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Gunera-Pastrana (Gustavo) v. State, 137 Nev. Adv. Op. 29 (July 8, 2021).

Sullivan Winesett

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CRIMINAL LAW: Due Process, Misconduct, and Cumulative Error

Summary:

Using a cumulative error test, the Nevada Supreme Court reversed and remanded the conviction of defendant, Gunera-Pastrana. The Court found that the defendant's due process right to a fair trial had been violated by judicial, juror, and prosecutorial misconduct.

Facts and Procedural History:

Gunera-Pastrana was charged and convicted of two counts of lewdness with a child under the age of 14 years and two counts of sexual assault of a minor under the age of 14 years. The district court sentenced him to 35 years to life in prison. The defendant lived with his girlfriend and her two children, one of which was a 12-year old girl, M.M. According to M.M., the defendant had touched her genitals on one occasion, sexually kissed her on another, and digitally penetrated her and performed cunnilingus on her on a final occasion. These facts, though disputed, led to the guilty verdict. The State presented no physical evidence of the crime so the issue of guilt was close, as will be discussed later.

Judicial Misconduct:

Prior to the opening statements, the district court made comments to the jury regarding what it means to be "presumed innocent." The district court asked "[W]hat do you really mean by presumption of innocence when we know that the Defendant has been arrested by the police department and we know that the District Attorney is prosecuting the Defendant[?] And we also know that the police department didn't go out and select somebody at random to prosecute." The defendant on appeal, argued that this comment and others made by the district court undermined his presumption of innocence, though he did not preserve the error for appellate review by objecting at the district court level.

In deciding unpreserved claims of judicial misconduct, the Court applies a three-part plain error review test. To succeed, an appellant must claim that (1) an error occurred, (2) that error was plain (clear from a casual inspection of the record), and (3) the error affected the defendant's substantial rights. In finding that the trial judge's comments were plain error, the Court noted the influential position that a judge holds in the eyes of the jury. Because of this influence, a trial judge must exhibit a level of restraint in their conduct and comments. Still, the Court found that the defendant's substantial rights were not prejudiced since the jury was adequately instructed on the presumption of innocence. Thus, by itself, the district court's error does not warrant a reversal.

Juror Misconduct:

M.M. testified against the defendant but had issues remembering the sequence of each occasion of sexual misconduct. In closing, the State emphasized that, rather than placing weight on the fact that M.M. had trouble remembering each occurrence, the jury should use "common

¹ By Sullivan Winesett.

sense” when considering her testimony. Further, the district court instructed the jury to use common sense in reaching a verdict. After announcing the verdict, the jury foreman told the bailiff that the jury had googled the meaning of “common sense” to reach its verdict. After an evidentiary hearing held by the district court, the jury foreman testified that two jurors had googled “common sense” on their phones and read the definition to the other jurors even though they were instructed not to use the internet. However, after the foreman’s testimony, the district court did not think there was reason to question other jurors so the jurors who googled the term were not questioned.

The defendant moved for a new trial based on juror misconduct and thus was required to provide admissible evidence to establish that (1) juror misconduct occurred and (2) the occurrence of the misconduct was prejudicial. To determine whether misconduct was prejudicial, the Court looks to whether an average member of the jury would be influenced by the misconduct and whether there is a reasonable probability that the information affected the verdict. Here, the Court found that since the term “common sense” was so emphasized by the State and the district court, the jury’s use of Google to define it could have prejudiced the defendant. Further, since the district court suggested that no more questioning of jurors would be necessary, the defendant was not given the ability to show prejudice as a result of misconduct. Therefore, the Court found that the jury’s misconduct contributed to the cumulative error in the case.

Prosecutorial Misconduct:

The prosecutor said at the end of closing argument: “There really are two people who know exactly what happened in that living room and that bedroom that can talk about it. And that’s [M.M.] and the—.” The defendant objected to this because the Fifth Amendment and the Nevada Constitution prohibit a direct, and in certain circumstances an indirect, comment made by a prosecutor regarding a defendant’s decision not to testify. The district court sustained the objection and the prosecutor repeated: “There’s two people that know what happened, and [M.M.] told you what happened. She told you what he did to her.”

This was an indirect comment made by the prosecutor regarding the defendant’s decision not to testify. To determine whether an indirect comment constitutes a Fifth Amendment violation the Court examined “whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant’s failure to testify.”² In applying this test to the prosecutor’s comments, the Court cited three cases from other jurisdictions that, while not binding, found that similar statements made by prosecutors violated the Fifth Amendment. The Court then took the opportunity to clarify that the comment “[t]here’s two people that know what happened,” is an impermissible indirect reference under the *Harkness* test if one of the two people referenced is the defendant.

Cumulative Error:

The Court noted that even though the prosecutorial misconduct by itself could possibly warrant a reversal, the cumulative effect of the judicial, juror, and prosecutorial misconduct prejudiced the defendant’s due process right to a fair trial. The Court considered three factors to

² *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (quoting *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir. 1968)).

determine the cumulative error in this case: “(1) whether the issue of guilt was close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.”³

First, the Court determined that the issue of guilt was close because no physical evidence of the crime was produced by the State and M.M.’s testimony had three inconsistencies which resulted in disputes over her credibility. Next, the Court determined that the three occurrences of misconduct, judicial, juror, and prosecutorial, were enough to satisfy the “quantity and character prong” of the test. Lastly, the crimes were grave because they led to the defendant being sentenced to 35 years to life in prison. Thus, according to this analysis, the Court found that the cumulative effect of the errors denied the defendant of his due process right to a fair trial.

Conclusion:

The Supreme Court of Nevada reversed the defendant’s conviction and remanded for a new trial. While the Court found that the prosecutorial misconduct alone may have been enough to warrant a reversal, they ruled in favor of the defendant based on the cumulative effect of the judicial, juror, and prosecutorial error.

³ Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (internal quotation marks omitted).