IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDUARDO ESTRADA-PUENTES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72335

ORDER OF AFFIRMANCE

Eduardo Estrada-Puentes appeals from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Estrada-Puentes strangled his wife, Stephanie Gonzales, to death in their trailer home in Elko.[1] A jury found Estrada-Puentes guilty of first-degree murder and the district court sentenced him to life without the possibility of parole. Estrada-Puentes does not dispute the fact that he strangled Gonzales; however, Estrada-Puentes argues that homicide by means of manual strangulation is insufficient to support a conviction of first-degree murder and the evidence presented at trial was only sufficient to support voluntary manslaughter or second-degree murder. He also argues that the prosecutor's demonstration of the length of time it takes to die by strangulation and characterizing the defense theory of voluntary manslaughter as "ridiculous" during closing arguments constituted prosecutorial misconduct that warrants reversal of his conviction.

First, Estrada-Puentes contends there was insufficient evidence to support a conviction of first-degree murder. In reviewing a

[1]We do not recount the facts except as necessary to our disposition.

challenge to the sufficiency of evidence supporting a criminal conviction, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (internal quotation marks omitted). The jury weighs the evidence and determines the credibility of the witnesses and decides whether the evidence is sufficient to meet the elements of the crime, and this court will not disturb a verdict that is supported by substantial evidence. *Id.*

Murder perpetrated by "willful, deliberate and premeditated killing" is first-degree murder. NRS 200.030(1)(a). Thus, willful first-degree murder requires that the killer actually intend to kill. *See Byford v. State*, 116 Nev. 215, 234, 994 P.2d 700, 713 (2000). "Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action." *Id.* at 236, 994 P.2d at 714 (internal quotation marks omitted). Deliberation may not be formed in the heat of passion, "it must be carried out after there has been time for the passion to subside and deliberation to occur." *Id.* (internal quotation marks omitted). Last, "[p]remeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing," which "may be as instantaneous as successive thoughts of the mind." *Id.* at 237, 994 P.2d at 714 (internal quotation marks omitted). "Circumstantial evidence may be considered and provide sufficient evidence to infer" premeditation and deliberation. *Leonard v. State*, 117 Nev. 53, 75, 17 P.3d 397, 411 (2001).

The jury heard the following evidence: Estrada-Puentes strangled Gonzales to death; injuries to Gonzales' body demonstrated there

was a struggle; it takes approximately four minutes of uninterrupted pressure to die by manual strangulation; the couple's daughter, who was in the trailer at the time of the murder, heard Estrada-Puentes call Gonzales a "bitch" "three or four" times, to which Gonzales responded by stating Estrada-Puentes' name in a "scared and like shrieky" tone, and then the trailer was "silent for, like, five minutes"; the daughter also heard Estrada-Puentes say something like "You're freaking dead"; Gonzales and Estrada-Puentes had separated and Gonzales was working on divorce papers; Gonzales had started dating Nelson Nunez; Nunez texted flirtatious messages and "kissing emojis" to Gonzales the night before the murder; Gonzales came by the couple's trailer that morning to shower and get ready for work; Estrada-Puentes called Nunez's phone four times in a two minute time span that morning; and Gonzales was found covered in blankets and pillows in between a wall and a bed in the trailer. Thus, in light of the extensive evidence presented at trial, we conclude that a rational jury could find that Estrada-Puentes' actions were willful, premeditated, and deliberate.

Next, Estrada-Puentes argues that the prosecutor committed misconduct during closing argument when the prosecutor demonstrated the length of time it takes to die by strangulation and characterized the defense theory of voluntary manslaughter as "ridiculous." However, Estrada-Puentes failed to object to the prosecutor's statements below. This court reviews for plain error instances of prosecutorial misconduct that were not objected to below. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). "Under that standard, 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." *Id.* (internal quotation marks omitted).

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, and the alleged improper remarks must be read in context." *Butler v. State*, 120 Nev. 879, 896, 102 P.3d 71, 83 (2004) (internal quotation marks omitted). This court applies a two-step analysis: first, this court "determine[s] whether the prosecutor's conduct was improper." *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. Then, "if the conduct was improper," then this court "must determine whether the improper conduct warrants reversal." *Id.*

Although the Nevada Supreme Court has not yet ruled on this issue, we conclude that on the facts presented here, the prosecutor's apparent four minutes of silence during closing argument to demonstrate the length of time it takes to die by manual strangulation, was not improper. *See, e.g., Crawford v. State*, 777 S.E.2d 463, 465 (Ga. 2015) (holding district court did not abuse its discretion in allowing prosecutor "to use a rope to demonstrate the act of strangulation followed by four minutes of timed silence representing the amount of time it allegedly took the victim to die"); *Braley v. State*, 572 S.E.2d 583, 593 (Ga. 2002) (concluding it was not improper when "[t]he prosecutor asked the jury to sit in silence while he timed five minutes to illustrate a portion of the time that the victim was attacked and conscious"); *State v. Corbett*, 130 P.3d 1179, 1196 (Kan. 2006) (concluding prosecutor's demonstrative silence for four minutes was not improper and did not appeal to the jurors' "biases, passions, or prejudices"); *State v. Hendricks*, 882 So. 2d 1212, 1217 (La. Ct. App. 2004) (allowing prosecutor to use clock during closing argument to illustrate the lapse of one minute as testified to by the medical examiner that death by

strangulation could occur in one minute); *Glass v. State*, 227 S.W.3d 463, 474 (Mo. 2007) (concluding "prosecutor was entitled to demonstrate that 30 seconds [was] a sufficient period of time to deliberate about killing another person" by instructing the jury "to 'watch that clock'"); *State v. Jones*, 487 S.E.2d 714, 719 (N.C. 1997) (concluding it was not improper for the prosecutor's closing argument to include five minutes of silence to represent "how long the victim was in the presence of this defendant as he cut, slashed, and stabbed and pursued her around that residence"). Therefore, we conclude that Estrada-Puentes has failed to demonstrate reversible plain error.

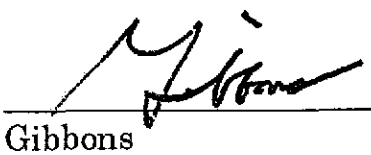
Turning to the prosecutor's statements that the defense theory was "ridiculous," we conclude that although these statements were likely inappropriate, reversal is not warranted because Estrada-Puentes failed to show how his rights were substantially affected, and therefore there was no plain error. A prosecutor has a duty to refrain from injecting his personal beliefs into an argument and to avoid statements that "ridicule or belittle the defendant or the case." *Earl v. State*, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995) (concluding the prosecutor's characterization of a witness's testimony as "malarkey" "violated his duty not to inject his personal beliefs into argument"). However, even if improper, Estrada-Puentes did not object at trial, which would have allowed "the district court to rule upon the objection, admonish the prosecutor, and instruct the jury." *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (internal quotation marks omitted). Because Estrada-Puentes fails to show how his rights were substantially affected, there was no plain error and reversal is not warranted.

For the foregoing reasons, we conclude that there was sufficient evidence to support the jury's first-degree murder verdict and that even if there were instances of prosecutorial misconduct, reversal is not warranted because there was no plain error. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Alvin R. Kacin, District Judge
Lockie & Macfarlan, Ltd.
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk