

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN STEVEN SPISAK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40720

**FILED**

APR 21 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction entered upon a jury verdict finding appellant John Spisak guilty of attempted murder with use of a deadly weapon. The district court sentenced Spisak to 84 to 210 months imprisonment, with a like consecutive sentence for use of a deadly weapon in the commission of the offense. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On appeal, Spisak asserts that the district court improperly failed to hold competency hearings prior to trial under NRS 178.415 and NRS 178.460; that the prosecution improperly commented upon Spisak's failure to testify in violation of his Fifth Amendment rights; that the prosecutor argued her personal beliefs relating to Spisak's whereabouts on the day of the crime to the jury; that the defense attorneys assigned to Spisak's case at different intervals were deficient or incompetent, resulting in the ineffective assistance of counsel; that the district court failed to adequately address the inattention of a trial juror; and that during voir dire, the district court improperly questioned prospective jurors concerning domestic violence issues. Spisak argues that the errors, taken separately or cumulatively, constitute reversible error.

## DISCUSSION

### Competency

Spisak argues the district court erred when it failed to hold separate competency hearings prior to trial under NRS 178.415 and NRS 178.460. These measures provide for a two-step process for resolution of pre-trial competency issues. NRS 178.415 relates to initial evaluation procedures.<sup>1</sup> NRS 178.460 outlines the mechanism to finally resolve pre-trial competence issues once the NRS 178.415 phase is complete.<sup>2</sup> We

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**<sup>1</sup>NRS 178.415 Appointment of person or persons to examine defendant; hearing; finding.** Reads in pertinent part:

1. Except as otherwise provided in this subsection, the court shall appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant.
2. Except as otherwise provided in this subsection, at a hearing in open court, the court that orders the examination must receive the report of the examination.
3. The court that receives the report of the examination shall permit counsel for both sides to examine the person or persons appointed to examine the defendant.

**<sup>2</sup>NRS 178.460 Powers and duties of court following finding of incompetence; limitation on length of commitment.** Reads in pertinent part:

1. If requested by the district attorney or counsel for the defendant within 10 days after the report by the Administrator or his designee is sent to them, the judge shall hold a hearing within 10 days after the request at which the district

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conclude that the defense and the prosecution waived their statutory rights to examine the doctors at the two phases described above.

First, the parties and the district court determined that the initial doctors' reports alone demonstrated sufficient indications of temporary incompetence to warrant a temporary suspension of proceedings per NRS 178.415(3). As a result, all subsequent proceedings involving Spisak were temporarily suspended and Spisak was committed to Lakes Crossing for psychiatric care and observation. Second, after Spisak's release from psychiatric care and upon receipt of the administrator's report that he was competent, the district court complied with NRS 178.460. NRS 178.460 does not expressly or implicitly require a judge to hold a competency hearing. However, such a hearing may be held if requested by counsel or if the judge has substantial evidence that a defendant is incompetent to stand trial.<sup>3</sup>

Despite the initial Lakes Crossing referral, the district court properly found Spisak competent to stand trial. The administrator at Lakes Crossing provided the district court with a report which opined that Spisak was indeed competent to stand trial, and that he could understand

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*... continued*

attorney and the defense counsel may examine the members of the treatment team on their report.

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3. Within 10 days after the hearing or 20 days after the report is sent, if no hearing is requested, the judge shall make and enter his finding of competence or incompetence, and if he finds the defendant to be incompetent[.]

<sup>3</sup>De Keplany v. Enomoto, 540 F.2d 975, 980 (9th Cir. 1976) (citing Pate v. Robinson, 383 U.S. 375 (1966)).

the nature of the criminal charges against him and assist in the defense of his case. The district court delivered the report to defense counsel and the district attorney, and neither counsel requested further hearings on the matter of competency. Accordingly, Spisak has shown no violation of either NRS 178.415 or NRS 178.460.

#### Prosecutorial Misconduct

Spisak argues that the prosecution violated his Fifth Amendment rights by commenting at final argument that “only [Spisak] can answer those questions.” In this, he claims the prosecution improperly commented upon his failure to testify.

The State argues that the comment was not improper and that, even if error occurred, it was harmless.

We conclude the prosecution did not make a direct reference to Spisak’s failure to testify. The prosecutor merely responded to rhetorical questions posed by the defense regarding the prosecution’s lack of evidence during closing arguments. Also, even if this comment was improper, the district court sustained the defense counsel’s contemporaneous objection and instructed the jury to disregard the prosecutor’s statement.

[T]he test for determining whether prosecutorial comment constitutes a prohibited reference to a defendant’s failure to testify is whether the language used was “manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant’s failure to testify<sup>4</sup>

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<sup>4</sup>See Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (quoting United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968) cert. denied sub nom., Lysczyk v. United States, 393 U.S. 846 (1968)).

We do not find such intent here. The prosecutor's statement was harmless error and resulted in no prejudice to Spisak.

Spisak also argues that the prosecutor improperly injected her personal opinion or belief as to Spisak's whereabouts on the day of the crime and in front of the jury.<sup>5</sup>

In the case at bar, the prosecutor was not allowed to finish her statement before defense counsel objected. Although the prosecutor's comment was improper, any resultant error was harmless because the statement was incomplete. We find no prejudice occurred because the prosecutor was interrupted and the jury was not allowed to hear the prosecutor's personal opinion.<sup>6</sup>

Inattentive Juror

Spisak next claims that the district court committed error by failing to hold a hearing to determine whether to remove and replace a juror it believed was dozing during a portion of the trial. Spisak argues the court's error warrants reversal for juror misconduct.

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<sup>5</sup>See Aesoph v. State, 102 Nev. 316, 721 P.2d 379 (1986) (citing Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985); McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984); Owens v. State, 96 Nev. 880, 885, 620 P.2d 1236, 1242 (1980)); (holding that prosecutors must not interject their personal beliefs and opinions into their arguments to the jury); Atkins v. State, 112 Nev. 1122, 1135, 923 P.2d 1119, 1128 (1996) (holding that such opinions or statements will not amount to reversible error unless the statement somehow prejudices the defendant).

<sup>6</sup>Atkins, 112 Nev. at 1135, 923 P.2d at 1128; Jimenez v. State, 106 Nev. 769, 772, 801 P.2d 1366, 1367-68 (1990).

The district court has broad discretion in matters that concern the excusing of seated jurors.<sup>7</sup> We conclude that Spisak waived his right to claim error and abuse of discretion when the defense failed to object to the dozing juror, and agreed on the record, that the court need not take any further action other than an admonishment.

Thus, we conclude that no abuse of discretion occurred. We also conclude that plain error was not committed by the district court because the juror was properly admonished.

#### Ineffective Assistance of Counsel

Spisak alleges his defense counsel failed to secure a video surveillance tape from a gas station in Kingman, Arizona, that could have exonerated him.

This court has declined to address ineffective assistance of counsel claims on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary.<sup>8</sup> We conclude that such a claim is improperly before this court on direct appeal.

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**<sup>7</sup>NRS 16.080 Discharge and replacement of jurors who become unable or disqualified to perform duties.** Reads in pertinent part:

After the impaneling of the jury and before verdict, the court may discharge a juror upon a showing of his sickness, a serious illness or death of a member of his immediate family, an undue hardship, an extreme inconvenience, any other inability to perform his duty or a public necessity.

<sup>8</sup>Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534-35 (2001) (citing Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995)).

## Voir Dire

Spisak argues that the district court erred when it questioned prospective jurors concerning domestic violence issues. Spisak contends the questioning was outside the scope of evidence since there was no evidence of domestic violence in the case. Spisak further claims the question implied that he had physically abused the alleged victim during their relationship.

The State argues that the district court's questioning on domestic violence was not intended to inflame the jury or to invoke emotional appeal, but rather to reveal biases towards the defendant, who was in a relationship with the victim prior to the crime. Moreover, the question was not outside the scope of the evidence. The victim was a terrified woman who left Spisak for the fourth time, relocated to another state and attempted to conceal her whereabouts. Further, Spisak followed the victim to her new place of residence, repeatedly left veiled threats, and ultimately shot her in the neck, chased her and beat her about the head with a blunt object.

NRS 175.031 provides that the court shall conduct the initial examination of the jurors, and the defense and prosecution are entitled to supplement further inquiry, as the court deems proper.<sup>9</sup> Both the scope and method of voir dire are within the discretion of the district court. Absent a showing that the district court abused its discretion or that the

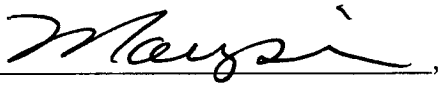
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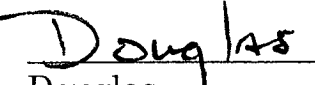
<sup>9</sup>**NRS 175.031 Examination of trial jurors.** The court shall conduct the initial examination of prospective jurors, and defendant or his attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted.

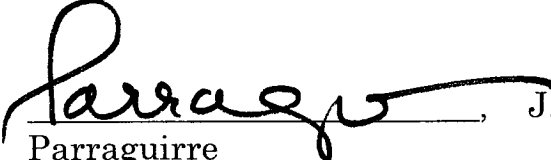
defendant was prejudiced, this court shall not disturb the district court's determinations.<sup>10</sup>

We conclude the domestic violence question was more probative of a juror's bias than prejudicial to the defendant. Spisak had been involved in a romantic relationship with the victim prior to the attack. The record reflects the district court attempted to minimize any bias that prospective jurors may have had towards individuals involved in a volatile domestic relationship. We thus conclude the district court did not abuse its discretion when it raised a domestic violence question during voir dire. Having reviewed Spisak's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Joseph T. Bonaventure, District Judge  
Mueller & Associates  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>10</sup>Summers v. State, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986).