

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL LEONARDO CASTRO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35940

**FILED**

**MAY 21 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Ruben*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction pursuant to a jury verdict, of two counts of sexual assault.

Appellant Daniel Leonardo Castro alleges several instances of error stemming from prosecutorial misconduct and the admission of testimony from various witnesses. Castro argues further that the evidence, amounting to little more than the testimony of the victim, does not support the jury's verdict. In the event that none of the errors standing alone is grounds for reversal, Castro finally contends that he was denied a fair trial based on the cumulative effect of the errors. We conclude that Castro's contentions are not grounds for reversal individually or cumulatively.

Castro first contends that the prosecutor committed reversible misconduct by asking questions in violation of the district court's preliminary order limiting testimony regarding the age of Castro's girlfriend and Castro's temper. Although the record reveals that the prosecutor blatantly attempted to violate the district court's order precluding testimony regarding the age of Castro's girlfriend, we conclude that the prosecutor's unanswered question on that point did not "so infect the trial with unfairness as to make

the resulting conviction a denial of due process."<sup>1</sup> Regarding the testimony about Castro's temper, we have reviewed the record and conclude that the testimony was properly elicited to explore the witness's bias.<sup>2</sup>

Castro next argues that the district court committed reversible error by admitting prior-bad-act evidence without holding a Petrocelli<sup>3</sup> hearing. The specific points of evidence Castro is concerned about include testimony regarding his temper, his employment status, and his ability to pay child support or otherwise contribute to the household. We conclude that testimony regarding Castro's temper is better described as "bad character" evidence. Castro provides no authority requiring a Petrocelli hearing for bad character evidence. In any event, even assuming that a Petrocelli hearing is required for such evidence, we conclude that the outcome of the trial would have been the same without the testimony.<sup>4</sup> Likewise we conclude that the outcome of the trial would not have been different had the testimony been excluded regarding Castro's employment status and his inability to pay child support or otherwise contribute to the household.<sup>5</sup>

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<sup>1</sup>See Smith v. Phillips, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

<sup>2</sup>See Ransey v. State, 100 Nev. 277, 278, 680 P.2d 596, 597 (1984) (holding that "[t]he bias of a witness is always relevant to the factfinder's assessment of credibility").

<sup>3</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

<sup>4</sup>See Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998) ("[T]he trial court's failure to conduct a proper [Petrocelli] hearing on the record is cause for reversal on appeal unless . . . the result would have been the same if the trial court had not admitted the evidence.").

<sup>5</sup>See id.

Castro next argues that he was denied due process by two instances of witness vouching. In one instance, a witness vouched for the testimony of the victim. The defense objected and the objection was sustained. In the other instance, the district court did not allow the witness to respond to the vouching question. While witness vouching is clearly improper,<sup>6</sup> we conclude that the trial court took prompt action and these instances were not so prejudicial as to have denied Castro his due process rights.<sup>7</sup>

Castro next argues that the district court abused its discretion by allowing Officer Smith to recite her interview with the victim. Although the testimony was not properly admitted under the res gestae doctrine as the district court supposed, we have considered the circumstances of the event and conclude that the testimony was admissible as an excited utterance.<sup>8</sup>

Castro next contends that the district court abused its discretion by allowing Officer Smith to testify regarding whether the victim appeared to be under the influence of anything. We agree with the district court that such

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<sup>6</sup>See *Marvelle v. State*, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998) (observing that "[i]t has long been the general rule that it is improper for one witness to vouch for the testimony of another") abrogated on other grounds by *Koerschner v. State*, 116 Nev. \_\_\_, \_\_\_, 13 P.3d 451, 455 (2000).

<sup>7</sup>See *id.* (concluding that the cumulative effect of State's improper expert testimony coupled with witness vouching consisting of four witnesses vouching for the victim's testimony constituted reversible error).

<sup>8</sup>See *Browne v. State*, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997) (holding that even if the district court gave the wrong reason for admitting testimony, there is no abuse of discretion if the testimony was admissible under another theory); *United States v. Rivera*, 43 F.3d 1291, 1296 (9th Cir. 1995) (holding that the lapse of time between the startling event and the out-of-court statement is relevant but not dispositive, and the court should also consider the

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testimony is based on common perception, helpful to the jury, and therefore admissible as lay opinion testimony.<sup>9</sup>

Castro also challenges the sufficiency of the evidence supporting the jury's verdict.<sup>10</sup> In the alternative, Castro argues that the cumulative effect of the district court's errors denied him a fair trial.<sup>11</sup> We disagree and conclude that the State presented sufficient evidence to support the verdict and that Castro was not denied a fair trial.

Finally, although we conclude that the misconduct of Michael Schwarz, the prosecutor in this case, did not rise to the level of denying Castro due process, we conclude that his conduct was reprehensible. In particular, his intentional violation of the district court's order limiting the testimony at trial and his improper solicitation of vouching testimony are tactics that offend justice. It is a cardinal rule of public law that a prosecutor's primary duty is not to convict at any cost, but to ensure that justice is administered.<sup>12</sup> We admonish Mr. Schwarz to discontinue these inappropriate tactics.

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. . . continued

characteristics of the event and the subject matter of the statements).

<sup>9</sup>See NRS 50.265 (allowing lay opinion testimony).

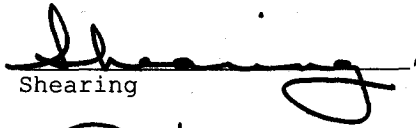
<sup>10</sup>See *Guy v. State*, 108 Nev. 770, 776, 839 P.2d 578, 582 (1992) (setting forth the standard of review for a sufficiency of the evidence challenge: "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (internal quotation marks and citation omitted)).

<sup>11</sup>See *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (noting that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction).

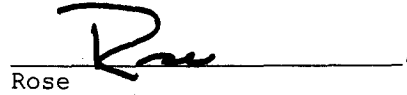
<sup>12</sup>See SCR 179; *Jimenez v. State*, 112 Nev. 610, 618, 918 P.2d 687, 692 (1996).

Having concluded that Castro's allegations of error do not constitute grounds for reversal, we

ORDER the judgment of the district court AFFIRMED.

  
Shearing J.

  
Agosti J.

  
Rose J.

cc: Hon. John S. McGroarty, District Judge  
Attorney General  
Clark County District Attorney  
Clark County Public Defender  
Clark County Clerk