

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE CRUZ-HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38280

FILED

DEC 11 2002

ORDER OF AFFIRMANCE

JANET H. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
DEPUTY CLERK

Appellant Jose Cruz-Hernandez appeals from a jury conviction for trafficking in a controlled substance and using a controlled substance.

After careful consideration, we conclude statements made by the prosecution, not objected to at trial, did not amount to plain error.¹ In addition, we conclude the prosecution's conduct during closing arguments was harmless error and did not shift the burden of proof to Cruz-Hernandez.² Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young
_____, C. J.
Young

Agosti
_____, J.
Agosti

¹Rowland v. State, 118 Nev. ___, ___, 39 P.3d 114, 118 (2002).

²NRS 178.598; Tavares v. State, 117 Nev. ___, ___, 30 P.3d 1128, 1132 (2001).

cc: Hon. Brent T. Adams, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

ROSE, J., dissenting:

I dissent because I believe that the prosecutor repeatedly and improperly characterized Jose Cruz-Hernandez as a liar and his testimony as untruthful. While, the appellant's attorney was inadequate in failing to object to the prosecutor's continual reference to the defendant as a liar, I would reverse and remand this case because I conclude that the repeated instances of prosecutorial misconduct amounted to plain error.

This court has had a long-standing rule that prohibits a prosecutor from calling a defendant's witnesses or the defendant a "liar."¹ In Rowland v. State,² we relaxed this prohibition somewhat and set forth a spectrum for determining when the prosecutor's characterization of the credibility of a witness amounts to misconduct. We explained that "[a] prosecutor's use of the words 'lying' or 'truth' should not automatically mean that prosecutorial misconduct has occurred. But condemning a defendant as a 'liar' should be considered prosecutorial misconduct."³ For situations that fall somewhere between these extremes, a case-by-case analysis is required to determine if misconduct has occurred.⁴

During closing argument, the prosecutor made numerous comments regarding Cruz-Hernandez's credibility:

You also know the defendant's testimony and you also know he's not telling the truth on a whole bunch of things.

¹See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990).

²118 Nev. ___, ___, 39 P.3d 114, 118 (2002).

³Id.

⁴Id.

...

And that's just one of the inconsistencies, a glaring inconsistency you know he's not telling the truth.

...

Defendant's story completely untrue.

...

And what do you know about the defendant's story? You know he doesn't tell the truth. You know he said it many a time to you today and you remember why? Because he's scared. He's been untruthful before because he's scared and that's what he's doing here today, but you know it happened.

...

You've heard an incredible amount of falsehoods from the defendant, things that were not true. . . . But what we know is that he has been untruthful not only to the officers before, not only was he untruthful to the officers in this case, but he has been untruthful in a court of law before in front of a judge, and I listed two different judges on two different times in this town, in this courthouse that he has been untruthful. And you remember he said why? It was because he was scared. That's true. He is scared. It's the same reason he's being untruthful here today. He's scared.

...

We have the officer again and again, PBT shows .10, still scared, still lying, still not telling the truth.

...

Who has the motive in this case to not tell the truth? Only one person, isn't there? Defendant. . . . The defendant . . . has absolutely nothing to lose, nothing to lose and, actually everything to gain, everything to gain. From not telling you the truth, okay?

...

Fears, it's right in there, his fears. Defendant's already told you that he doesn't tell the truth when he's afraid. You think he's not afraid now? He is. He is. Okay.

...

Because we know there's all kinds of things the defendant has said today that are not true. Right.

...

Because he's not telling the truth, and you know that. All the facts tell you that, that he's not telling the truth.

...

We know the defendant's not telling the truth.

...

So the one person—if you won't buy the defendant doesn't tell the truth, when you get back there and there is somebody here who thinks well, wait a second, maybe he's telling the truth, I'm not sure exactly he's lying, then you have that person explain, first of all, all those indiscrepancies [sic] that I've gone into, the long list, and you have them explain, well, look. You're buying the story of someone who's drunk, who has a lot of alcohol, .210, all right?

...

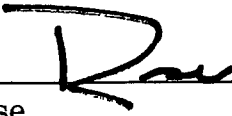
You're supposed to talk about what matters, and the only way you can find the State didn't prove its case, I submit to you because we proved it with all of our facts is if you believe the defendant, and I've shown you again and again that you can't, he's lied again and again and again.

...

You can throw out the defendant's story.

I conclude that these comments were far more than occasional and were, therefore, not within the reasonable latitude provided by Rowland.⁵

Therefore, I respectfully dissent.


_____, J.
Rose

⁵Id. at ___, 39 P.3d at 119 (allowing “reasonable latitude” to “occasionally stat[e] in argument that a witness is lying”).