

ORIGINAL

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3  
4 RAUL GARCIA,

5 Appellant,

6 v.

7 THE STATE OF NEVADA,

No. 37816

8 Respondent.

**FILED**

NOV 29 2001

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10 RESPONDENT'S ANSWERING BRIEF

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1 the prosecutor. Id. pp. 106, 116. No evidence was presented  
2 suggesting that Deputy Walling saw similar action from Ms.  
3 Torrenses when Anna testified, however. Deputy Walling went on to  
4 say, however, that the answers given by Palma were either yes/no  
5 answers, and appeared to correspond to Ms. Torrenses' nodding or  
6 shaking her head. Id. p. 106. Initially, Walling said he watched  
7 Ms. Torrenses, who was seated in the front row of the gallery,  
8 shaking or nodding her head two times and let it go, but he looked  
9 up from his desk a few minutes later and saw her do it two or three  
10 more times. Id. pp. 106-7. As a result, Deputy Walling looked at  
11 Ms. Torrenses, and she stopped. Id. Walling said he looked up  
12 again later, but Ms. Torrenses was not nodding anymore. Id. p.  
13 106.

14 While Walling did not say which questions were being  
15 asked when Ms. Torrenses nodded, the key question, according to  
16 defense counsel, involved whether Palma had ever seen Raul Garcia  
17 with the girls before or had played with the girls before; to this  
18 question, Palma said no. (This exchange is found at 2 TT, p. 7,  
19 lines 4-19.) Defense counsel went on to say that "our defense is  
20 that [Raul Garcia] has played with the girls before." Id. pp. 123-  
21 25. Curiously, Appellant never presented any evidence proving he  
22 had been with or played with the girls before or ever. Moreover,  
23 Anna denied such activity too. 1 TT, p. 60.

24 After listening to Garcia and Walling, the trial judge  
25 reviewed Palma's testimony. When he completed his review of the  
26 testimony, the trial judge, who is in the best position to

1           Heretofore, this Court's cases have condemned the  
2 coaching the witnesses, particularly in cases in which child-  
3 victims have been tainted by improper interview techniques by  
4 detectives and other experts. See, e.g., Felix v. State, 109 Nev.  
5 151, 849 P.2d 220 (1993). But to get to a point where substantive  
6 condemnation, and therefore a new trial is required, a factual  
7 threshold must be cleared and, in those cases, was cleared.  
8 Garcia's counterargument, presented in his brief, proceeds on the  
9 assumption that coaching was proved when it was not. Moreover, it  
10 must be shown from the factual threshold that the trial judge  
11 manifestly abused his discretion in refusing to allow Ms. Garcia  
12 and/or Deputy Walling to testify. Accord, Beck v. District Court,  
13 113 Nev. 624, 939 P.2d 1059 (1997). It is in this respect that  
14 Appellant Garcia's argument is undercut. Even if we were to look  
15 at the record in the light most favorable to Garcia, he proved  
16 virtually nothing upon which the lower court ruling could be  
17 reversed. Accord, State v. Rodriguez, 509 N.W.2d 1, 4 (Neb. 1993)  
18 - cross-examination allowed, but only if improper action proved.

19           For example, Appellant Garcia presented absolutely no  
20 evidence establishing Ms. Torrenses suggested answers to Anna. The  
21 best Appellant Garcia could show through Ms. Garcia's testimony is  
22 that when Ms. Torrenses nodded, Anna was answering "I don't  
23 remember." Moreover, it should be noted that Ms. Garcia speaks no  
24 English, or very little English, but Anna testified in English. In  
25 either event, the crucial portions of Anna's testimony came as  
26 narrative answers posed by the prosecutor and which called for

1 narrative, open-ended answers. 1 TT, pp. 29-54. On cross-  
2 examination, however, Anna said "I don't remember" approximately  
3 two times. Id. pp. 68, 69.

4 In short, insofar as Anna is concerned, Garcia failed to  
5 prove that Ms. Torrenses even suggested answers to her daughter.  
6 Accordingly, the trial judge did not err in refusing to allow  
7 Roberta Garcia to testify in this case.

8 While Garcia goes on, at some length in his brief,  
9 respecting how cross-examination is the great engine of truth  
10 production, and that most of Anna's answers to the cross-  
11 examination were yes/no answers, it should be remembered that the  
12 answers were to leading questions, but more importantly, Ms. Garcia  
13 was not paying much attention and only weighed in on the "I don't  
14 remember" answers. Indeed, defense counsel pressed Ms. Garcia to  
15 move beyond those answers to other more provocative answers, but  
16 she would not. 2 TT, p. 132, lines 2-22.

17 A similar result should follow with respect to the trial  
18 judge's ruling refusing to allow Deputy Walling to testify:  
19 namely, Appellant Garcia failed to prove that Ms. Torrenses  
20 suggested answers to Mr. Palma. Read in the light most favorable  
21 to Garcia, the record merely reflects that Ms. Torrenses nodded her  
22 head four or five times when Palma was on direct examination;  
23 Walling saw no similar conduct on cross-examination. If Ms.  
24 Torrenses was suggesting answers to Palma, then we should have  
25 expected him to be completely stumped when it came to cross-  
26 examination, but he was not. Moreover, not every question put to

1 Mr. Palma required a yes/no response; indeed, the key details  
2 provided by Palma were given in a narrative:

3 Q. Mr. Palma, as precisely as you can, I want  
4 you to describe for the ladies and gentlemen  
exactly what you saw.

5 A. When I went into the room I saw Raul in  
6 the room of the girls. When I was going in I  
7 saw . . . I saw the girl, that she was pulling  
8 her shorts up. And as soon as Raul saw me, he  
9 kind of got scared and turned around . . . he  
10 told me that he was looking at the  
11 decorations. Because I asked him, what are  
12 you doing? And he told me nothing.

And I saw the girl nervous.

And I . . . grabbed her and asked her what he  
was doing to her. And she told me to tell  
Chino [Raul Garcia] to go so she can tell me  
what happened.

13 2 TT, p. 20.

14 During the hearing, as noted above, defense counsel  
15 claimed the key questions put to Mr. Palma dealt with whether Raul  
16 Garcia had played with Anna and her sister before, and whether  
17 Palma had seen Raul Garcia with the girls before. 2 TT, p. 123.  
18 To pique the trial judge's curiosity, defense counsel stated "that  
19 our defense is that he has played with the girls before." Id.  
20 Anna answered similar questions negatively, however, and since no  
21 evidence corroborated Anna's claim of sexual assault, Palma's  
22 corroboration on this point of Anna's testimony was crucial to her  
23 credibility, at least according to defense counsel.

24 Defense counsel's reliance on this sequence of questions  
25 to make his point is very problematic and only serves to underscore  
26 the propriety of the trial judge's ruling. First, Walling never

1 testified that it was these questions that were being asked when  
2 Ms. Torrenses was nodding. Secondly, if these questions were key  
3 to the defense, it is not clear why. Despite defense counsel's  
4 claim to the contrary, the excerpted narrative, quoted above, is  
5 the key piece of corroborating evidence.<sup>2</sup> Moreover, Raul Garcia  
6 did not present any evidence, from any witness, that he had ever  
7 played with Anna at any time; both Anna and Palma said no to these  
8 questions, and their testimony on this point was uncontradicted.  
9 And finally, it is not this sequence of questions which Garcia  
10 relies on here on appeal to demonstrate an abuse of discretion.

11 In his brief, Garcia latches onto another exchange.  
12 Since Garcia does not bother to quote the exchange in full, we  
13 will:

14 Q. Thank you. Mr. Palma, you had described  
15 if I remember correctly, that Anna Karen was  
16 doing something with her hands. Could you  
show the ladies and gentlemen where her hands  
were?

17 A. Can I stand up?

18 Q. Please.

19 A. She was like this with her hands like  
20 that.

21 Q. What was she holding onto with her hands,  
22 kind of around your fly towards the front of  
your pants?

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23 <sup>2</sup>Defense counsel's claim that there was no other  
24 corroboration, Opening Brief, p. 10, line 25, is dubious in that  
25 there was a forensic medical examination conducted by a nurse  
practitioner. 2 TT, pp. 51-70. While the examination revealed no  
26 physical trauma, Id. pp. 55-57, and Anna's hymen was in tact, the  
nurse practitioner noted that the absence of such injuries was not  
surprising. Id. pp. 66-68.

1 A. Her shorts that she was wearing.

2 Q. Were her shorts down that far?

3 A. Yes.

4 MR. BOSLER: Objection. That's leading.

5 THE COURT: We were having a little difficulty  
6 in translation so I will go ahead and allow  
7 that. Overruled.

8 BY MR. HAHN:

9 Q. Could you see the back of her shorts where  
10 they were? You have described where the front  
11 of the shorts are. Where were the back of the  
12 shorts in relation to her body?

13 A. Over here like this.

14 2 TT, pp. 23-24.

15 Garcia's present argument respecting this sequence reads  
16 as follows:

17 In addition, the court was in error about a  
18 crucial point of Mr. Garcia's testimony. One  
19 of the questions to which he answered "yes"  
20 was "Were her shorts down that far?" 2 TT, p.  
21 24. This was not a follow-up to something Mr.  
22 Garcia had just stated. Mr. Garcia had just  
23 stated that his daughter had her hands holding  
24 onto her shorts. He said nothing about the  
25 shorts being down. When the prosecutor asked  
26 if the shorts were "down that far," defense  
counsel objected to the leading nature of the  
question. This is the crucial key to the  
father's corroboration of the daughter's  
testimony. This could have been one of the  
questions to which Mr. Palma received the  
coaching from his wife. The court even  
overruled the objection stating "we were  
having a little difficulty in translation so I  
will allow that." 2 TT, p. 24. There was a  
problem with translation. The court allowed a  
crucial question to be asked in a leading  
fashion. Then the court denied the jury the  
opportunity to hear the truth: Mr. Palma's



1 wife had, during at least some parts of his  
2 testimony, nodded her head in the affirmative  
3 or the negative prior to Mr. Palma giving the  
corresponding yes or no answer. (Emphasis  
supplied).

4 Opening Brief, p. 11, lines 7-19.

5 Despite Garcia's rhetoric to the contrary, we would know  
6 if Ms. Torrenses was nodding during this exchange if defense  
7 counsel had asked Walling that question during the hearing, but he  
8 didn't. It is certainly conceivable that defense counsel knew the  
9 answer already and did not want it on the record, or that he did  
10 not know the answer and didn't want to find out under oath. In  
11 addition, despite Garcia's present claim that Palma had said  
12 "nothing about the shorts being down," the record obviously belies  
13 this representation. Indeed, the State excerpted that part of  
14 Palma's testimony in full just so there would be no  
15 misunderstandings about such things.

16 In closing, and despite Garcia's very insulting comments  
17 to the contrary, Opening Brief, p. 11, lines 20-26, it did matter  
18 to the trial judge that Ms. Torrenses may have suggested answers to  
19 Anna and/or Palma. If it didn't matter to him, then why even  
20 bother with an evidentiary hearing. The fact of the matter is the  
21 trial judge was seriously irritated by this situation, and wanted  
22 to get to the bottom of it. Once he did, by virtue of an  
23 evidentiary hearing, he ruled against Garcia. The trial judge's  
24 action was prudent and undertaken with care, and his ruling on the  
25 merits, given the information before him, did not constitute an  
26

1 abuse of discretion.<sup>3</sup>

2 B. THE TRIAL JUDGE DID NOT ERR IN THE MANNER  
3 IN WHICH HE INSTRUCTED THE JURY.

4 When jury instructions were settled, the trial judge  
5 proposed to give, and ultimately did give, the following  
6 instruction:

7 Inconsistencies or discrepancies in the  
8 testimony of a witness, may or may not cause  
9 the jury to discredit such testimony. An  
10 innocent misrecollection, like failure to  
11 recollect, is not an uncommon experience. In  
weighing the effect of a discrepancy, consider  
whether it pertains to a matter of importance,  
or an unimportant detail, and whether the  
discrepancy results from innocent error or  
willful falsehood.

12 Instruction 20, Appellant's Appendix, p. 25.

13 Trial counsel claimed this instruction "is not only  
14 duplicative and misleading but not a correct statement of the law."  
15 2 TT, pp. 101-2. The trial judge disagreed and gave the  
16 instruction.

17 Garcia contends that the trial judge erred in giving this  
18 instruction. Specifically, he claims that Instruction 20 (1) was

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19 <sup>3</sup>Garcia, of course, remarks that the jury trial would only be  
20 extended 10 or 15 minutes if Mr. Garcia's and Deputy Walling's  
21 testimony were presented. Despite Garcia's claim that the trial  
22 judge's action should be viewed as promoting expediency and not  
23 fairness, it is clear that the trial judge appreciated the  
24 extrinsic side show the jury would be forced to endure if relief  
25 was granted. While Ms. Garcia and Deputy Walling might take only  
26 15 or 20 minutes, the State's rebuttal case, including Ms.  
Torrenses, Anna, Palma and the prosecutor's investigator who,  
allegedly, sat next to Ms. Torrenses, would take some time and  
would certainly be viewed as distracting for a jury and therefore  
legally irrelevant under NRS 48.035. In contrast to Garcia's  
failure of proof, legal relevance may not be completely dispositive  
but neither should it be ignored.

1 substantially covered by other instructions, (2) unnecessarily  
2 singled out the complaining witness, (3) reduced the State's burden  
3 of proof, (4) was confusing, superfluous and distorted the law by  
4 excusing discrepancies in testimony as nothing more than innocent  
5 misrecollections. The State respectfully submits that Garcia's  
6 contention lacks merit.

7 First, it is well settled that a trial judge is entitled  
8 to instruct jurors on all matters of law he thinks necessary for  
9 their information in giving their verdict. NRS 175.161(2). To  
10 reverse a trial judge's decision to give a jury instruction, it  
11 must be the case that the trial judge abused his broad discretion  
12 in giving a particular instruction, but an abuse occurs only if the  
13 trial judge's discretion is arbitrary, capricious or exceeds the  
14 bounds of law. Jackson v. State, 117 Nev. \_\_\_\_, 117 P.3d 998, 1000  
15 (2001).

16 In the present case, Garcia has not cited any authority  
17 supporting the view that the trial judge's decision in giving  
18 Instruction 20 constitutes an abuse of discretion. Moreover, none  
19 of Garcia's claims is well taken.

20 First, Garcia's claim that Instruction 20 is an incorrect  
21 statement of law is meritless. See, for example, People v.  
22 Beardslee, 806 P.2d 1311, 1324 (Cal. 1991); United States v.  
23 Butler, 56 F.3d 941, 945 (8th Cir. 1995); see also United States v.  
24 Lancaster, 78 F.3d 888, 895 (4th Cir. 1996). Accordingly, since  
25 Instruction 20 is a correct statement of law, Garcia must establish  
26 the trial judge's action was arbitrary and capricious, but he has

1 failed to do so.

2 Obviously, Garcia would be on much stronger footing if  
3 Instruction 20 singled out Anna as the subject of the instruction,  
4 but the instruction singles out no one. Consequently, the scope of  
5 the instruction covers all witnesses. In addition, despite  
6 Garcia's claim to the contrary, Instruction 20 is not superfluous  
7 or cumulative in relation to, for example, Instruction 18; instead,  
8 Instruction 20 supplements Instruction 18. Finally, the presence  
9 of these so-called falsus in uno falsus in omnibus instructions  
10 could not have prejudiced Garcia, because their application, if  
11 deemed operative by the jury, would operate to the State's  
12 detriment and not the other way around.

13 In short, the lower court did not err in giving  
14 Instruction 20. Garcia's contention to the contrary should be  
15 rejected.

16 III. CONCLUSION

17 Based on the above arguments and points and authorities  
18 cited in support thereof, the State respectfully urges this Court  
19 to affirm Garcia's convictions.

20 DATED: November 29, 2001.

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23 By *G. H. Hatlestad*  
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