

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK "PUMPKIN" SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54234

**FILED**

**FEB 03 2011**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY Young  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, home invasion, and burglary. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

This case arose after Frank Smith and Deljuan Goodlow murdered Royce Riley while trying to break into a motel room. After a trial, the jury convicted Smith of first-degree murder with the use of a deadly weapon, home invasion, and burglary. Smith appeals, arguing, among other things, that the district court erred by making improper comments during jury selection.

We conclude that the district court committed reversible error after making outrageously improper comments, and we therefore reverse and remand for a new trial. Because the parties are familiar with the facts, we do not recount them further except as is necessary to our disposition.

The district court's improper comments warrant a new trial

Smith argues that the district court committed reversible error by making improper comments during jury selection that denied him the right to a fair and impartial trial. We conclude that the district court judge's comments were improper and a new trial is warranted.

We take issue with two statements the district court judge made during jury selection. He first stated:

Now, I cannot say in any way, shape or form that I hate the defendants, because I'm a judge. I can't say I hate Saddam Hussein. I can't say I hated Adolph Hitler. I can't say I hated Ho Chi Minh. And I fought in the jungles against his boys. Do you see what I'm saying? So we don't go there. I don't know if I hate the NVA or Viet Cong now, even though they killed my men and wounded me.

It's right this minute, before you hear anything, can you apply the law, can you give the defendants presumption of innocence? And if you say, "I'm not sure," you know what? That's all [all] of us are saying that stuff right now, "I'm not sure."

So I'm not going to let you off the hook. I'm going to—you've got to tell me that you don't like Mr. Smith because he's black . . . . You don't like [him] because—whatever. You don't like the system, you don't like the lawyers, you don't like the prosecutor. See what I mean? Specific as far as why you cannot—before you even hear the case, why you cannot be a fair and impartial juror. Okay?

The judge also stated: "[a]nybody else in regards to enmity, hatred, bias, prejudice against [Smith] because of the charges, anybody . . . have any

member of your immediate family or yourself that's been affected by these horrible—this horrible murder, horrible burglary, horrible invasion of the home?”

After the judge made these statements, Smith moved for a mistrial, arguing that the statements tainted the jury pool. The district court denied the motion.

This court reviews a district court's denial of a motion for mistrial for an abuse of discretion. Chavez v. State, 125 Nev. \_\_\_, \_\_\_, 213 P.3d 476, 487 n.2 (2009). However, whether judicial misconduct occurred at all is subject to de novo review. Cf. Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) (recognizing that attorney misconduct presents a legal question subject to de novo review).

Because of the respect a juror has for a judge, the judge's commentary can mold the juror's opinion. Holderer v. Aetna Cas. and Sur. Co., 114 Nev. 845, 851, 963 P.2d 459, 463 (1998).

“The average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the trial judge. Human opinion is oftentimes formed upon circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury . . .”


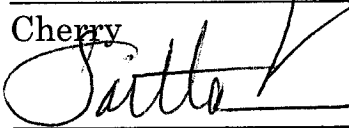
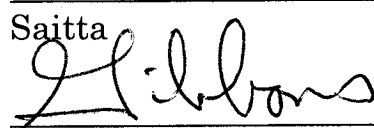
Parodi v. Washoe Medical Ctr., 111 Nev. 365, 367-68, 892 P.2d 588, 589-90 (1995) (quoting Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 416-17, 470 P.2d 135, 140 (1970)).

When considering whether judicial misconduct warrants reversal, we will normally consider the weight and extent of the evidence of guilt. Kinna v. State, 84 Nev. 642, 647, 447 P.2d 32, 35 (1968). While we ultimately affirmed the convictions in Kinna, we did state that “even when evidence is quite apparent, misconduct may so interfere with the right to a fair trial as to constitute grounds for reversal.” Id. (citing to People v. Mahoney, 258 P. 607, 610 (Cal. 1927) (reversing a conviction based on improper judicial statements and stating “[t]he fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice”)).

Here, there is strong evidence of Smith’s guilt, including a surveillance video of Smith and Goodlow breaking into the hotel room where the murder occurred and then fleeing the scene in a car. However, commentary from the judge calling these crimes horrible and referring to the defendants in the same context as infamous figures like Saddam Hussein, Adolf Hitler, and Ho Chi Minh is so outrageous as to create the appearance of partiality and result in a miscarriage of justice. Additionally, the judge’s commentary in this case is so egregious we feel it necessary to discourage all district courts from making any similar commentary in the future because it grossly undermines NCJC Canon 2. See Paine v. State, 107 Nev. 998, 1001, 823 P.2d 281, 283 (1991) (vacating a death sentence based on concern for public confidence in the judiciary and the need to avoid the appearance of prejudice and partiality) overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). Therefore, even though the evidence of Smith’s guilt is overwhelming, we conclude the judge abused his discretion in denying the

motion for a mistrial and we reverse and remand for a new trial.

It is so ORDERED.<sup>1</sup>

  
\_\_\_\_\_, J.  
Cherry  
  
\_\_\_\_\_, J.  
Saitta  
  
\_\_\_\_\_, J.  
Gibbons

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

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<sup>1</sup>We have considered Smith's claim that there was insufficient evidence to support the verdict and conclude that it lacks merit. Because we are reversing the judgment based on the district court judge's improper comments during jury selection, we decline to address the other issues raised on appeal.