

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE JUAN MARQUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40042 **FILED**

SEP 24 2003

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of grand larceny auto (count I) and robbery (count II). The district court sentenced appellant Jose Juan Marquez to serve a prison term of 22 to 96 months for count I and a concurrent prison term of 35 to 156 months for count II.

The charges against Marquez arose when he and his codefendant took a vehicle from Thrifty Car Sales. A Thrifty auto salesman testified that he took Marquez and his codefendant on a test-drive of a vehicle. During the course of the test-drive, Marquez informed the salesman that he was taking the vehicle and to get out of the car or he would shoot him. When the salesman refused to exit the vehicle, Marquez's codefendant forced the salesman out of the vehicle while it was moving at a speed of approximately thirty miles per hour. The salesman landed face-down on the concrete and was, ultimately, hospitalized for several weeks with severe injuries to his neck and back.

Marquez first contends that reversal of his conviction is warranted because the prosecutor engaged in misconduct at voir dire by giving the jury a detailed description of each witness's testimony. We conclude that Marquez's contention lacks merit.

Our review of the transcripts of the voir dire indicates that the prosecutor did not engage in misconduct. At the beginning of voir dire, the district court asked the prosecutor to introduce himself to the potential jurors, briefly explain the case, and read the list of witnesses. The prosecutor complied with the district court's request by explaining the charges against Marquez, stating the name and occupation of each potential witness, and briefly explaining each witness's association to the case. At the end of voir dire, defense counsel moved for a mistrial, arguing that the prosecutor's introductory remarks were improper because the State was allowed, in essence, to make two opening arguments. The district court denied the motion for a mistrial.

"Denial of a mistrial is within the sound discretion of the district court, and that ruling will not be reversed unless it was an abuse of discretion."¹ A mistrial is not generally granted unless an error occurs that is so patently prejudicial that it cannot be neutralized by an admonition to the jury.² In the instant case, we conclude the prosecutor's introductory remarks at voir dire did not rise to the level of misconduct. In briefly referring to each potential witness, the prosecutor was merely describing the nature of the case, as instructed by the district court. Accordingly, the district court acted within its discretion in concluding

¹Lisle v. State, 113 Nev. 679, 700, 941 P.2d 459, 473 (1997), modified on other grounds by Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998).

²See Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996).

that the prosecutor's introductory remarks were not so patently prejudicial as to warrant a mistrial.³

Marquez next contends that reversal of his conviction is warranted because the prosecutor committed misconduct during his introductory remark and, again, in opening arguments by making statements not substantiated by the evidence. Specifically, Marquez contends that the prosecutor referred to the fact that fingerprints were found on a tire iron in the car "then never made mention of that speculation again." We conclude that Marquez's contention lacks merit.

This court has held that it is proper for the prosecutor, in opening statements, to outline his theory of the case by proposing those facts he intends to prove.⁴ However, the prosecutor must act in good faith by stating the facts fairly and refraining from making statements that he cannot prove.⁵

We conclude that the prosecutor did not commit misconduct when he made the statements about the fingerprints on the tire iron because he had a good faith belief the statement was substantiated by the evidence. At trial, the prosecutor intended to call two witnesses, a crime scene analyst and a forensic investigator, to show that Marquez and his codefendant brought a tire iron and a tire wrench with them when they test-drove the vehicle. Although the district court later excluded that

³See id.; see also Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997) ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

⁴See Garner v. State, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962).

⁵See Lord v. State, 107 Nev. 28, 32-33, 806 P.2d 548, 551 (1991).

evidence finding that it was overly prejudicial, at the time the prosecutor made the statement, he had a good faith belief that it was admissible to prove Marquez and his codefendant conspired to take the vehicle.⁶

In a related argument, Marquez contends that the prosecutor committed misconduct in opening arguments by showing a demonstrative exhibit to the jury that included pictures of Marquez and his codefendant in handcuffs. Marquez alleges that the photographs on the exhibit were presented solely to inflame the jury, had no probative value, and "amounted to nothing more than a needless presentation of cumulative evidence."⁷ We conclude that Marquez's contention lacks merit.

This court has recognized that a photograph is admissible if its probative value outweighs its prejudicial effect.⁸ In this case, we conclude that the prosecutor did not commit misconduct in referring to the photographs in opening argument because they were substantiated by the evidence and, eventually, were admitted into evidence at trial. To the extent that Marquez argues that the district court abused its discretion in admitting the photographs, we reject that contention. The photographs

⁶See Garner, 78 Nev. at 371, 374 P.2d at 528. Although the State did not allege that Marquez used the tire iron and tire wrench as a deadly weapon in the course of the robbery, the State wanted to present evidence that Marquez and his codefendant brought those tools to prove the conspiracy count, namely, that they planned to take the vehicle prior to taking it out on a test-drive.

⁷To the extent that Marquez argues that the prosecutor should not have used the exhibit because it was not substantiated by the evidence, we reject that contention. We conclude the prosecutor had a good faith belief that the photographs would be admitted into evidence at the time he made his opening argument. See id.

⁸Shuff v. State, 86 Nev. 736, 740, 476 P.2d 22, 24-25 (1970).

were relevant to: (1) identify Marquez and his codefendant, as their appearances had changed by the time of trial; and (2) show that Marquez and his codefendant were wearing baggy clothes and therefore the salesman could reasonably believe the two had a weapon when they threatened to shoot him. Additionally, the prejudicial effect of the photographs showing Marquez and his codefendant with their hands behind their back was minimal because the jury had already heard testimony, without objection, that the two had been handcuffed by police officers. Accordingly, the district court did not abuse its discretion in admitting the photographs.

Having considered Marquez's contentions and concluded that they lack merit, we affirm the judgment of conviction. However, our review of the judgment of conviction reveals a clerical error. The judgment of conviction states that Marquez was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. We therefore conclude that this matter should be remanded to the district court for the correction of the judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED, and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. John S. McGroarty, District Judge
Kocka & Bolton
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk