

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSBALDO CHAPARRO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59907

FILED

NOV 15 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery with intent to commit sexual assault. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Chaparro argues that the prosecutor committed misconduct during her closing argument that deprived him of his right to a fair trial and to due process. Because Chaparro did not object to any of the statements, we review them for plain error. Rose v. State, 123 Nev. 194, 208-09, 163 P.3d 408, 418 (2007).

Chaparro first alleges that the prosecutor inappropriately attempted to quantify reasonable doubt by analogizing it to a fraying rope holding up the conclusion of guilt, stating, "Maybe there's a strand or two that you'll disagree about, but the entire rope, even with a strand or two missing, supports the weight of the conclusion." This court has repeatedly and emphatically instructed prosecutors not to make any attempt to "quantify, supplement, or clarify the statutorily prescribed reasonable doubt standard." Holmes v. State, 114 Nev. 1357, 1366, 972 P.2d 337, 343 (1998). We have "nevertheless consistently deemed incorrect explanations of reasonable doubt to be harmless error as long as the jury instruction correctly defined reasonable doubt." Randolph v. State, 117 Nev. 970, 981,

36 P.3d 424, 431 (2001). We therefore conclude that the prosecutor's use of an analogy to explain reasonable doubt was improper, yet no prejudice resulted because the jury was correctly instructed.

Next, Chaparro alleges that the prosecutor committed misconduct by inappropriately analogizing the presumption of innocence to "a big soap bubble," and stating, "The evidence is sort of like a stick pushing in on it until it bursts the presumption. And the evidence in this case has burst the presumption of innocence." The criminal standard of proof beyond a reasonable doubt is interwoven with the presumption of innocence. See In re Winship, 397 U.S. 358, 362 (1970) (stating that the burden of proof beyond a reasonable doubt "provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law" (internal quotations omitted)). Prosecutors and defense counsel alike must thereby avoid analogizing, quantifying, or supplementing the statutory instruction for presumption of innocence. However, we conclude that while this statement was also improper, no prejudice resulted because the jury was properly instructed that a person is presumed innocent unless the contrary is proved by competent evidence beyond a reasonable doubt.

Chaparro also alleges that the prosecutor committed misconduct by describing the presumption of innocence as a "legal fiction" that "existed prior to the jury's consideration of the evidence and lasted until the case was submitted to the jury for deliberations." Although describing the presumption of innocence as a legal fiction may be technically accurate, it is not unforeseeable that a jury could become confused when a bedrock principle of criminal law—whose enforcement lies

at the foundation of our justice system—is described as a fiction. However, we conclude that the statement does not rise to the level of plain error. Further, we disagree that the prosecutor’s statement to the jury that the presumption of innocence exists until it deliberates implied that the State did not have to meet its burden, again noting that the jury was properly instructed as to the State’s burden. Cf. Morales v. State, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006) (concluding that plain error occurred when a prosecutor instructed the jury that the presumption of innocence cloaked the defendant at the beginning yet no longer existed at the end of trial).

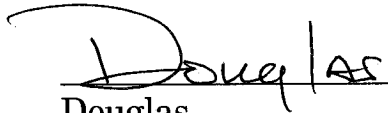
Next, Chaparro argues that the prosecutor committed misconduct by asking the jury to follow “the social compact that protects all of us from abuse and violence,” stating that things would have been “far more awful” for the victim if she had been submissive during the attack and stating that the jury should believe the victim because she was the only person who gave credible evidence. Considering each of these statements in context, it appears that the prosecutor was merely asking the jury to follow the law and find the defendant guilty of the crime for which he was charged. Cf. Evans v. State, 117 Nev. 609, 633-34, 28 P.3d 498, 515 (2001) (concluding that a prosecutor erred by challenging the jury to be courageous enough to find the defendant guilty using words particularly designed to stir the jury's passion and appeal to partiality). We also note that although the prosecutor told the jury that it will find the defendant guilty rather than asking them to find the defendant guilty, she was doing so in an effort to avoid confusion over multiple verdict forms. Accordingly, we conclude that the statements do not rise to the level of plain error.


Finally, Chaparro asks us to consider the instances of prosecutorial misconduct cumulatively. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (noting that under a cumulative error analysis we must determine “(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged” (internal quotations omitted)). We conclude that while the issue of guilt was close because there was no testimony that Chaparro attempted to penetrate the victim and the crime was substantial, the misconduct here was not so serious as to warrant relief. Id. at 1190, 196 P.3d at 477 (“An error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing ‘actual prejudice or a miscarriage of justice.’” (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))).¹

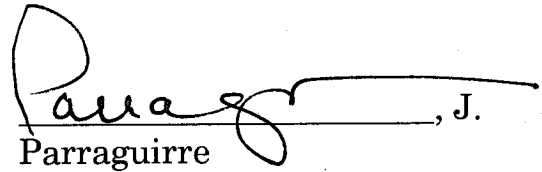
¹We have closely reviewed the challenged prosecutorial misconduct and the prosecutor’s arguments raise concern. Although we conclude that the improper arguments do not mandate reversal, we do not condone the prosecutor’s actions and caution her to avoid future misconduct. We note that this court has and will impose sanctions for egregious misconduct.

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

ORDER the judgment of conviction AFFIRMED.


Douglas, J.


Gibbons, J.


Parraguirre, J.

cc: Hon. Patrick Flanagan, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk