts could be corroborated by the evidence. By saying "Do I think Spooky exists[?]," the prosecutor was not implying any secret knowledge about Spooky's identity or Herrada-Gonzalez's guilt. Instead, she was merely arguing an inference that the jury could draw about Spooky's identity from the evidence presented. Thus, this single use of the pronoun "I" did not constitute an expression of personal opinion but was merely a comment on the admitted evidence. As a result, this statement was not improper.

The prosecutor did not disparage defense counsel

Herrada-Gonzalez contends that the prosecutor made disparaging remarks toward defense counsel. "Disparaging remarks directed toward defense counsel 'have absolutely no place in a courtroom, and clearly constitute misconduct.'" *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (quoting *McGuire v. State*, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984)). Further, the prosecutor may not disparage the defense's use of "legitimate defense tactics." *Id.* at 898, 102 P.3d at 84.

While discussing the fact that the casino's surveillance videotapes were not recovered, the prosecutor argued:

> You know, defense says, well, with the video tapes that Bulloch sat before you—their witness—sat before you and told you that the detectives did come in and reviewed all the tapes together from the front of the building and there was nothing. But now he stands before you and says, well, who knows what he was talking about. Why[?] Because it doesn't work for him.

Contrary to Herrada-Gonzalez's assertion, this comment was not directed at his attorney but at his attorney's argument. Specifically, the comment was an attempt to show the weaknesses in defense counsel's argument about the necessity of the missing videotapes for Herrada-Gonzalez's defense. Because the comment was directed at the quality of an argument made and not the attorney making it, this argument was not disparaging of defense counsel or his choice of tactics. As a result, this comment was not improper.

The entitlement to justice comment was not improper

Herrada-Gonzalez argues that the prosecutor's comments that Bravo was entitled to justice even if he was involved in unlawful activity were improper. Although it is inappropriate to appeal to the jury's sympathy, it is not necessarily viewed as a clear error that is prejudicial to the defendant. *See Rose v. State*, 123 Nev. 194, 210, 163 P.3d 408, 419 (2007) (holding that while a prosecutor's appeal to the jury's sympathy was improper, it did not constitute plain error). The context of the prosecutor's statements shows that she was not trying to appeal to the jury's sympathy. Instead, the prosecutor was pointing out that any evidence presented to show Bravo's bad character did not change the fact that he was the victim of a murder. The word "justice" was not prejudicial because it explained that Bravo's lifestyle choices were not relevant to the

question of Herrada-Gonzalez's guilt. Therefore, this comment was not improper.

The predator and prey comment was not improper

Herrada-Gonzalez takes issue with the prosecutor's comment that: "The evidence shows that there is a man who is unarmed, who is fighting for his life, who [is] scrambling, who's getting shot all [over] his body because he's trying to get away. As prey would a predator."

We previously have determined that describing a defendant as a predator and a victim as prey is acceptable if it is used to describe the defendant's actual conduct. *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 58-59 (2005). In *Miller*, the prosecutor argued that a defendant who stole from an undercover police officer posing as an intoxicated vagrant was "looking for people to prey upon." *Id.* at 100, 110 P.3d at 58 (internal quotations omitted). Because the State developed evidence that the *Miller* defendant actively sought vulnerable victims, we found that describing the defendant as a predator that preyed upon his victims was not improper. *Id.* Thus, it is not improper for a prosecutor to use the words "predator" or "prey" when these terms are used to describe the defendant's conduct and are supported by admitted evidence. *Id.* at 100, 110 P.3d at 58-59.

Here, the prosecutor used the predator and prey analogy when discussing evidence that supported the State's lying-in-wait theory of murder. Before and after using the analogy, the prosecutor discussed the evidence showing that Herrada-Gonzalez laid in wait for Bravo in the casino's darkened parking lot after searching for him at other locations. Because these facts demonstrate that Herrada-Gonzalez was hunting for Bravo, it was not improper for the prosecutor to use the predator and prey analogy in describing Herrada-Gonzalez's conduct while arguing a lying-in-wait theory of murder. Therefore, this comment was not improper.

The prosecutor did not argue facts that were not in evidence or vouch for witnesses

Herrada-Gonzalez argues that the prosecutor improperly commented on facts that were not in evidence, vouched for the detective's credibility, and interjected her opinion about two non-testifying witnesses. The prosecutor argued:

> We've heard a lot about the different witnesses in this case. Bryan and Andrea Bracamontes, why didn't we call them. Pretty much know why. The detective didn't believe anything they said, why should we. They are the Defendant's friends. The detective found them through the Defendant's phone records. They're an absolute non-issue.

It is inappropriate for the prosecutor to refer to facts that are not in evidence, *Rose*, 123 Nev. at 209, 163 P.3d at 418, or to interject her opinion of the case, *Aesoph*, 102 Nev. at 322-23, 721 P.2d at 383-84. However, commenting on the evidence is allowed. *Jimenez*, 106 Nev. at 773, 801 P.2d at 1368. Additionally, the State may not vouch for the credibility of its witnesses. *Anderson*, 121 Nev. at 516, 118 P.3d at 187 (2005).

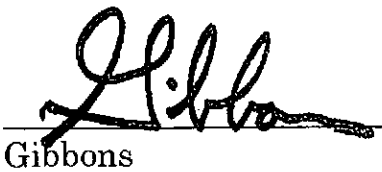
Taken in context, this comment does not show that the prosecutor vouched for a witness, interjected her opinion, or referred to facts not in evidence. The detective testified that he spoke to Bryan and Andrea Bracamontes and stated that they did not have anything helpful to add. In her rebuttal, the prosecutor simply reiterated that testimony to the jury. Those statements do not amount to vouching for the detective's credibility. Also, saying that Bryan and Andrea were not helpful or that they did not provide anything to the case is not an interjection of opinion. Instead, it was a comment on the evidence presented to the jury and an explanation of why the State did not present them as witnesses. *Jimenez*,

106 Nev. at 773, 801 P.2d at 1368. Thus, the prosecutor did not vouch for a witness, interject personal opinion, or refer to facts not in evidence. Therefore, these comments were proper.

Conclusion

There was substantial evidence to support Herrada-Gonzalez's murder conviction, but not to support his robbery conviction. Further, the district court did not abuse its discretion by declining to give Herrada-Gonzalez's negative inference jury instruction because the record did not demonstrate that the failure to copy the surveillance video constituted gross negligence. Finally, the prosecutor's closing argument comments were not improper. Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.



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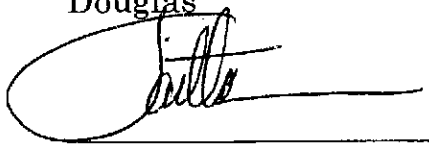

_____, J.
Saitta

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