IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER ELIAS GIANGOUSIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41093

FILED

OCT 06 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of offer, attempt, or commission of an unauthorized act relating to a controlled or counterfeit substance. Third Judicial District Court, Churchill County; Robert E. Estes, Judge. The district court sentenced appellant Roger Elias Giangousis to a prison term of 12-48 months, and then suspended execution of the sentence and imposed a term of probation not to exceed 5 years.

First, Giangousis contends that the district court erred by denying his motion for a mistrial on the grounds that the prosecutor improperly elicited prior bad act testimony. Giangousis challenges the following exchange on redirect examination between the prosecutor and Detective Sergeant Norman Walters:

> Q. And you heard [defense counsel] ask you about there were no law enforcement officers present at the time in the residence, correct?
>
> A. That's correct.
>
> Q. Why is that?
>
> A. Because we had previous contact with Mr. Giangousis, and as a result he would have known every one of us.
>
> Q. What is your experience –

> DEFENSE COUNSEL: Your Honor, I'm going to object to that. I think that that is highly prejudicial.
>
> THE COURT: Calls for speculation. Sustained.

Giangousis later moved for a mistrial, and the district court denied the motion, concluding:

> [T]here was no request to admonish the jury to disregard, and the Court also finds that in light of it being a minimal – a minimal statement possible with several possible interpretations that there's no great harm and that the Defendant was not prejudiced by the statement.

We conclude that Giangousis has failed to demonstrate that he was prejudiced by the brief exchange.

The test for determining whether a witness has referred to a defendant's "criminal history is whether 'a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.'"[1] This court has stated that "[d]enial of a motion for a mistrial is within the sound discretion of the district court, and that ruling will not be reversed absent a clear showing of abuse of discretion."[2]

In the instant case, we conclude that the district court did not abuse its discretion in denying Giangousis' motion for a mistrial. It is not clear that the jury could reasonably infer from the challenged testimony that Giangousis had engaged in prior criminal activity. Even if the jury could so infer, any error was harmless beyond a reasonable doubt because the statement was unsolicited, the reference was inadvertent, and counsel

---

[1]Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (quoting Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972)).

[2]McKenna v. State, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998).

did not request an admonition to the jury.[3] This conclusion is bolstered by consideration of the convincing nature of the evidence of Giangousis' guilt.[4] In particular, we note that the State presented the testimony of a confidential informant, who was searched prior to undertaking the operation and under surveillance at the time. The confidential informant testified that Giangousis gave her the drugs that were eventually confiscated. Therefore, Giangousis has not demonstrated that the challenged testimony above could have affected the outcome of the trial, and we conclude that the alleged error did not have a prejudicial impact on the verdict.[5] Accordingly, we conclude that Giangousis' contention lacks merit.

Second, Giangousis contends that the prosecutor committed misconduct during closing arguments when he made the following statement:

> When magicians try to accomplish their feats of prestidigitation, they use smoke and mirrors and misdirection.
>
> The State submits to you, ladies and gentlemen, that misdirection has gone on here today by the Defendant, and that misdirection has taken the form of claims regarding drug slang, claims about what the meaning of the word "wired for sound" is.
>
> You don't ask somebody if they're wired for sound and then feel them to see if they're wired for sound

---

[3]See Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992).

[4]See Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983).

[5]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

> and be able to maintain with any degree of credibility that it's slang for high on meth.

Citing to Rowland v. State for support,[6] Giangousis argues that by accusing him of "misdirection," the prosecutor attacked his veracity and improperly vouched for the credibility of the State's witness, the confidential informant. Giangousis concedes that counsel failed to contemporaneously object to the prosecutor's allegedly improper comments or ask for a curative instruction,[7] but he nonetheless argues that the misconduct resulted in plain error, and therefore, is appropriate for review on appeal by this court.[8] We conclude that Giangousis' contention is without merit.

This court has had a long-standing rule that prohibits a prosecutor from calling a defendant's witnesses or the defendant a "liar."[9] In Rowland we relaxed this prohibition and set a new standard for determining when the prosecutor's characterization of the credibility of a witness amounts to misconduct. We explained that "[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

---

[6]118 Nev. 31, 39, 39 P.3d 114, 119 (2002).

[7]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).

[8]See NRS 178.602; Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998).

[9]See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990) see also Rowland, 118 Nev. at 39 n.6, 39 P.3d at 119 n.6.

'liar' should be considered prosecutorial misconduct."[10] 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."[11] In the instant case, we conclude that the prosecutor's statement did not affect Giangousis' substantial rights or have a prejudicial impact on the verdict.[12] Therefore, defense counsel's failure to object precludes this court's review of the issue.

Third, Giangousis contends that he received ineffective assistance of counsel. Giangousis claims that the "wrong evidence bag" was admitted into evidence during his trial and that counsel "did nothing" about it. This court has repeatedly stated that we will not generally consider claims of ineffective assistance of counsel on direct appeal; such claims must be presented to the district court in the first instance in a post-conviction proceeding where factual uncertainties can be resolved in an evidentiary hearing.[13] We conclude that Giangousis has failed to demonstrate that we should depart from this policy in his case.[14]

---

[10]Rowland, 118 Nev. at 40, 39 P.3d at 119.

[11]Id.

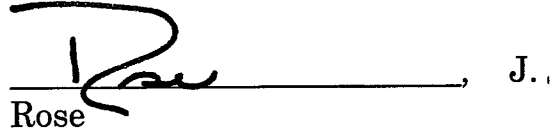
[12]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

[13]See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

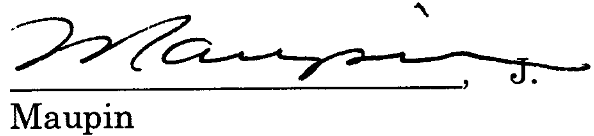
[14]See id. at 160-61, 17 P.3d at 1013-14.

Therefore, having considered Giangousis' contentions and concluded that they are either without merit or not properly raised in a direct appeal, we

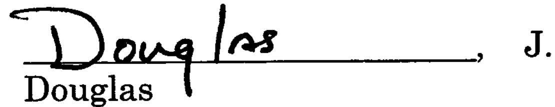
ORDER the judgment of conviction AFFIRMED.



_______________, J.
Rose



_______________, J.
Maupin



_______________, J.
Douglas

cc: Hon. Robert E. Estes, District Judge
Paul G. Yohey
Attorney General Brian Sandoval/Carson City
Churchill County District Attorney
Churchill County Clerk