

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL GARCIA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 37816

FILED

DEC 24 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Appeal From A Judgment of Conviction
Second Judicial District Court of the State of Nevada
The Honorable Jerome M. Polaha, District Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES.....ii

ARGUMENT

 I. The trial court erred by failing to allow the defense to
 present evidence of witness coaching..... 1

 II. The jury was improperly instructed..... 5

CONCLUSION 6

1
2
3
4
5
6
7
8
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14
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TABLE OF AUTHORITIES

CASES

Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053 (1985).....5

Smith v. State, 111 Nev. 499, 894 P.2d 974 (1995).....3

ARGUMENT

In this appeal Appellant, Raul Garcia, alleges two violations of his right to a fair trial, each of which requires reversal. This remains Mr. Garcia's position for the reasons outlined in the Opening Brief. This Reply Brief will address each contention in turn.

1. The trial court's error in suppressing evidence of witness coaching

The State argues in its Answering Brief that the evidence that Rebecca Terrones coached two key witnesses—the accuser Anna, and her father, Jorge Palma, was properly kept from the jury. Answering Brief, p., 3. This argument states that one witness to the coaching, Roberta Garcia, spoke no English. Answering Brief., p. 2. However, the testimony of Ms. Garcia was that she was not able to write in English. TT2.,p. 129. She testified through an interpreter, and stated that she did not understand "a lot" of English, but did not say she could not understand any English. Ms. Garcia testified as follows:

Q Do you know how long that went on?

A I was not paying a lot of attention. Only when the girl was answering, I don't remember. That's when the lady did like this. That's all I saw.

Q All right.

THE COURT Could you repeat that answer?

BY MR. BOSLER:

Q Can you tell me again what you just said?

A When the girl said I don't remember.

Q All right. Let me try this again. When you saw this person with short hair nodding up and down or to the left and right, what kind of responses were you hearing from the witness?

A I don't understand a lot of English.

TT2.,p. 132. This testimony can be read to state that Anna was answering "I don't remember" or that Ms. Garcia said she saw the behavior only when Anna was answering, but that her command of English was insufficient for her to remember what type of answers Anna was giving. Either way, her testimony that Anna's mother was coaching Anna, regardless of which particular

1 questions were being asked at the time, was critical for the jury to know in order to accurately
2 evaluate Anna's credibility. The prosecutor could certainly argue to the jury that Ms. Garcia's
3 testimony was insufficient for the jury to conclude that Anna was lying about the essential
4 elements of her testimony, but that was ultimately a decision for the jury to make.

5 Deputy Walling also testified that Jorge Palma's answers were yes or no answers when
6 the coaching he witnessed had occurred. TT2., p. 106. Deputy Walling also testified that he did
7 not watch Ms. Terrones during the entire testimony of Anna or Jorge. Instead, he testified
8 specifically that he was not looking at Ms. Terrones the entire time. TT2.,p. 106. The answering
9 brief attributed to defense counsel the comment that the key question was whether Mr. Palma had
10 ever seen Mr. Garcia playing with the girls before. Answering Brief, p. 3. However, defense
11 counsel clearly stated that the entire issue of witness coaching was critical for the jury's
12 determination of whether to believe these charges. TT2., p. 113-115. Counsel, in answering
13 questions from the court, used the questions "Have you seen Raul Garcia with the girls before?
14 Has he played with the girls before?" and the answer "No" as just an example of what the jury
15 might find important. TT2.,p. 123-124. Counsel never stated that those were the only important
16 questions which might have been subject to coaching by Ms. Terrones.

17 The State also argues that the trial judge is in the best position to determine whether the
18 coaching of a witness occurred. Answering Brief, p. 4. That is not necessarily accurate. The
19 jury is in the best position to evaluate the evidence and determine the truth from it. The trial
20 judge in this case refused to give the jury the tools to evaluate the credibility of Anna. The trial
21 judge's finding that the possible coaching did not occur during material questions is questionable.
22 The jury could certainly have found that the coaching was likely to have occurred on more than
23 just those occasions where the witnesses happened to notice it. Indeed, the Deputy specifically
24 stated that he did not know whether it occurred when he was not looking at Ms. Terrones. TT2.,p.
25 106. This is specifically the type of information that is critical to a jury determination. If Ms.
26 Terrones was coaching, even only during those times when she was seen to do so, what else
might she have done to get Anna and Mr. Palma to testify this way?

1 The State mentions, in footnote one, that defense counsel did not call Anna, Mr. Palma or
2 Ms. Terrones to the stand during this offer of proof. Of course, the prosecutor did not either.
3 The prosecutor, if any of these three could testify contrary to the allegation of coaching, could
4 certainly have called them back for his own offer of proof. Moreover, defense counsel
5 specifically stated that he did not learn of Ms. Garcia's evidence until "after the break of
6 testimony before lunch". TT2.,p. 112. Lunch break occurred after the testimony of Alfredo
7 Garcia. TT2.,p. 98. The break before lunch occurred after the testimony of Detective Holladay.
8 TT2.,p. 48. Jorge Palma testified first thing in the morning, before Detective Holladay. TT2.,p.
9 2, 3. Thus, defense counsel could not have questioned Mr. Palma about the coaching during his
10 testimony as pondered in the State's footnote, because defense counsel was unaware of such
11 behavior until after the break which occurred well after Mr. Palma finished testifying. It was a
12 violation of Mr. Garcia's right to confront witnesses against him when the court allowed Ms.
13 Terrones to coach witnesses, whether it occurred "only" four or five times, or whether it occurred
14 throughout Anna's and Mr. Palma's testimony. See, e.g., Smith v. State, 111 Nev. 499, 894 P.2d
15 974 (1995).

16 The State argues that there was a threshold which was not met by Mr. Garcia. Answering
17 Brief, p. 5. However, the only threshold necessary was whether the evidence was relevant to the
18 proceedings. Coaching of the only two "eyewitnesses" is clearly relevant to a determination of
19 whether they could be believed. The testimony of Deputy Walling showed that Ms. Terrones was
20 giving nonverbal yes or no directions to Mr. Palma before Mr. Palma actually gave the
21 corresponding yes or no answer. The testimony of Ms. Garcia showed that Mr. Terrones was
22 giving nonverbal yes or no directions to Anna, although Ms. Garcia could not remember what
23 responses Anna was giving after receiving those directions¹. The State avers that the only yes or
24

25 ¹ The State argues that the defense attorney pushed Mr. Garcia to give a better description of the
26 type of responses that Anna was giving, but the prosecutor objected to the question. TT., p.
132.

1 does not matter what weight the trial court gives or what he might wish the lawyers had seen.
2 What matters is that the jury needed to decide what weight to give this evidence and the trial
3 court did not let them. The district court had a very simple fix for this whole problem. All the
4 trial court had to do was let the jury hear the witnesses and decide what weight to give that
5 evidence². There is the ultimate answer to this critical factual issue: Let the jury do its job. The
6 trial court failed. Mr. Garcia should be allowed a fair trial where he can confront all of the
7 witnesses against him and not face coached testimony generated by an unsworn third party.

8 2. The jury was improperly instructed

9 The State argues that the instruction as given was a correct statement of the law and cites
10 to a California case, and Eighth Circuit case and a Fourth Circuit case. Answering Brief, p. 12.
11 None of those citations contradict the fact that this Court has previously decided that such an
12 instruction is duplicitous of the general instruction on witness credibility and the burden of proof
13 beyond a reasonable doubt. *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053(1985). For this
14 reason, and those outlined in the Opening Brief, it remains Mr. Garcia's position that this jury was
15 improperly instructed.

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22 ² The Answering Brief notes that it might have taken a substantial amount of time for the jury to
23 hear this evidence and then whatever rebuttal the State might have elected to present. Mr.
24 Garcia, of course, is in prison for three consecutive life terms and will not be eligible for parole
25 until a total minimum of at least forty years has been served. An extension of this trial for an
26 hour or two, or a day or two or three or however long the State might have needed to rebut that
fifteen to twenty minutes of testimony was certainly not unreasonable.

1 CONCLUSION:

2 Mr. Garcia was forced to face an unfair trial where the two key witnesses against him received
3 coaching from an unsworn and involved third party: Anna's mother. The trial court erred in
4 refusing to allow the defense to present evidence of this unacceptable and improper coaching.
5 The jury was unable to reach a verdict in which this Court can have confidence because they
6 were deprived of crucial credibility information. Therefore, it is respectfully requested that this
7 Court reverse and vacate the judgment and sentence imposed herein, and remand the matter back
8 to the district court for a fair trial.

9 DATED this 21st day of December, 2001.

10 Respectfully submitted,

11 MICHAEL R. SPECCHIO
12 Washoe County Public
13 Defender

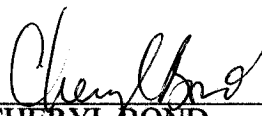
14 By: 

15 CHERYL BOND
16 Appellate Deputy
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1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief, and to the best of my knowledge,
3 information, and belief, it is not frivolous or interposed for any improper purpose. I further
4 certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in
5 particular NRAP 28 {e}, which requires every assertion in the brief regarding matters in the
6 record to be supported by a reference to the page of the transcript or appendix where the matter
7 relied upon is to be found. I understand that I may be subject to sanctions in the event that the
8 accompanying brief is not in conformity with the requirements of the Nevada Rules of
9 Appellate Procedure.

10 Dated this 21st of December, 2001.

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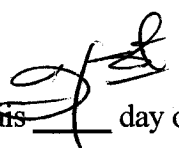
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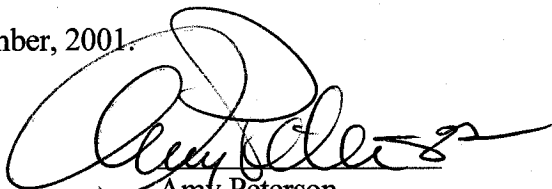
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document addressed to:

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DATED this  day of December, 2001.


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