

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE JAMES SEVIER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41308

FILED

OCT 15 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one felony count of domestic battery. The district court sentenced appellant Willie James Sevier to serve a prison term of 24-60 months and ordered him to pay restitution in the amount of \$3,103.76.

Sevier's sole contention is that prosecutorial misconduct rendered his trial unfair. Sevier argues that the prosecutor's improper comments during closing argument warrant reversal of his conviction. Sevier concedes that counsel failed to contemporaneously object to the prosecutor's allegedly improper comments or ask for a curative instruction,¹ but he nonetheless argues that the misconduct resulted in plain error, and therefore, is appropriate for review on appeal by this court.²

Sevier challenges the following statement by the prosecutor:

¹See 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).

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

The Court has told you that every person charged with the commission of a crime is presumed innocent until the contrary is proven by competent evidence beyond a reasonable doubt.

So the presumption of innocence is like a big soap bubble that surrounds a criminal defendant. And it's not until the evidence comes through that shield and pops it can you find – that once the evidence has established his guilt, the presumption is lifted and there is no more presumption of innocence. So the case is decided on the evidence.

Citing to Pagano v. Allard for support, Sevier argues that because the right to be presumed innocent applies during jury deliberations, by analogizing the presumption of innocence to a “soap bubble” that “pops” when all the evidence of guilt is presented, his due process right to be presumed innocent until proven guilty beyond a reasonable doubt was violated by the prosecutor's comments.³ We conclude that although the prosecutor's comments were improper, any error was harmless and not reversible plain error.⁴

³218 F. Supp. 2d 26, 33-35 (D. Mass. 2002) (holding that the prosecutor improperly analogized the presumption of innocence to a cloak that comes off at the end of trial); 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.”).

⁴See NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”); Rowland v. State, 118 Nev. 31, 40, 39 P.3d 114, 118-19 (2002); Gallego v. State, 117 Nev. 348, 365-66, 23 P.3d 227, 239 (2001).

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.”⁵ “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.”⁶

Once again, we note that Sevier did not object to the above statement by the prosecutor or request a curative instruction from the district court. We also note that Pagano is distinguishable from the instant case. In Pagano, the evidence against the defendant was weak.⁷ In the instant case, there was overwhelming evidence of Sevier's guilt. The victim, Sevier's wife, testified at trial about the incident and the extent of her injuries. Photographs of the victim's injuries were admitted into evidence. Eyewitnesses testified to having seen Sevier forcibly manhandling the victim, putting her in a headlock, pushing and shoving her into a wooden fence, yelling at her, and preventing her from getting away. 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 Sevier “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. Therefore, in light of the

⁵Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998).

⁶Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).


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

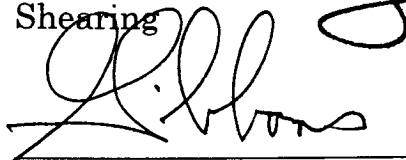
above, we conclude that the prosecutor's misconduct amounted to harmless error.⁸

Having considered Sevier's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

cc: Hon. James W. Hardesty, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁸See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (holding "where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error"); Skiba v. State, 114 Nev. 612, 614-15, 959 P.2d 959, 960-61 (1998) (although prosecutorial comment was violative, it was not reversible because there was overwhelming evidence of defendant's guilt); Rippo v. State, 113 Nev. 1239, 1254-55, 946 P.2d 1017, 1026-27 (1997) (prosecutorial error was harmless in light of the overwhelming evidence of guilt supporting the conviction).