

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEsar CONTRERAS ZANCHEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49508

**FILED**

JUN 13 2008

TRACIE A. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of attempted murder with the use of a deadly weapon and burglary. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge. The district court sentenced appellant Sesar Contreras Zanchez to a prison term of 60 to 150 months for the attempted murder count, followed by an equal and consecutive term for the deadly weapon enhancement, and a concurrent term of 48 to 120 months for the burglary count.

The victim testified at trial that Zanchez knocked on the door of his residence late at night, pointed a shotgun at him, and accused him of sexual relations with Zanchez's girlfriend. The victim grabbed the shotgun barrel and moved it from his face, and the shotgun went off, missing the victim. A bullet hole was found exiting the victim's residence. The victim's employer's wife testified that she saw Zanchez's vehicle slowly approach the victim's residence. The employer's wife then heard a gunshot and observed Zanchez's vehicle exit very quickly. Police officers stopped Zanchez's vehicle close to the area of the crime. However, there was evidence presented that the victim was motivated to fabricate a story

about Zanchez because of his romantic interest in Zanchez's girlfriend. Additionally, the weapon was not found in Zanchez's possession.

First, Zanchez contends that the district court abused its discretion by admitting character evidence. Specifically, Zanchez contends that the district court erred in allowing cross-examination of his girlfriend, which elicited testimony that she had filed a domestic violence report against Zanchez with the police department and then sought to withdraw the report. He also contends that the district court erred in allowing cross-examination of his employer, which elicited testimony that his employer had fired Zanchez previously and paid a "coyote" to retrieve him. Zanchez contends that the reference to a "coyote" informed the jury of his illegal immigrant status and prejudiced his case.

Initially, we note that there were no objections below to the admission of the character evidence. The failure to raise an objection with the district court generally precludes appellate consideration of an issue.<sup>1</sup> This court may nevertheless address an alleged error if it was plain and affected the appellant's substantial rights.<sup>2</sup> When conducting a review for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice."<sup>3</sup>

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<sup>1</sup>See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

<sup>2</sup>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.").

<sup>3</sup>Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (citing Phenix v. State, 114 Nev. 116, 119, 954 P.2d 739, 740 (1998)).

“This court reviews a district court’s decision to admit or exclude evidence for an abuse of discretion.”<sup>4</sup> NRS 48.045(1) states:

1. Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(a) Evidence of his character or a trait of his character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence;

(c) Unless excluded by NRS 50.090, evidence of the character of a witness, offered to attack or support his credibility, within the limits provided by NRS 50.085.

NRS 50.085(3) states:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself . . . .

“[A]n examiner can question a witness on practically any aspect of the witness’s direct testimony.”<sup>5</sup>

Here, although it is a fairly close call, the prosecutor’s cross-examination of Zanchez’s girlfriend regarding her filing of a domestic violence report and then rescinding it was in direct reference to the girlfriend’s credibility and thus was proper. Additionally, the prosecutor’s cross-examination of Zanchez’s employer regarding his firing of Zanchez was proper given the employer’s testimony on direct examination that

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<sup>4</sup>Jezdik v. State, 121 Nev. 129, 135, 110 P.3d 1058, 1062 (2005).

<sup>5</sup>Id. at 137, 110 P.3d at 1063.

Zanchez was a good employee. In contrast, the question regarding hiring a “coyote” was not directly related to the employer’s direct testimony and thus was improper.<sup>6</sup> Nevertheless, given the strength of the evidence presented by the State, any error did not affect Zanchez’s substantial rights.

Zanchez next contends that several instances of prosecutorial misconduct resulted in cumulative error that deprived him of the right to a fair trial. We agree.

Initially, we note that Zanchez did not object to the majority of the challenged comments. Therefore, we review for plain error.<sup>7</sup>

First, Zanchez contends that the prosecutor committed misconduct by accusing the defense witnesses and Zanchez of lying. Specifically, Zanchez contends that the prosecutor improperly referred to the truthfulness of the testimony of his girlfriend, his employer, and himself.

We have long held that a prosecutor is prohibited from calling a witness a “liar.”<sup>8</sup> In Rowland v. State, 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.<sup>9</sup> We explained,

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<sup>6</sup>See, e.g., State v. Avendano-Lopez, 904 P.2d 324, 330-34 (Wash. Ct. App. 1995).

<sup>7</sup>See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

<sup>8</sup>See Pascua v. State, 122 Nev. 1001, 1008, 145 P.3d 1031, 1035 (2006) (quoting Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990)).

<sup>9</sup>118 Nev. 31, 40, 39 P.3d 114, 119 (2002).

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. For those situations that fall in between these two examples, we must look to the attorney for the defendant to object and the district judge to make his or her ruling on a case-by-case basis.<sup>10</sup>

Here, the prosecutor committed misconduct by stating that the defense witnesses and Zanchez had lied. Nonetheless, given the strength of the evidence presented by the State, we conclude that these individual instances of prosecutorial misconduct did not constitute plain error that affected Zanchez's substantial rights.<sup>11</sup>

Second, Zanchez contends that the prosecutor committed misconduct by vouching for the credibility of the State's witnesses. Specifically, Zanchez contends that the prosecutor vouched for investigators and crime lab personnel in his opening statement.

It is improper for a prosecutor to vouch for the credibility of a government witness.<sup>12</sup> Here, when considered in context, the statements were not improper and did not amount to witness vouching because the

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<sup>10</sup>Id.

<sup>11</sup>See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991) ("if a guilty verdict was free from doubt, even aggravated prosecutorial remarks will not justify reversal").

<sup>12</sup>See United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980) (citing Lawn v. United States, 355 U.S. 339, 359-60 n.15 (1958)).

prosecutor was merely commenting on the evidence and what it would show.<sup>13</sup>

Third, Zanchez contends that the prosecutor committed misconduct by expressing his personal opinion. Specifically, the prosecutor stated on numerous occasions his personal opinion as to what the evidence demonstrated.<sup>14</sup>

A prosecutor should not inject his or her personal opinion into the proceedings or attempt to inflame the jury,<sup>15</sup> and a prosecutor should be “unprejudiced, impartial, and nonpartisan.”<sup>16</sup> “By stepping out of the prosecutor’s role, which is to seek justice, and by invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney.”<sup>17</sup>

Here, the prosecutor improperly injected his personal opinion on several instances. However, the district court admonished the jury that credibility issues were solely the responsibility of the jury, and thus cured the improprieties. Zanchez cannot demonstrate that the statements

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<sup>13</sup>See Rice v. State, 113 Nev. 1300, 1312-13, 949 P.2d 262, 270 (1997), modified on other grounds by Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002).

<sup>14</sup>The record indicates one instance in which defense counsel objected to the prosecutor expressing his personal opinion. The district court admonished the jury to disregard the statement, thereby curing any error.

<sup>15</sup>Collier v. State, 101 Nev. 473, 479-80, 705 P.2d 1126, 1130 (1985).

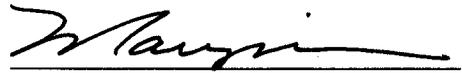
<sup>16</sup>Id. at 480, 705 P.2d at 1130 (quoting State v. Rodriguez, 31 Nev. 342, 346, 102 P.3 863, 864 (1909)).

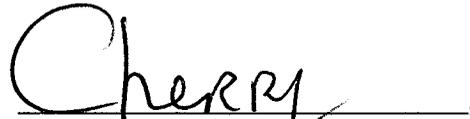
<sup>17</sup>Id. at 480, 705 P.2d at 1130 (citation omitted).

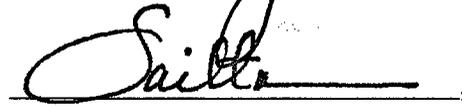
affected his substantial rights and amounted to reversible plain error given the strength of the evidence presented.

The factors relevant for evaluating a claim of cumulative error “include whether ‘the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.’”<sup>18</sup> Here, although the evidence presented was strong, it was not overwhelming. Further, although individually, the prosecutor’s misconduct was not prejudicial, because of the numerous instances of misconduct, coupled with the prejudicial effect resulting from the reference to Zanchez’s status as an illegal alien, we conclude that the cumulative effect of the errors warrant reversal.<sup>19</sup> Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for a new trial.

  
Maupin, J.

  
Cherry, J.

  
Saitta, J.

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<sup>18</sup>Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (quoting Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1288 (1996)).

<sup>19</sup>We admonish the prosecutor Russell Smith, and caution him that similar misconduct in the future may result in this court referring him to the State Bar of Nevada for disciplinary proceedings.

cc: Hon. Richard Wagner, District Judge  
State Public Defender/Carson City  
State Public Defender/Winnemucca  
Attorney General Catherine Cortez Masto/Carson City  
Humboldt County District Attorney  
Humboldt County Clerk