

IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT SANCHEZ,

No. 35568

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**AUG 10 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY: *J. [Signature]*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in prison with the possibility of parole.

Appellant Gilbert Sanchez filed this appeal, arguing that three errors warranting a reversal of his conviction occurred during the course of his trial.

First, Sanchez argues that the prosecutor mischaracterized the reasonable doubt standard during her closing argument. Second, Sanchez argues that the district court improperly admitted prior bad act evidence. Third, Sanchez argues that the district court failed to address him personally at the sentencing hearing.

We conclude that (1) although the prosecutor mischaracterized the reasonable doubt standard, the error was corrected by a proper jury instruction, (2) the district court erred in admitting evidence of prior bad acts but that the error was harmless, and (3) the court did address Sanchez personally.

Sanchez was charged with one count of murder with the use of a deadly weapon in connection with the December 1998 death of his wife, Tiofila ("Terri") Sanchez. The case was tried before a jury in October 1999, and the jury

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ultimately found Sanchez guilty of second degree murder with the use of a deadly weapon. Sanchez was sentenced to two consecutive terms of life imprisonment with the possibility of parole after ten years.

On December 21, 1998, Sanchez called 9-1-1 and told the emergency operator, "I think I killed my wife." Sanchez told the emergency operator that he and his wife had argued over purchasing furniture the previous evening and that he had laid across her face. Sanchez also stated that the last time he had seen his wife breathing was the previous day. Police were then dispatched to the Sanchez residence in Henderson.

When police arrived at the Sanchez home, they discovered Terri's body covered with pillows and a blanket on the floor of the master bedroom. Terri's body was marked by various lacerations and abrasions to her head, neck, chest, torso, arms, and shoulders. An examination of Terri's eyes revealed petechial hemorrhages, a condition consistent with suffocation.

At trial, Sanchez testified on his own behalf and gave his version of what had happened the day his wife died. Sanchez testified that he and his wife had an argument and that Terri had attacked him with a screwdriver. Terri then attacked Sanchez with two screwdrivers; and after scuffling on the floor, Sanchez was able to pry the tools out of her hands. Then Sanchez testified that he laid on top of Terri's face. Next, Sanchez testified he got off Terri to search for his glasses he had lost during the scuffle and that Terri got off the floor and attempted to enter the master bedroom, which was locked. Sanchez testified that he attempted to assist his wife in opening the door and that he ultimately broke down the door. After another scuffle involving an iron and another screwdriver, Sanchez testified that his wife simply knelt down

on the floor, draped a blanket over her head, and went to sleep. Sanchez gave no explanation for how Terri sustained her injuries and testified that he did not notice any blood on himself, his clothes, or on any part of the home until the next morning, when he contacted the police.

Although Terri had been seriously injured during the protracted fight with her husband, she did not die as a result of those injuries. The autopsy concluded that the cause of death was mechanical asphyxiation.

The reasonable doubt standard

First, Sanchez argues that the State made improper remarks explaining reasonable doubt during closing argument and that his conviction should, therefore, be reversed.

The State responds by arguing that regardless of the prosecutor's remarks in closing, the jury was properly instructed by the court on reasonable doubt, pursuant to NRS 175.211,<sup>1</sup> and therefore, the prosecutor's misstatement was harmless.

We conclude that although the prosecutor's comments were marginally inappropriate, any error was harmless given

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<sup>1</sup>NRS 175.211, the statutorily approved reasonable doubt instruction, states:

1. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this state.

that the district court properly instructed the jury using the statutorily prescribed reasonable doubt instruction.

The standard of review for prosecutorial misconduct rests upon the defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'"<sup>2</sup> The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process.<sup>3</sup> The defendant must show that, but for the challenged remarks, the prosecutor would not have been able to prove his case beyond a reasonable doubt.<sup>4</sup>

Prosecutors must be free to express their perceptions of the record, evidence, and inferences properly drawn therefrom.<sup>5</sup> A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comment standing alone.<sup>6</sup> Relevant statements or conduct must be viewed in context to determine whether the prosecutor's conduct affected the fairness of the trial.<sup>7</sup> If the error is harmless beyond a reasonable doubt, the conviction will stand.<sup>8</sup>

The portion of the closing argument relevant to this argument, and to which Sanchez objects, is as follows:

MS. LUZAICH [Prosecutor]: The burden on the state in any criminal case is to prove our elements, our case beyond a

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<sup>2</sup>Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)).

<sup>3</sup>See Darden v. Wainwright, 477 U.S. 168, 181 (1986).

<sup>4</sup>See McCraney v. State, 110 Nev. 250, 256, 871 P.2d 922, 926 (1994).

<sup>5</sup>See Jimenez v. State, 106 Nev. 769, 773, 801 P.2d 1366, 1368 (1990).

<sup>6</sup>See United States v. Young, 470 U.S. 1, 11 (1985).

<sup>7</sup>Id.

<sup>8</sup>See Manning v. Warden, 99 Nev. 82, 87, 659 P.2d 847, 850 (1983).

reasonable doubt, and absolutely that's the way it should be because, like the defense, says, this is very serious, very, very serious and we wouldn't want anybody to take it lightly, and we don't take it lightly. So, it is beyond a reasonable doubt.

But what you need to remember, folks, is that reasonable doubt is not a mystical and magical concept. It's not beyond a shadow of a doubt, it's not beyond all imaginary doubt. It's just beyond a reasonable doubt. It is a standard that's used in every single criminal case in the country. The same standard in a petty larceny case or a felony case or a murder case. The same standard of proof. And it's a standard of proof that is used every day in courtrooms up and down the hall here and in other courts. People are convicted under the beyond-a-reasonable-doubt standard.

And what it means, basically, is you have to have a reason for - to find somebody not guilty. You can't just, you know, "ehh, you know, I just have this little tiny weeny inkling in my mind that it's possible that he might not have done it," that is not reasonable doubt. If you can say the defendant is not guilty because, if you have a reason.

MR. GENTILE: Objection, Your Honor. This is shifting the burden.

THE COURT: You will have an instruction as to reasonable doubt. Our Supreme Court has indicated that is the only instruction as to what reasonable doubt is.

MS. LUZAICH: Absolutely. And the burden is only on the state, the defense has absolutely no burden whatsoever. But with all of the evidence, the only, the only verdict is guilty of murder. None of you will be able to find a reason not to find him guilty of murder, of first degree murder.

Thank you.

Sanchez relies heavily on Holmes v. State<sup>9</sup> in support of his argument. In Holmes, the defendant's conviction was overturned in part because the prosecutor made improper remarks regarding the standard for reasonable doubt.<sup>10</sup>

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<sup>9</sup>114 Nev. 1357, 972 P.2d 337 (1998).

<sup>10</sup>Id. at 1366, 972 P.2d at 342.

Holmes can easily be distinguished from the instant case. In Holmes, the defendant's conviction was overturned because the district court gave the jury an erroneous reasonable doubt instruction in addition to the prosecutor having made improper remarks. In reversing the conviction, the court ruled that it was "[t]he convergence of these two errors" that warranted reversal.<sup>11</sup> Conversely, in the instant case, it is undisputed that the judge gave the proper instruction. Therefore, Sanchez's argument must fail.

The prosecution's arguments, although marginally improper, were not so misleading or patently prejudicial as to affect the outcome reached by the jury. Further, the jury was properly instructed on the concept of reasonable doubt, thereby removing the taint of the prosecutor's mischaracterization. Moreover, the prosecutor, directly after the questionable comment, stated that the burden was entirely upon the State and that the defendant had no burden whatsoever.

#### Prior bad acts evidence

The trial court's determination to admit or exclude prior bad act evidence is to be given great deference and will not be reversed absent manifest error.<sup>12</sup>

Sanchez argues that the district court erred in admitting the rebuttal testimony of Terri's sister, Ms. Guzman, that Sanchez had nineteen years prior called his wife a "slut" and a "nigger-lovin' whore." Sanchez also argues that the district court improperly allowed Ms. Guzman to

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<sup>11</sup>Id.

<sup>12</sup>Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

testify that fifteen years earlier, Sanchez ordered Ms. Guzman to leave the Sanchez residence.

Sanchez contends that the testimony was not relevant to the State's case, that it constituted inadmissible evidence of Sanchez's prior bad acts which was more prejudicial than probative, and that it was not properly framed so as to relate to Sanchez's character.

In the present case, the State offered Ms. Guzman's testimony to rebut Sanchez's general denial of the two incidents. On appeal, the State argues that the evidence was properly admissible to rebut factual assertions made by Sanchez.

NRS 48.045(2) states the general rule for admitting evidence of prior bad acts:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Further, a district court determining whether such acts are admissible under NRS 48.045(2) must conduct a hearing and determine whether (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.<sup>13</sup>

Regarding the relevancy of evidence, NRS 48.015 states that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it

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<sup>13</sup>Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

would be without the evidence" is "relevant evidence." This court has generally held inadmissible those prior acts that are remote in time and involve different actions than those which are charged or involve someone other than the victim.<sup>14</sup>

Regarding the weighing of probative value versus unfair prejudice, this court has stated that the use of uncharged bad acts is heavily disfavored and is likely to be prejudicial or irrelevant.<sup>15</sup> Further, such evidence forces the accused to defend himself against vague and unsubstantiated charges and may result in a conviction because the jury believes the defendant to be a bad person.<sup>16</sup> Thus, using uncharged bad acts to show criminal propensity is forbidden and is commonly viewed as grounds for reversal.<sup>17</sup>

With regard to the use of the testimony as relating to Sanchez's character, NRS 48.045(1), in combination with NRS 48.055, allows for character evidence in the form of reputation or opinion evidence to be admitted only if the defendant puts his or the victim's character in issue.<sup>18</sup> Further, where character evidence is admissible, evidence of specific acts is admissible only upon cross-examination or

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<sup>14</sup>The following cases are illustrative: Roever v. State, 114 Nev. 867, 872, 963 P.2d 503, 506 (1998) (in a case involving a woman's murder of her husband, this court held that testimony recounting the defendant's prior violent behavior toward others and stories of extraordinary past murders was "so inflammatory, speculative, and utterly fantastic as to bear practically no probative value"); Beck v. State, 105 Nev. 910, 912, 784 P.2d 983, 984 (1989) (in a case involving a high school teacher's sexual assault of one of his students, testimony by another student victim regarding a bad act that occurred sixteen years earlier was deemed to be irrelevant as it involved a different bad act and was too remote in time).

<sup>15</sup>Roever, 114 Nev. at 872, 963 P.2d at 506.

<sup>16</sup>Id.

<sup>17</sup>Id.

<sup>18</sup>See Roever, 114 Nev. at 871, 963 P.2d at 505-06.



whenever the defendant's character is an essential element of the charge or defense.<sup>19</sup>

We conclude that the prior acts are too remote in time. We further conclude that Sanchez's prior acts are inadmissible for any other purpose contemplated by NRS 48.045(2) or NRS 48.055. Additionally, any probative value the alleged name-calling incident might have is outweighed by the prejudicial value because of the racially charged nature of the alleged slur. Finally, the evidence was not properly admitted as relating to Sanchez's character because it was not offered in the form of opinion or reputation testimony or elicited on cross-examination per NRS 48.055(1). Accordingly, despite the highly deferential standard of review, the district court abused its discretion in admitting the evidence.

We conclude, however, that the error was harmless in light of the other substantial evidence establishing Sanchez's guilt. An error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent error."<sup>20</sup>

This other substantial evidence included: (1) Sanchez's own 9-1-1 call in which he said, "I think I killed my wife"; (2) Sanchez's explanation to the 9-1-1 operator that he and his wife had engaged in a heated argument over purchasing furniture, and in an effort to make her stop yelling at him, he laid across her face; (3) when police arrived at the Sanchez home, they discovered Terri's dead body covered with pillows and a blanket; and (4) the investigation and Sanchez's own testimony described a violent fight between

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<sup>19</sup>See id.

<sup>20</sup>Neder v. United States, 527 U.S. 1, 18 (1999).

Sanchez and his wife. Although Terri had been seriously injured in the fight, the autopsy indicated she died as a result of mechanical asphyxiation, not the injuries sustained in the fight.

Failure to address the defendant personally

Sanchez's final argument is that the district court failed to address him personally before imposing his sentence as required by NRS 176.015(2). Sanchez argues that the failure to personally address him violates Nevada's statutory requirement as well as his constitutional right to due process.

We conclude that Sanchez's argument is patently without merit and that the district court did address Sanchez personally.

NRS 176.015(2)(b) requires that the court, before imposing sentence on the defendant, shall "[a]ddress the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."

The transcript reveals that the district court clearly addressed Sanchez and gave him the opportunity to address the court:

As to this matter Mr. Sanchez you have a right to make a statement to the Court if you wish to, if you don't wish to you don't have to, in any case counsel will be speaking on your behalf. And Mr. Gentile how ever [sic] you want to handle this portion, if you wish to speak first with Mr. Sanchez speaking last or vice versa.

In addition, the defense counsel's failure to object or complain of any alleged failure on the part of the court to address Sanchez waives that issue on appeal.<sup>21</sup>

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<sup>21</sup>See McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

We conclude that the prosecutor mischaracterized the reasonable doubt standard, but this error was cured by the proper reasonable doubt instruction. We also conclude that the district court erred in admitting evidence of Sanchez's prior bad acts, but the error was harmless. Finally, we conclude that the district court addressed Sanchez personally and that no error occurred in this context. We, therefore,

ORDER the judgment of the district court AFFIRMED.

Young J.  
Young

Leavitt J.  
Leavitt

Becker J.  
Becker

cc: Hon. Michael L. Douglas, District Judge  
Attorney General  
Clark County Public Defender  
Clark County District Attorney  
Clark County Clerk