IN THE SUPREME COURT OF THE STATE OF NEVADA

GEOVANNY TORRES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38724

FILED

MAR 17 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction and a district court order denying a motion for a new trial.

On June 30, 2000, appellant Geovanny Torres was convicted, pursuant to a jury verdict, of conspiracy to commit a crime, murder with use of a deadly weapon, and attempted murder with use of a deadly weapon. Torres moved for a new trial based on newly discovered evidence. The district court denied the motion. The district court sentenced Torres to serve two consecutive life sentences, concurrent terms totaling three hundred sixty months, and a consecutive term of two hundred forty months, all with parole eligibility. On October 25, 2001, Torres appealed.

Torres argues that the prosecutor's closing argument included three statements inappropriately attacking defense counsel, and therefore, he should be granted a new trial. This court must determine if improper arguments were made and, if so, "whether the errors were harmless beyond a reasonable doubt."[1] If the errors were harmless, a new trial is not warranted.[2] Torres objected to two of the statements and the district

[1]Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988).

[2]Id. at 724-25, 765 P.2d at 1155-56.

court sustained the objections. Further, the district court gave a jury instruction, which stated that the jury "must disregard any evidence to which an objection is sustained by the court." When an objection is sustained and the jury admonished, this court presumes the jury followed the admonishment.[3] Thus, even if the prosecutor's statements were improper, these statements were harmless.[4]

Torres failed to object to the third statement, and therefore, this court will only review the alleged prosecutorial misconduct if it constitutes plain error.[5] The prosecutor improperly disparaged defense counsel by telling the jury not to be fooled by his defense strategy.[6] However, when addressing plain error, this court must view the claim against the entire record.[7] Because overwhelming evidence of Torres' guilt exists, the prosecutor's comments were harmless error.[8]

Next, the reasonable doubt instruction the district court gave to the jury replicated the reasonable doubt definition provided in NRS 175.211. Torres argues this instruction is unconstitutional. This court

---

[3]Owens v. State, 96 Nev. 880, 885, 620 P.2d 1236, 1240 (1980).

[4]Id.

[5]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995).

[6]See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991).

[7]United States v. Young, 470 U.S. 1, 16 (1985).

[8]See Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997); Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (holding that because the case was a close call, the prosecutor's errors had the cumulative effect of denying the defendant his right to a fair trial).

has consistently held NRS 175.211 constitutional.[9] The United States Court of Appeals for the Ninth Circuit has also held the reasonable doubt instruction constitutional.[10] Thus, Torres' argument is without merit.

Torres claims that the district court abused its discretion by rejecting his proposed jury instruction on conflicting evidence and this warrants a new trial. However, this court has previously considered an almost identical instruction and held that "it is not error to refuse to give the instruction if the jury is properly instructed regarding reasonable doubt."[11] Both the United States Supreme Court and the Ninth Circuit also found that when a reasonable doubt instruction is provided, an instruction on conflicting evidence is unnecessary.[12] Torres, however, argues that the previous cases dealt solely with circumstantial evidence, while his case also involves direct evidence. Torres' argument is meritless. This court has considered similar instructions addressing conflicting evidence in cases involving both direct and circumstantial evidence and reached the same decision.[13] Because the district court properly

---

[9]See Riley, 107 Nev. at 214, 808 P.2d at 556; Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999); Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Hutchins v. State, 110 Nev. 103, 112, 867 P.2d 1136, 1142 (1994).

[10]See Ramirez v. Hatcher, 136 F.3d 1209, 1214-15 (9th Cir. 1998); Nevius v. McDaniel, 218 F.3d 940, 944 (9th Cir. 2000).

[11]Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976).

[12]Holland v. United States, 348 U.S. 121, 139-40 (1955); United States v. Nelson, 419 F.2d 1237, 1240-41 (9th Cir. 1969).

[13]See Bails, 92 Nev. at 97, 545 P.2d at 1156; Hall v. State, 89 Nev. 366, 371, 513 P.2d 1244, 1247-48 (1973); Anderson v. State, 86 Nev. 829,

continued on next page . . .

instructed the jury on reasonable doubt, we conclude a new trial is not warranted in this regard.

Torres argues that the district court abused its discretion by rejecting his proposed jury instruction advising the jury it could consider a witness' felony conviction in determining the witness' credibility. This court has held that "[i]t is not error to refuse to give an instruction when the law encompassed therein is substantially covered by another given to the jury."[14] The district court gave two credibility instructions to the jury, including a direction that the jury could determine a witness' credibility based on admitted evidence. These jury instructions cover the law asserted in Torres' proposed instruction. Further, two witnesses testified that they had prior felony convictions and neither party objected to this testimony. Thus, there is no merit to Torres' claim that the jury would think that they were not permitted to consider this evidence in assessing these witnesses' credibility.

Torres argues that the district court abused its discretion by denying his motion for a new trial based on newly discovered evidence. Torres claims that the testimony of three new witnesses, Reinol Zarate Sanchez, Raidel Vega, and Jose Vigoa, would lead to a different result on retrial. The grant or denial of a motion for a new trial based on newly discovered evidence is within the trial court's discretion and will not be

---

. . . *continued*
837, 477 P.2d 595, 600 (1970); Vincze v. State, 86 Nev. 546, 548, 472 P.2d 936, 937 (1970).

[14]Roland v. State, 96 Nev. 300, 301, 608 P.2d 500, 501 (1980).

overturned absent an abuse of discretion.[15] The district court found that Sanchez's testimony was not newly discovered evidence because Torres failed to establish that even upon exercising reasonable diligence, Sanchez could not have been produced for trial.[16] The evidence in the record supports this finding. Torres knew about Sanchez prior to trial, Sanchez was listed as a witness in discovery, and Sanchez had previously given a statement.

The district court also denied Torres' motion for a new trial based on Vega's and Vigoa's testimony. Rafael Cortina and Eduardo Rojas Medina (Rojas) testified at trial and Vega and Vigoa claimed this testimony was false. The district court denied Torres' motion because it found that Torres failed to establish under Callier v. Warden that Cortina's and Rojas' testimony was false.[17] In Callier, this court articulated the standard for assessing whether a new trial should be granted on the grounds of witness recantation.[18] However, Cortina and Rojas did not recant their testimony because they did not withdraw their

---

[15]Hennie v. State, 114 Nev. 1285, 1289, 968 P.2d 761, 764 (1998); Funches v. State, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997).

[16]Hennie, 114 Nev. at 1290, 968 P.2d at 764 (holding that a new trial cannot be granted based on newly discovered evidence if the evidence could have been found upon an exercise of reasonable diligence).

[17]111 Nev. 976, 901 P.2d 619 (1995).

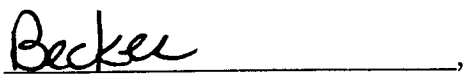
[18]Id. at 988, 901 P.2d at 626. The State claims that Callier holds that the standard applies to perjury cases. However, this court specifically held that the standard applies to witness recantation cases. Id. at 988, 901 P.2d at 626.

testimony formally and publicly.[19] Thus, the district court erred by applying the Callier standard, instead of the standard for a new trial based on newly discovered evidence.[20] However, under the correct standard, Vega's and Vigoa's testimony does not constitute newly discovered evidence, and thus, a new trial is not warranted. Therefore, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt



_____, J.
Becker

cc: Hon. John S. McGroarty, District Judge
Special Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

---

[19]See Black's Law Dictionary 1267 (6th ed. 1990) (defining "recant" as "[t]o withdraw or repudiate formally and publicly"); see also Homick v. State, 108 Nev. 127, 139, 825 P.2d 600, 608 (1992) (witness formally recanted her earlier statements to a police detective); Sheriff v. Frank, 103 Nev. 160, 161-62, 734 P.2d 1241, 1242 (1987) (individual recanted accusations at a custody hearing).

[20]See Hennie, 114 Nev. at 1290, 968 P.2d at 764 (noting the criteria that must be met to grant a new trial based on newly discovered evidence).