IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 08 2018 02:52 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

RONALD ALLEN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 75329

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from a Judgment of Conviction involving a conviction of a Category B felony.

STATEMENT OF THE ISSUE

I. Did the State commit prosecutorial misconduct during rebuttal.

STATEMENT OF THE CASE

On September 23, 2016, Ronald Allen (hereinafter "Appellant") was charged by way of Information with Battery on a Protected Person with Substantial Bodily Harm (Category B Felony – NRS 200.481). 1 AA 81 – 82.

Appellant's trial commenced on October 31, 2017. 2 AA 254. On November 3, 2017, the jury returned a verdict of guilty. 4 AA 734.

On February 6, 2018, Appellant was sentenced, under the small habitual criminal statute, to 96 to 240 months in the Nevada Department of Corrections ("NDOC"). 4 AA 751. The Judgment of Conviction was filed on February 16, 2018. 1 AA 209 – 10.

Appellant filed a Notice of Appeal on March 8, 2018. 1 AA 211 – 14. Appellant filed his Opening Brief on July 11, 2018. The State responds herein.

STATEMENT OF THE FACTS

On August 9, 2016, Officer Karanikolas responded to Extra Space Storage because of a call that a male was harassing a female. 3 AA 583. When Officer Karanikolas arrived, he saw a brown Pontiac that matched the description of the car from the call. Id. Officer Karanikolas approached the Pontiac, and saw a black male sitting in the driver seat of the vehicle reading the newspaper. 3 AA 584. Officer Karanikolas made contact with the driver, who identified himself as Appellant. Id. Officer Karanikolas told Appellant to remain in the vehicle and returned to the patrol car to run Appellant's name. 3 AA 585.

As Officer Karanikolas was sitting in his patrol car, a black female ran up to the driver side of his car. Id. Officer Karanikolas tried to talk to her, but she was so

frantic he could not understand what she was saying. 3 AA 587. However, Officer Karanikolas was able to determine that she was the female from the call. Id.

Appellant then jumped out of the Pontiac. Id. Officer Karanikolas told the female to back up and he got out of the patrol car. 3 AA 587 – 88. Appellant walked towards the patrol car, and Officer Karanikolas directed Appellant to the front of the patrol car to pat him down for potential weapons. Id. Officer Karanikolas attempted to ask Appellant a question, but Appellant took off running towards the passenger side of the patrol car; Officer Karanikolas called for help on the radio. 3 AA 588 – 89. Officer Karanikolas ran up the driver side of the patrol car. Id. Officer Karanikolas and Appellant both reached the back of the patrol car, and Appellant sped up and pushed Officer Karanikolas, causing him to step back to regain his balance. 3 AA 590 – 91. As Officer Karanikolas stepped back, his leg popped, forcing him to drop his knee to the ground. 5 AA 594. Officer Karanikolas was unable to stand back up, and Appellant began to run towards the female. 3 AA 594 – 95. Before Appellant could reach her, Officer Karanikolas deployed his Taser, which hit Appellant and caused him to fall to the ground. 5 AA 596.

Sergeant Rohrbaugh heard Officer Karanikolas' distress call over the radio and responded to the location. 3 AA 575. Upon arrival, Sergeant Rohrbaugh noticed that Officer Karanikolas appeared to be in pain and was limping. 3 AA 578. Sergeant Rohrbaugh and Officer Karanikolas put Appellant in handcuffs and took him into

custody. 3 AA 575; 3 AA 597. Officer Karanikolas was taken to University Medical Center ("UMC") by ambulance, where it was discovered that he had a partial tear in his right Achilles requiring surgery. 3 AA 598 – 99.

SUMMARY OF THE ARGUMENT

On appeal, Appellant raises one claim – that a single comment made by the State during rebuttal argument infected the proceedings so severely that he was denied a fair trial. However, the State's comment was not improper. The State began its rebuttal by characterizing Appellant's theory as inconsistent with the evidence, and then discussed the overwhelming evidence that was presented and the jury instructions. Moreover, Appellant has failed to even allege prejudice. The single comment Appellant complains of did not so infect the proceedings with unfairness as to result in a denial of due process. Accordingly, Appellant's claim fails and the Judgment of Conviction should be affirmed.

ARGUMENT

I. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT IN REBUTTAL ARGUMENT

This Court applies a two-step analysis to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). This Court first determines whether the prosecutor's conduct was improper, and second, whether the conduct warrants reversal. Id. "A prosecutor's comments should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a

prosecutor's comments standing alone.'" Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quoting United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). Moreover, "this Court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Valdez, 124 Nev. at 1188, 196 P.3d at 476.

Appellant argues that the State committed prosecutorial misconduct by "belittle[ing] and ridicule[ing]" his theory. AOB 7 – 10. The single comment Appellant complains of is as follows:

> Folks, defense counsel comes up here and tells you what, when you have an overwhelming amount of evidence in this case and the defendant is absolutely boxed into a corner, this is what happens. Defense counsel does this, blames everybody other than the defendant. Right?

4 AA 720.

As an initial matter, Appellant failed to object, waiving all but plain error review. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995).

Plain error review asks:

> To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.' In addition, 'the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.' Thus, reversal for plain error is only warranted if

> the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at __, 343 P.3d at 594 (internal citations omitted).

In this case, this single comment does not amount to error so readily apparent and Appellant has failed to demonstrate that the alleged error was prejudicial to his substantial rights. This comment was at the beginning of the State's rebuttal and did not belittle or ridicule the defense theory, but characterized it as being inconsistent with the overwhelming evidence. 4 AA 720. The State then discussed the overwhelming evidence that was presented and the jury instructions. Therefore, the State merely rebutted defense counsel's closing argument, on rebuttal. This single comment does not amount to error so readily apparent. Martinorellan, 131 Nev. at __, 343 P.3d at 594. As such, this claim fails and should be denied.

Moreover, even assuming arguendo that the State's comment was improper, Appellant cannot show prejudice. To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process. Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). This Court must consider such statements in context, as a criminal conviction is not to be lightly overturned. Id. Additionally, this Court has held that "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing the evidence of guilt is." Rowland, 118 Nev. at 38, 39

P.3d at 119. If the issue of guilt is not close and the State's case is strong, misconduct will not be considered prejudicial. Id.

Here, the evidence against Appellant was overwhelming. Thus, because the issue of guilt was not close, any alleged prosecutorial misconduct was harmless. In addition, Appellant has failed to even allege prejudice. AOB 6 – 10. Appellant makes a conclusory statement that the comment "den[ied] him a constitutionally guaranteed fair trial." AOB at 10. The complained of comment was at the beginning of the rebuttal, was not objected to, and the State moved on to discuss the evidence and the jury instructions at length. This is not the type of disparaging remark that constitutes prosecutorial misconduct. More importantly, this single comment did not infect the proceedings to render a denial of due process. Thus, any alleged error was harmless.

Finally, the cases cited by Appellant do not support his claim. For example, the case relied on most heavily by Appellant is United States v. Rodrigues, 159 F.3d 439 (9th Cir. 1998), however, this is not binding or applicable. In Rodrigues, the prosecutor said that defendant's counsel was responsible for lying and deceiving – in fact, the appellate court characterized it as "slander if defense counsel." Rodrigues, 159 F.3d at 449 – 52. Even then, the Court determined that only "[o]n the bribery counts proper the combination of misstatement of the law with slander of defense counsel was prejudicial to the point of denying Rodrigues a fair trial: the government simultaneously misled the jury on the law and denied the defendant the

right to counsel unstained by unfair disparagement by the United States." Id. at 451 (emphasis added). This conduct was far more egregious than the comment Appellant complains of, and the Court found it to be prejudicial only when combined with additional misstatements of the law. Id.

Similarly, in McGuire v. State, 100 Nev. 153, 157-158, 677 P.2d 1060, 1063-1064 (1984) this Court found that the prosecutor "repeatedly made disparaging and uncalled-for remarks pertaining to defense counsel's ability to carry out the required functions of an attorney." This Court then gave an example of such disparaging remark:

> [D]uring Oakes' direct examination of the victim, Oakes asked her if appellant had an erection at the time of the assault. The witness answered, 'I guess he did.' Defense counsel then objected and moved to strike the answer, apparently on the ground the 'guess' constituted speculation. In response to defense counsel's seemingly legitimate objection, Oakes then said: 'How do you strike an erection?' We can discern no purpose for the statement other than as an attempt to belittle defense counsel in front of the jury. Other examples appear throughout the trial transcript.

Id. This Court determined that these types of disparaging comments appeared throughout the transcript and found prosecutorial misconduct. Id. In McGuire, the defendant complained of multiple statements made consistently throughout trial and the Court determined that there was no other purpose of the comments other than to disparage defense counsel. Id. Neither is the case here.

In addition, in Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991), this Court considered whether it was prosecutorial misconduct for the State to tell the jury "that defense counsel had taken facts out of context and was making stuff up." This Court determined that the comments of the prosecutor did not warrant a reversal of the conviction. Id. This Court reasoned "that if a guilty verdict was free from doubt, even aggravated prosecutorial remarks will not justify reversal." Id. This conduct, even though far more egregious, did not warrant reversal.

In Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989), this Court stated that:

> While we recognize that reversal is an option where prejudicial prosecutorial misconduct is found, we realize that such is not the only remedy, nor the most appropriate. Reversal due to prosecutorial misconduct may prejudice society more than the prosecutor and increase the expense of the state and all concerned.

In Barron, the prosecutor shifted the burden to the defendant and made indirect comments related to the defendant's failure to testify. Id. However, this Court found that the improper comments did not mandate reversal. Id. Again, this conduct is far more egregious than the comment Appellant complains of, and was still found to not mandate a reversal.

Therefore, Appellant's claim fails and should be denied.

/ / /

/ / /

CONCLUSION

For the foregoing reasons, Appellant's Judgment of Conviction should be AFFIRMED.

Dated this 8th day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 2,031 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of August, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 8, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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