

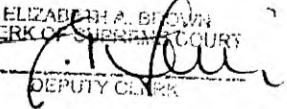
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHEL CIFONTES BLANCO, A/K/A
MITCHELL SIFONTES BLANCO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83937-COA

FILED

OCT 27 2022

ELIZABETH A. BROWN
CLERK OF SUPERIOR COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Michel Cifontes Blanco appeals from a judgment of conviction entered pursuant to a jury verdict of battery by a prisoner with the use of a deadly weapon causing substantial bodily harm. First Judicial District Court, Carson City; James E. Wilson, Judge.

First, Blanco argues the State committed prosecutorial misconduct by making improper facial expressions, mumbling, and engaging in additional distracting actions during the trial. We apply a two-step analysis in our review of prosecutorial misconduct claims. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). “First, we must determine whether the prosecutor’s conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal.” *Id.* (footnote omitted). “With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error.” *Id.*

The record reveals that during trial, the district court admonished the prosecutor for making facial expressions, hand gestures, and/or muttering under her breath following adverse rulings, and it directed the prosecutor to strive to stop those actions. Even assuming that the prosecutor’s conduct amounted to misconduct, *see State v. Martinez*, 282

P.3d 409, 416 (Ariz. 2012) (stating that eye-rolling and disapproving facial expressions by the prosecutor were improper), Blanco is not entitled to relief for the reasons discussed below.

The evidence at trial demonstrated that Blanco and the victim engaged in a discussion. Sometime after the conclusion of the discussion, Blanco retrieved a shovel from a storage room, approached the victim, and used the shovel to hit the victim in the head. The blow caused wounds to the victim's head. Blanco testified that he hit the victim because the victim sexually harassed him. Blanco further testified that he acted because he did not want to share a cell with the victim any longer and he felt the correctional staff would not help him out of the situation.

The evidence produced at trial demonstrated that Blanco was not legally justified to act in self-defense because he did not have a reasonable belief he was in imminent danger. *See Culverson v. State*, 106 Nev. 484, 487, 797 P.2d 238, 239 (1990) (providing the requirements for justifiable homicide); NRS 200.275 (applying the self-defense requirements beyond homicide). In addition, the evidence did not demonstrate that Blanco was justified in harming the victim out of necessity because the social benefit of his act of hitting the victim with a shovel did not outweigh the social costs of failing to commit the crime. *See Hoagland v. State*, 126 Nev. 381, 385, 240 P.3d 1043, 1046 (2010) (describing the common law defense of necessity).

In light of the overwhelming evidence of Blanco's guilt and the district court's admonishment to the prosecutor, we conclude that the prosecutor's facial expressions, mumbling, and distracting actions were harmless. *See Valdez*, 124 Nev. at 1189, 196 P.3d at 476 (explaining that nonconstitutional error is harmless unless "the error substantially affects the jury's verdict"). Therefore, Blanco is not entitled to relief based on this claim.

Second, Blanco argues the State committed prosecutorial misconduct during closing arguments by making disparaging statements about Blanco's defense and shifting the burden of proof to Blanco. Blanco did not object to the challenged comments. Thus, Blanco is not entitled to relief absent a demonstration of plain error. See *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018). To demonstrate plain error, Blanco must show "(1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected [his] substantial rights." *Id.* at 50, 412 P.3d at 48 (internal quotation marks omitted). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

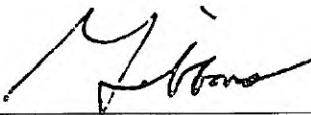
In closing arguments, the State may "assert inferences from the evidence and argue conclusions on disputed issues." *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). A prosecutor may not "disparage legitimate defense tactics." *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004). Once self-defense has been raised, the State has "the burden of proving absence of justification or excuse for the [actions]." *Hill v. State*, 98 Nev. 295, 297, 647 P.2d 370, 371 (1982). A prosecutor impermissibly shifts the burden of proof by commenting "on the defense's failure to produce evidence or call witnesses." *Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996). A criminal conviction, however, is not easily overturned solely on a prosecutor's comments. *United States v. Young*, 470 U.S. 1, 11 (1985).

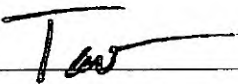
During its rebuttal argument, the State noted that Blanco had put forth self-defense and necessity as theories of his case and said to the jurors that the theories may "mess with your brain." In addition, the State argued that the defense did not meet the elements of the defenses they put forth. The State also urged the jurors to use common sense when reviewing

the evidence and the law. The State's comments did not disparage the defense. Moreover, the State did not err by arguing that Blanco was not entitled to act out of necessity. *See Evans v. State*, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001) (stating that a prosecutor does not improperly shift the burden of proof by commenting on the defense's failure to substantiate its theories with supporting evidence), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

However, as it was the State's burden to prove that Blanco was not justified to act in self-defense, the State's argument that Blanco was not entitled to such a defense if he did not prove the necessary elements was improper. Thus, the State's argument amounted to error. But as explained previously, the evidence produced at trial demonstrated that Blanco was not legally justified to act in self-defense or out of necessity. Accordingly, Blanco fails to demonstrate error affecting his substantial rights, and we conclude that he is not entitled to relief based upon this claim. Therefore, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. James E. Wilson, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Attorney General/Las Vegas
Carson City District Attorney
Carson City Clerk