IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARMANDO MANUEL SALAZAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89233-COA

ORDER OF AFFIRMANCE

Armando Manuel Salazar appeals from a judgment of conviction, entered pursuant to a jury verdict, of sexual assault. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Salazar first argues there was insufficient evidence to support his conviction. Specifically, he claims the State failed to prove that the sexual penetration was nonconsensual or that Salazar did not act under a mistaken belief of consent where he and the victim had previously had consensual sexual encounters, where the victim consented to a sexual encounter, and where there was no evidence of violence surrounding that sexual encounter. Salazar also argues that the victim's intoxication may have affected his recollection of the events and that it was not clear when or if Salazar heard the victim say "No." When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

At trial, the victim in this case, J.C., testified that he encountered Salazar at a bar in Elko one night in November 2023. J.C. first met Salazar in 2019 using a dating app designed to facilitate casual sexual encounters between men. Salazar and J.C. had approximately 8 sexual encounters between 2019 and 2023. After drinking together, Salazar asked J.C. if he wanted to have sex, and J.C. agreed. On the walk to Salazar's house, J.C. told Salazar two times that he did not want to "bottom" (i.e., he did not want to be anally penetrated). At Salazar's house, the two men had consensual sex, with J.C. anally penetrating Salazar. J.C. then fell asleep. J.C. woke up in pain and realized that Salazar was on top of him penetrating him anally. J.C. told Salazar, "No," and "please stop" more than once. Salazar only stopped penetrating J.C. when J.C. elbowed Salazar and physically forced him off.

The next night, J.C. went to the hospital because he was experiencing rectal pain and bleeding. Hospital records reflected a diagnosis of rectum pain and sexual assault. This diagnosis was later corroborated by testimony from a sexual assault nurse examiner who described the physical examination and J.C.'s complaints of significant pain during that examination. A sexual assault kit was collected; the results of the kit were not available at the time of trial. Salazar participated in a recorded voluntary interview with an Elko Police Department detective. During the interview, Salazar admitted to anally penetrating J.C. and

admitted he heard J.C. say "No" while he was penetrating him but did not immediately stop.

Viewing this evidence in the light most favorable to the prosecution, we conclude a rational juror could find beyond a reasonable doubt that Salazar sexually assaulted J.C. *See* NRS 200.366(1)(a). To the extent Salazar challenges J.C.'s credibility or his memory of events due to intoxication, it is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Next, Salazar asserts the prosecutor committed prosecutorial misconduct by using the word "rape" instead of the statutory term "sexual assault" during trial and closing argument and by referring to unadmitted forensic evidence during closing argument. When reviewing claims of prosecutorial misconduct, this court considers whether the conduct was improper and, if it was, whether it warrants reversal or was harmless. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." *Id.* Statements alleged to be prosecutorial misconduct should be considered in context, and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Byars v. State*, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014) (quotation marks omitted).

Salazar's argument regarding the State's use of the word "rape" relies on the supreme court's unpublished decision in *Avila-Granados v.*

State, No. 76412, 2019 WL 3484170 (Nev. July 24, 2019) (Order of Reversal and Remand). In that case, the supreme court concluded that the prosecutor's use of the word "rape" during closing argument was improper because the district court had sustained a defense objection to the use of the word during cross-examination of the defendant and called it a mischaracterization. *Id.* at *2. Ultimately, however, the supreme court concluded the error was harmless and, standing alone, did not warrant reversal because the district court sustained the defense objection, referred to the term as a mischaracterization, and admonished the jury.[1] *Id.*

Here, Salazar objected to any use of the word "rape" prior to opening arguments. Unlike the court in *Avila-Granados*, the district court overruled Salazar's objection, noting that the supreme court has used the word in several decisions and that, based on its experience, potential jurors were unfamiliar with the phrase "sexual assault" but understood "rape" to refer to nonconsensual sexual penetration.[2] Thus, we are not convinced the

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[1]The supreme court did, however, find that this error, when cumulated with other trial errors, warranted reversal. *See Avila-Granados*, 2019 WL 3484170, at *2.

[2]Embedded within Salazar's prosecutorial misconduct claim is a claim that the district court abused its discretion in overruling his objection to the use of the word "rape." The district court's reasoning that potential jurors understood "rape" to refer to nonconsensual penetration generally comports with the common understanding of the word. *Compare* Rape (2), Black's Law Dictionary (12th ed. 2024) (defining "rape" as "[u]nlawful sexual activity . . . without consent and usu. by force or threat of injury") *with* NRS 200.366(1)(a); *see also* Sexual Assault (2), Black's Law Dictionary (12th ed. 2024) (cross-referencing the definition of Rape); *cf. Guam v. Torre*, 68 F.3d

prosecutor's use of the word constituted misconduct in this matter. Moreover, even assuming the State committed misconduct in this regard, any such misconduct was harmless because it did not pervade the trial such that it had any effect on the jury's verdict, particularly given the state of the evidence against Salazar. *Cf. Acosta v. State*, 141 Nev., Adv. Op. 40, --- P.3d --- (2025) (holding that the State's colloquial use of the words "victim" or "murder" in questioning witnesses during trial was not error because the commonsense understanding of the terms fit the allegations and factual circumstances of the crime and that the use of the words did not prejudice the jury against the defendant or weaken the presumption of innocence).

As to Salazar's argument regarding the prosecutor's reference to unadmitted forensic evidence in its closing argument, the results of forensic testing on the materials gathered in the sexual assault kit were not available as of the time of trial. During examination of the lead detective, the State elicited testimony that sexual assault kits[3] primarily show whether DNA is present in a tested sample and that "all [the sexual assault kit] would show is that [Salazar and J.C.] had sex and DNA was present." Salazar objected to this testimony as speculation, and the district court

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1177, 1180 (9th Cir.1995) (holding the prosecutor's use of the term "rape" was proper because "there is no rule of evidence or ethics that forbids the prosecutor from referring to the crime by its common name when examining a witness"). We therefore cannot say the district court abused its discretion in overruling Salazar's objection.

[3]Notably, the State's witnesses used the terms "sexual assault kit" and "rape kit" interchangeably during their testimony without objection from Salazar.

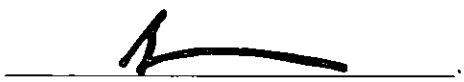
sustained the objection. The sexual assault nurse examiner subsequently testified—without objection from Salazar—that the DNA evidence from the sexual assault kit would not show anything relevant to consent. During closing, the prosecutor argued the sexual assault kit would not show anything except DNA. Salazar objected to this argument. After the district court instructed the State to move on, the prosecutor briefly noted the jury had heard testimony that a sexual assault kit would show DNA.

The prosecutor's argument that the sexual assault kit would only show DNA appears to be a reasonable inference from the testimony of the sexual assault nurse examiner. *See Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) ("A prosecutor may not argue facts or inferences not supported by the evidence. Nevertheless, the prosecutor may argue inferences from the evidence and offer conclusions on contested issues." (internal quotation marks omitted)). However, to the extent the prosecutor's statements constituted misconduct, such misconduct did not substantially affect the jury's verdict because it was an isolated comment and because there was substantial evidence that Salazar sexually assaulted J.C. Therefore, any error was harmless, and Salazar is not entitled to relief on this claim.

Finally, Salazar claims the errors below cumulated and deprived him of his right to a fair trial. Reversal is warranted where individually harmless errors, viewed collectively, nevertheless violate the defendant's right to a fair trial. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481. In reviewing claims of cumulative error, we consider "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the

gravity of the crime charged." *Id.* (internal quotations omitted). We conclude cumulative error does not warrant reversal. Although the charged crime is serious, the issue of guilt was not close on the charge for which Salazar was convicted, and to the extent there were errors, they were neither pervasive nor consequential as related to that charge considering the evidence against him. *See id.* at 1197, 196 P.3d at 482 (concluding there was cumulative error where "[t]he prosecutorial misconduct occurred throughout the trial" and another error "resulted in serious jury misconduct"). Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, C.J.
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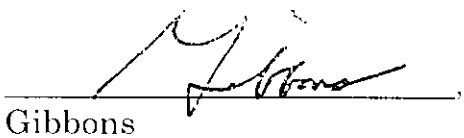

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Alvin R. Kacin, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk