

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO ADRIAN RANGEL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40736

FILED

AUG 15 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of committing an unlawful act related to human excrement or bodily fluid. The district court sentenced appellant Pedro Adrian Rangel to serve a prison term of 30-96 months.<sup>1</sup>

Rangel contends that prosecutorial misconduct rendered his trial unfair. Rangel concedes that counsel failed to contemporaneously object to the prosecutor's allegedly improper comments or ask for a curative instruction,<sup>2</sup> but argues that the cumulative effect of the misconduct resulted in plain error, and therefore, is appropriate for review

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<sup>1</sup>Rangel was also convicted by the jury of one count of battery upon an officer. The battery count was dismissed by the district court at Rangel's sentencing.

<sup>2</sup>See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993) (holding that the failure to object to prosecutorial misconduct generally precludes appellate consideration).

on appeal by this court.<sup>3</sup> The State concedes that the prosecutor's comments amounted to "forensic misconduct," but argues that the errors were harmless. This court has stated that "[t]he level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt."<sup>4</sup> "If the issue of guilt or innocence is close, [and] if the state's case is not strong, prosecutor[ial] misconduct will probably be considered prejudicial."<sup>5</sup>

First, Rangel contends that the prosecutor's improper comments during closing argument warrant reversal of his conviction. Rangel challenges the following statement by the prosecutor:

You heard at the beginning of the trial the judge tell you that the defendant is presumed innocent. That's our system. But when you heard the evidence in this case, that cloak – I think that's the way the judge termed it – that cloak was lifted off his person, and now you saw what's underneath. That cloak of innocence is gone, and underneath it is a guilty man.

Citing to Pagano v. Allard for support, Rangel argues that because the right to be presumed innocent applies during jury deliberations, by analogizing the presumption of innocence to a cloak that comes off at the

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<sup>3</sup>See NRS 178.602; Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998).

<sup>4</sup>Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998).

<sup>5</sup>Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

end of trial, his due process right to be presumed innocent until proven guilty beyond a reasonable doubt was violated by the prosecutor's comments.<sup>6</sup> We conclude that Pagano is distinguishable from the instant case, and that Rangel's contention is without merit.

Once again we note that Rangel did not object to the above statement by the prosecutor or request a curative instruction from the district court. Also, unlike in Pagano where the evidence was weak,<sup>7</sup> in this case there was overwhelming evidence of Rangel's guilt. The victim-police officer, and both Rangel's daughter and wife, all testified that he purposefully and successfully projected blood towards the officer's face, either by spitting the blood from his mouth or by blowing the blood out of his nose. Further, the district court's instructions to the jury prior to deliberations served to mitigate the possible prejudice. The district court instructed the jury that Rangel "shall be presumed innocent unless the contrary is proved by competent evidence beyond a reasonable doubt." The jury was also instructed that the statements and arguments of counsel were not to be considered evidence. We therefore conclude that

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<sup>6</sup>218 F. Supp. 2d 26, 33, 35 (D. Mass. 2002); see also Delo v. Lashley, 507 U.S. 272, 278 (1993) ("Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears.").

<sup>7</sup>See Pagano, 218 F. Supp. 2d at 36. Additionally, defense counsel in Pagano objected to the prosecutor's improper statement. See id. at 31.

even if the prosecutor's statement was improper, it was harmless and did not affect Rangel's substantial rights.<sup>8</sup>

Second, Rangel contends that during his cross-examination by the State, he was characterized as a liar by the leading questions of the prosecutor because his responses led him to claim that the State's witnesses were liars. Rangel argues that the prosecutor also "wove this theme" into his closing argument. Citing to Rowland v. State<sup>9</sup> and Ross v. State<sup>10</sup> for support, Rangel argues that such a characterization amounted to prosecutorial misconduct and resulted in plain error requiring the reversal of his conviction. We disagree and conclude that Rangel's contention is without merit.

As we stated in Rowland, "[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."<sup>11</sup> And as we stated in Ross, "[a] prosecutor may demonstrate to a jury through inferences from the record

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<sup>8</sup>See Rowland v. State, 118 Nev. \_\_\_, \_\_\_, 39 P.3d 114, 118-20 (2002); Gallego v. State, 117 Nev. 348, 365-66, 23 P.3d 227, 239 (2001).

<sup>9</sup>118 Nev. at \_\_\_, 39 P.3d at 118-19.

<sup>10</sup>106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990).

<sup>11</sup>118 Nev. at \_\_\_, 39 P.3d at 119.

that a defense witness's testimony is palpably untrue."<sup>12</sup> For situations that fall somewhere between these extremes, a case-by-case analysis is required and "we must look to the attorney for the defendant to object and the district judge to make his or her ruling."<sup>13</sup>

In this case, we conclude that the prosecutor did not commit misconduct. Initially, we note again that for nearly all of the challenged exchange, defense counsel did not object. The one time an objection was lodged, the prosecutor immediately withdrew the question before the district court could rule. During the State's cross-examination, Rangel testified that the State's witnesses – his wife, daughter, and two police officers – were lying when they testified against him during the trial. Rangel was never called a liar or characterized as one by the prosecutor. Rangel's testimony merely, and predictably, contradicted the testimony of the State's witnesses. Also, the challenged and unobjected to portion of the State's closing argument drew reasonable inferences from the record. Finally, as we discussed above, strong and convincing evidence of Rangel's guilt was presented by the State. Therefore, we conclude that the

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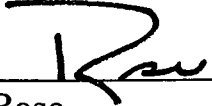
<sup>12</sup>106 Nev. at 927, 803 P.2d at 1106; see also Rowland, 118 Nev. at \_\_\_, 39 P.3d at 119 ("[W]hen a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness – even if this means occasionally stating in argument that a witness is lying.").

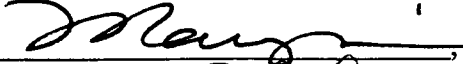
<sup>13</sup>Rowland, 118 Nev. at \_\_\_, 39 P.3d at 119.

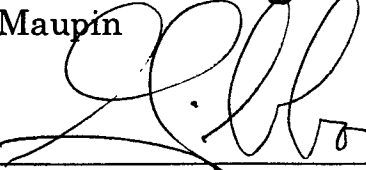
prosecutor's line of questioning and closing argument did not amount to prosecutorial misconduct.

Having considered Rangel's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

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

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Steven R. Kosach, District Judge  
Washoe County Public Defender  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk