

REMEDYING JUDICIAL FOOT-IN-MOUTH DISEASE: NEVADA'S PROHIBITIONS AGAINST JUDICIAL COMMENTARY ON EVIDENCE AND THE RULE OF HARMLESS ERROR*

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I. INTRODUCTION

Article VI, section 12 of the Nevada Constitution states, “Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law.”¹ Similar language, codified by the Nevada legislature, forbids district judges from commenting upon the truth or falsity of evidence or its credibility.² The Supreme Court of Nevada has repeatedly held that these provisions prohibit trial judges from commenting on the evidence presented at trial³ and that violation of these “constitutional and statutory prohibitions [are] subject to the rule of harmless error”⁴ and may warrant a new trial.⁵ In circum-

* “Foot-in-mouth disease” has been described as “[a] capacity for saying the wrong or inappropriate thing. The term is a play on the foot-and-mouth disease of livestock and on the old saying about putting one’s foot in one’s mouth. Prince Philip of Great Britain coined the word ‘dontopedology’ to express the tendency.” JAMES ROGERS, *THE DICTIONARY OF CLICHES* 112 (Ballantine Books 1985). This note explores the tendency of some judges to improperly interject commentary during trials, in particular judicial comments regarding the evidence. In effect, those judges “put their feet in their mouths,” if you will, by saying the wrong or inappropriate things in what is supposed to be a dignified – even hallowed – arena. An epidemic it is not, but improper judicial commentary on the evidence may be properly analogized to a chronic disease, recurring at inopportune moments.

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² NEV. CONST. art. VI, § 12.

³ NEV. REV. STAT. 3.230 (2001) provides:

District judges shall not charge juries upon matters of fact but may state the evidence and declare the law. In stating the evidence, the judge should not comment upon the probability or improbability of its truth nor the credibility thereof. If the judge states the evidence, he must also inform the jury that they are not to be governed by his statement upon matters of fact.

⁴ See *Gordon v. Hurtado*, 541 P.2d 533, 535-36 (Nev. 1975); *Wheeler v. Twin Lakes Riding Stable, Inc.*, 500 P.2d 572, 573 (Nev. 1972).

⁵ *Wheeler*, 500 P.2d at 573. See also NEV. R. CIV. P. 61, which states:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for

stances where a court finds that a judge's comments relating to the evidence are harmful, "[a] full and fair jury trial could not [have] occur[red]." ⁶ The rationale of these rules is clear: litigants should be entitled to fair trials by juries free from external influences, including gratuitous commentary by trial judges. ⁷

An examination of the Nevada cases addressing these issues, however, reveals inconsistencies as to when a judge's comments will be ruled to have crossed the line of impropriety, thus warranting a new trial. Perhaps most telling of these inconsistencies is the Nevada Supreme Court's seeming drift away from the application of the rule of harmless error in a case involving violations of constitutional and statutory prohibitions against judicial commentary on the evidence. In *Oade v. State*, ⁸ the Nevada Supreme Court held that the trial judge's improper comments on the evidence and other egregious conduct warranted a new trial. ⁹ The court reached its decision to reverse and remand for a new trial by analyzing the trial judge's comments based on a "clearly erroneous and potentially prejudicial" standard. ¹⁰ A review of Nevada case law reveals, however, that *Oade* failed to consider the established rule of analysis in cases where a judge has violated the constitutional and statutory prohibitions: the rule of harmless error. ¹¹ Consequently, *Oade* represents a substantial change in Nevada law, without apparent justification.

This Note explores Nevada's prohibitions against judicial commentary on evidence in light of the rule of harmless error. Part II of this note provides an introduction to the underlying issues in *Oade*, and Part III provides a brief synopsis of the rules that have historically governed judicial commentary on evidence during trials, including a comparison between the rules at common law, in federal courts, and in state courts. Part IV of this note will briefly outline the history and purpose of the harmless error rule. Subsequently, Part V will highlight Nevada's erratic disposition of these issues by analyzing Nevada case law, comparing those comments have amounted to misconduct or improper commentary on the evidence with those that have not. This Part will also illustrate how improper judicial commentary on the evidence in Nevada

granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

⁶ See *Gordon*, 541 P.2d at 535-36; *Wheeler*, 500 P.2d at 573; *Peterson v. Pittsburg Silver Peak Gold Mining Co.*, 140 P. 519, 520-21 (Nev. 1914).

⁷ *Wheeler*, 500 P.2d at 573.

⁸ See *Parodi v. Washoe Med. Ctr., Inc.*, 892 P.2d 588, 589-90 (Nev. 1995) (citations omitted).

⁹ 960 P.2d 336 (Nev. 1998).

¹⁰ *Id.* at 339-40. Note that, in *Oade*, the trial judge's improper conduct was not confined to improper comments relating to the evidence. The judge "expressed his impatience with *Oade's* counsel in the presence of the jury," and also assessed repeated fines and "issued warnings to *Oade's* counsel for minor transgressions." *Id.* at 339. While the court found that the district judge's conduct on the whole, including his conduct not related to his comments of the evidence, warranted a new trial, *Id.* at 339-40, a cursory reading of the case clearly reveals that the most egregious conduct committed by the trial judge was his improper comments on the evidence. Consequently, only those violations constitute the subject of this note.

¹¹ *Id.* at 339-340.

has historically been governed by the doctrine of harmless error. Further, Part V will contrast previous Nevada decisions with *Oade*, stressing the *Oade* Court's unfortunate failure to follow Nevada precedent in evaluating the facts presented therein.

II. STATEMENT OF FACTS

The Nevada State Gaming Control arrested Blake Oade ("Oade") at the Clarion Hotel and Casino in Reno, Nevada, on May 5, 1994.¹² He was accused, pursuant to NEVADA REVISED STATUTES 465.070¹³ and 465.088,¹⁴ of fraudulent gaming for twice unlawfully increasing bets he made during a blackjack game, after the cards had been dealt.¹⁵ At trial, Oade argued that his actions were not an attempt to commit fraud upon the casino, but rather were the results of being intoxicated on the morning of the incident.¹⁶ He attempted to explain his mistakes, stating that in the first instance, "he must have mistakenly dropped extra chips on his original bet after the cards had been dealt

¹² See *id.* at 339.

¹³ *Id.* at 337.

¹⁴ In 1994, NEV. REV. STAT. 465.070 provided:

It is unlawful for any person:

(1) To alter or misrepresent the outcome of a game or other event on which wagers have been made after the outcome is made sure but before it is revealed to the players.

(2) To place, increase or decrease a bet or to determine the course of play after acquiring knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the game or which is the subject of the bet or to aid anyone in acquiring such knowledge for the purpose of placing, increasing or decreasing a bet or determining the course of play contingent upon that event or outcome.

(3) To claim, collect or take, or attempt to claim, collect or take, money or anything of value in or from a gambling game, with intent to defraud, without having made a wager contingent thereon, or to claim, collect or take an amount greater than the amount won.

(4) Knowingly to entice or induce another to go to any place where a gambling game is being conducted or operated in violation of the provisions of this chapter, with the intent that the other person play or participate in that gambling game.

(5) To place or increase a bet after acquiring knowledge of the outcome of the game or other event which is the subject of the bet, including past-posting and pressing bets.

(6) To reduce the amount wagered or cancel the bet after acquiring knowledge of the outcome of the game or other event which is the subject of the bet, including pinching bets.

(7) To manipulate, with the intent to cheat, any component of a gaming device in a manner contrary to the designed and normal operational purpose for the component, including, but not limited to, varying the pull of the handle of a slot machine, with knowledge that the manipulation affects the outcome of the game or with knowledge of any event that affects the outcome of the game.

¹⁵ *Oade v. State*, 960 P.2d 336, 337 (Nev. 1998). Additionally, NEV. REV. STAT. 465.088 provided, in pertinent part:

(1) A person who violates any provision of NRS 465.070 to 465.085, inclusive, is guilty of a category B felony and shall be punished:

(a) For the first offense, by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, or by a fine of not more than \$10,000, or by both fine and imprisonment . . .

¹⁶ *Oade*, 960 P.2d at 337.

. . . .”¹⁷ In the second instance, “he thought he had been paid on his first bet and was attempting to place a second bet.”¹⁸

The trial judge’s conduct during Oade’s trial was erratic and disruptive. Indeed, throughout the trial, the judge seemed to be preoccupied with the behavior of Oade’s counsel.¹⁹ At an early point during the trial, Oade’s counsel moved for a mistrial because the court’s “attitude” toward him seemed improper.²⁰ The court responded abruptly to the motion, interrupting Oade’s counsel, and denied the motion.²¹ After dismissing the jury, the trial judge admonished Oade’s counsel that he would not “be provoked into a mistrial.”²²

On numerous other occasions, the judge “expressed his impatience with Oade’s counsel in the presence of the jury.”²³ Additionally, the judge offered his opinion regarding the evidence and discussed issues wholly unrelated to the case.²⁴ At one point, after Oade’s counsel had cross-examined “a state gaming agent regarding blackjack rules,”²⁵ the judge addressed the jury as follows:

There is no regulation or rule which permits a person to increase the bet after the bet has been made and the cards dealt unless it is a situation where it’s known as a double down . . . or you split cards. *But in my view, this examination borders on illogical. If [Oade’s counsel] is trying to suggest that you have a right to double the bet when the cards are favorable to you just because you like the cards, that is not the law. Those are not the rules.*²⁶

Moreover, the judge expressed his opinion that Oade’s defense theory – that he was intoxicated while gambling – was unsustainable.²⁷ The judge also assessed repeated “fines against or issued warnings to Oade’s counsel for minor transgressions, such as injecting argument into his opening statement and calling his own client by his first name.”²⁸

The jury, like the judge, did not accept Oade’s defense and found him guilty.²⁹ On appeal, Oade argued that the district court judge’s comments, repeated threats, and imposition of fines were inappropriate and had a prejudicial effect on the jury’s ability to gauge the credibility of his defense.³⁰ Thus, Oade argued, the judge’s comments and other inappropriate conduct substantially affected his right to a fair trial.³¹ The Nevada Supreme Court agreed.³² It concluded “that the district court judge’s conduct, when considered in its

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 338.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 339.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (emphasis added).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 337.

³¹ *Id.* at 338.

³² *Id.*

entirety, constituted cumulative error, which *may have* prejudiced Oade's right to a fair trial."³³

Justice Shearing, in her dissenting opinion, argued that the judgment below should have been affirmed.³⁴ Justice Shearing opined that the district court's admonitions of Oade's counsel were made in an effort "to focus on the relevant issues, avoid inappropriate argument and prevent counsel from repeating questions or arguing after objections were sustained."³⁵ While finding that the district court judge's comments relating to the rules of blackjack were "potentially prejudicial," Justice Shearing stated that the judge's comments could not have prejudiced Oade because later testimony effectively cleared up any disagreement that may have existed regarding the rules.³⁶

Also dissenting, Justice Maupin indicated that he regretted the trial judge's conduct, but stated that, because the evidence overwhelmingly suggested the defendant's guilt, the conduct was harmless.³⁷ In sum, the dissent opined that the district court judge's comments were harmless.

III. RULES RELATING TO JUDICIAL COMMENTARY ON THE EVIDENCE

The rules governing whether a trial judge may comment on the evidence evolved from the English common law and now differ greatly from jurisdiction to jurisdiction.³⁸ The common law and American federal courts generally permit commentary relating to the evidence.³⁹ Nonetheless, "the majority of state courts forbid it."⁴⁰

A. *English Common Law*

Through the years, English common law has strictly limited the judge's ability to manipulate jury deliberations.⁴¹ Intriguingly, however, the English common law has preserved the judge's right to persuade the jury by commenting on the evidence.⁴² This right included the "power to . . . express an opinion

³³ *Id.*

³⁴ *Id.* (emphasis added).

³⁵ *Id.* at 340-41.

³⁶ *Id.* at 340.

³⁷ *Id.* at 340-41. Justice Shearing's reasoning in dissent is effectively a harmless error analysis. In essence, she argues that the judge's comments were harmless, given that later testimony effectively overrode any prejudice caused by them.

³⁸ *Id.*

³⁹ Laura Braden Foster, Note, *Nobles v. Casebier and Judicial Comments on the Evidence in Arkansas*, 51 ARK. L. REV. 801, 804-11 (1998). Some of the background material for this Part was taken from Foster's case note, and, therefore, is attributed to her. Additional similarity between her note and this presentation are the result of using many of the same background resources.

⁴⁰ *Id.* at 804.

⁴¹ *Id.*

⁴² See, e.g., Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 408 (1996). Here, the author explained *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), which forbade English judges from punishing jurors for rendering verdicts that were not in line with the judge's view of the case. Smith stated:

This case established the independence of the English jury and cemented its position as a guarantor of liberty in the face of state oppression. After *Bushell's Case*, judges could no longer punish

concerning the credibility of witnesses.”⁴³ Not only could common law judges comment upon the evidence, but they could also direct how and when evidence was presented for the jury’s review.⁴⁴ Thus, English common law did not forbid direct persuasion of jurors by a common law judge;⁴⁵ rather, it encouraged it.⁴⁶ One theory explaining why common law judges were permitted, even encouraged, to comment on the evidence is that, since they had originally been granted license to compel juries to resolve a case in the manner that the judge desired, “the lesser power of using persuasion to influence the jury could not by comparison be problematic.”⁴⁷

A judge’s power to comment on the evidence continues today under modern English common law.⁴⁸ In fact, not only are today’s common law judges permitted to comment on the evidence, they are obligated to present to the jury

a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are [sic] entitled to draw from their particular conclusions about the primary facts.⁴⁹

Even so, that power is not boundless: the common law judge must still indicate to the jury that they are not bound to accept the judge’s opinion regarding the evidence presented or his interpretation thereof.⁵⁰

the jury for its verdict, but could set aside verdicts and grant new trials based upon procedural or evidentiary error.

Smith, *supra*.

⁴³ *Id.*

⁴⁴ *Id.* at 408-09 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 375 (University of Chicago Press 1979) (1769); 1 MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 291 (4th ed. 1792)); *see also* Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 680 (1918), stating:

At common law it was clearly proper for the judge not merely to state the law and to sum up the evidence, but also to express an opinion on the questions of fact in issue as long as he leaves to the jury the ultimate determination of the issue, and makes it clear that it is not bound to adopt his opinion as its own.

⁴⁵ Smith, *supra* note 41, at 408-09.

⁴⁶ *Id.* at 409.

⁴⁷ *Id.* Smith noted:

The utility of judicial commentary was said to be found in the greater experience of the judge in observing the testimony of witnesses and weighing the evidence before him. According to one early commentator, the judge was able “in matters of fact to give [the jury] great light and assistance by his weighing the evidence before them, and by shewing them his opinion even in a matter of fact.” Thus, the use of this persuasive power of the judge over members of the jury was justified on the grounds that it might lead to more accurate factfinding by the jury. The judge represented a valuable source of information since he had experience listening to testimony and receiving evidence in many different cases, whereas the experience of the members of the jury was more limited. Although early English jurors may not have been onetime participants in the system (like modern jurors), and may have had prior trial experience, they certainly were not as experienced as the trial judge.

Id. (citing HALE, *supra* note 43, at 291).

⁴⁸ Smith, *supra* note 41, at 410.

⁴⁹ *Id.*

⁵⁰ *Id.* (quoting Regina v. Lawrence, 73 Crim. App. 1, 5 (1981) (Lord Hailsham)).

B. American Federal Courts

The English common law practice of commenting on the evidence "was one that, under the Constitution, descended to and has been more or less maintained by federal courts."⁵¹ Trial judges presiding over American federal courts enjoy many of the same rights, privileges, and powers that English common law judges maintain in conducting trials, including the power to comment on the evidence.⁵² That power, however, has been severely limited in American federal courts.⁵³

In *Quercia v. United States*,⁵⁴ the United States Supreme Court narrowed the traditional common law rule permitting trial judges to comment on the evidence. The trial judge in *Quercia*, after instructing the jury regarding the governing law surrounding the case, declared to the jury that he believed the defendant's testimony to be false merely because he wiped his hands during his testimony.⁵⁵ The judge attempted to mitigate the effects of his statement by instructing the jury that his opinion of the evidence was not binding upon them,⁵⁶ and that, if the jury members did not agree with his interpretation of the evidence, they were to find the defendant not guilty.⁵⁷ After his conviction, the defendant took exception to this charge as infringing upon his right to a fair trial.⁵⁸

In "the most comprehensive modern opinion from the Supreme Court on this subject,"⁵⁹ the United States Supreme Court stated:

This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards of governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should

⁵¹ Scott, *supra* note 43, at 680.

⁵² *United States v. Filani*, 74 F.3d 378, 383 (2d Cir. 1996). See also *Vicksburg & Meridian R.R. Co. v. Putnam*, 118 U.S. 545, 553 (1886); *Quercia v. United States*, 289 U.S. 466, 469 (1933).

⁵³ *Filani*, 74 F.3d. at 383.

⁵⁴ *Id.* at 383-84.

⁵⁵ 289 U.S. 466 (1933).

⁵⁶ *Id.* at 468-69. The judge stated:

And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

Id.

⁵⁷ *Id.* at 469 ("Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.").

⁵⁸ *Id.* Note that the judges remarks here, effectively "washing his own hands clean" of any error, is a tactic that would have permitted the statements at common law. See Smith, *supra* note 46.

⁵⁹ *Quercia*, 289 U.S. at 468-69.

be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided."⁶⁰

Accordingly, the Supreme Court held that the trial judge had improperly interjected his own opinion as if it were factual evidence presented during the trial, thus prejudicing the defendant's right to a fair trial.⁶¹ The trial judge had not analyzed the evidence, or merely presented it to the jury, but in fact had added to it and "based his instruction upon his own addition."⁶²

Quercia identified certain factors to which courts should look when analyzing whether improper judicial comments warrant reversal.⁶³ These have been outlined as: (1) "whether the judge assumed the role of a witness by either distorting or adding to the evidence;"⁶⁴ (2) "whether the judge was one-sided or partisan;"⁶⁵ (3) "whether the judge undercut either the accused's privilege to testify or to call witnesses on his own behalf or the jury's ability to find the facts and determine credibility;"⁶⁶ (4) "whether the judge's conduct was coercive, in that it influenced the verdict;"⁶⁷ and (5) "whether the impropriety was cured by the judge's subsequent instructions to the jury."⁶⁸

While these factors continue to appear in federal case law, *Quercia* failed to provide a bright-line constitutional test "that can be applied readily to claims of improper judicial behavior."⁶⁹ Rather, the case serves as a description of a federal trial court judge's role, and is, therefore, not binding on state courts.⁷⁰

C. State Courts

The decline of the English common law tradition of allowing and even encouraging trial judges to comment on the evidence began early in the American colonies.⁷¹ One of the main reasons for the decline was the distrust felt by

⁶⁰ A. Sherman Christensen, *Comment on the Evidence as a Vital Part of the Common Law Charge to the Jury*, 44 F.R.D. 310, 310 (1946).

⁶¹ *Quercia*, 289 U.S. at 470 (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894); *Hickory v. United States*, 160 U.S. 408, 421-23 (1896)). The court also stated:

It is within the [trial judge's] province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.

Id. Interestingly, the court held that the trial judge's comments in this case were improper, despite his instruction that his statements did not bind the jury members. Apparently there is a subtle distinction between expressing one's opinion on the evidence and actually adding to the evidence, as was held herein. This distinction is not pursued here, however.

⁶² *Id.* at 471-72.

⁶³ *Id.* at 471.

⁶⁴ See Emily Wheeler, *The Constitutional Right to a Trial Before a Neutral Judge: Federalism Tips the Balance Against State Habeas Petitioners*, 51 BROOK. L. REV. 841, 872-73 (1985).

⁶⁵ *Id.* at 872.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 872-73.

⁶⁹ *Id.* at 873.

⁷⁰ *Id.*

⁷¹ *Id.*

bar members and the general public towards colonial judges.⁷² Colonial judges often lacked formal training in the law and were widely regarded throughout the American colonies as "puppets of the crown."⁷³ Consequently, the nascent state legislatures soon began "curbing the power of judges by, among other things, taking away their right to comment on the evidence."⁷⁴

In 1796, North Carolina became the first state to forbid judges from expressing "any opinion as to whether a fact was fully or sufficiently proved."⁷⁵ Tennessee soon followed suit, including a provision in its constitution that provided, "Judges of the inferior and the superior courts shall not charge juries with respect to matters of facts, but may state the testimony and declare the law."⁷⁶ As new states began entering the Union, many of them based their own constitutions on that of Tennessee, as it was widely regarded at the time as a model constitution.⁷⁷ Indeed, Nevada's constitution also imitates the language of Tennessee's constitution, with provisions virtually identical to those of Tennessee, in stating: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law."⁷⁸ By 1913, nearly every state had enacted a law prohibiting judges from commenting upon the evidence.⁷⁹

IV. THE RULE OF HARMLESS ERROR

Nevada has adopted the rule of harmless error.⁸⁰ The rule is set forth as follows:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.⁸¹

The Nevada Supreme Court has held that this rule applies where judges have violated the constitutional and statutory prohibitions against commenting on the evidence.⁸² The Federal version of the rule of harmless error is identical to its Nevada counterpart⁸³ and likewise "is applicable to conduct in the courtroom. It has been applied to excessive conversation between the judge and

⁷² Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 164 (1988).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 164-65.

⁷⁷ TENN. CONST. art. VI, § 9. See Foster, *supra* note 38, at 811.

⁷⁸ Foster, *supra* note 38, at 811 (citing Johnson, *supra* note 75, at 77 nn.5-10).

⁷⁹ NEV. CONST. art. VI, § 12.

⁸⁰ Foster, *supra* note 38, at 811.

⁸¹ See NEV. R. CIV. P. 61. While no comparable criminal statute exists, the rule of harmless error is unquestionably utilized in the criminal context.

⁸² *Id.*

⁸³ See, e.g., *Wheeler v. Twin Lakes Riding Stable, Inc.*, 500 P.2d 572, 573 (Nev. 1972).

counsel, and to remarks made by the trial judge in connection with the charge to the jury.”⁸⁴

In application, the rule of harmless error obligates courts to evaluate alleged violations, but ignore all errors or defects that do “not affect the substantial rights of the parties.”⁸⁵ The rule stems from the common notion that “[n]o one is entitled to a perfect trial.”⁸⁶ The inherent imperfections of the people who created, and now administer, the judicial system, make any attempt at a perfect trial impossible.⁸⁷ Consequently, fairness is the ultimate goal in today’s judicial system because, as one commentator noted, “[A] fair trial, as opposed to a perfect trial, is the best our system of justice can offer.”⁸⁸

The rule of harmless error thus evolved as a reaction to the imperfections that flourish in trials throughout the judicial system.⁸⁹ Because of the social and economic costs associated with re-trying cases on appeal due to minor imperfections during the original trial, this rule emerged as a means to mitigate the cost of such reversals.⁹⁰ Unfortunately, however, the development of the doctrine of harmless error may have unintentionally promoted misconduct on the part of prosecutors and judges, who now may weigh their chances that “the appellate courts will ignore the misconduct.”⁹¹ Ironically, the effect of the rule of harmless error may have resulted in an increased number of appeals involving judicial misconduct by improper commentary on the evidence.⁹²

V. JUDICIAL COMMENTARY ON THE EVIDENCE IN NEVADA

Nevada follows the majority of states that forbid trial judges from commenting on the evidence. Article I, section 12 of the Nevada Constitution states: “Judges shall not charge juries in respect to matters of fact”⁹³ The Nevada legislature has also forbidden trial judges from commenting on the evidence. Section 3.230 of Nevada Revised Statutes states, in part: “In stating the evidence, the judge should not comment upon the probability or improbability

⁸⁴ FED. R. CIV. P. 61.

⁸⁵ 7 JAMES WM. MOORE & JO DESHA LUCAS, MOORE’S FEDERAL PRACTICE § 61.08 (2d ed. 1993) (citations omitted).

⁸⁶ NEV. R. CIV. P. 61.

⁸⁷ Denise M. Faehnrich, *The “Harm” in the Application of the “Harmless Error” Doctrine to the Constitutional Defect in In Re C.V.*, 44 S.D. L. REV. 340, 366 (1999) (citing *Kotteakos v. United States*, 328 U.S. 750, 761 (1946)).

⁸⁸ *Id.*

⁸⁹ *Id.* at 367.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Bennet L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 425 (1992). See also Tara J. Tobin, Note, *Miscarriage of Justice During Closing Arguments By An Overzealous Prosecutor and a Timid Supreme Court in State v. Smith*, 45 S.D. L. REV. 186, 224-25 (2000).

⁹³ Cf. Tobin, *supra* note 91, at 224-25 (citations omitted), wherein the author postulates: This increased number of appeals involving prosecutorial misconduct in closing arguments is due in large part to the expanded use of this doctrine. Recognizing the effect of this doctrine, prosecutors are essentially “unleash[ed] . . . from the restraining threat of appellate reversal.” Predicting that a reviewing court will apply the harmless error doctrine, prosecutors increasingly use improper trial tactics during closing arguments.

of its truth nor the credibility thereof.”⁹⁴ The Nevada Supreme Court has expressly held that violations of these provisions may require a new trial⁹⁵ where the violations are not harmless to a party’s substantial right to a fair trial.⁹⁶

A. Nevada Case Law

The earliest Nevada case dealing with a trial judge’s improper comments regarding evidence is *Peterson v. Pittsburg Silver Peak Gold Mining Co.*⁹⁷ While the *Peterson* Court did not grant a new trial based on the trial judge’s improper comments,⁹⁸ this case nonetheless laid the foundation of rules and policies governing improper judicial commentary on the evidence.⁹⁹ The court clearly stated its disdain for unnecessary commentary by trial judges and cautioned judges against doing so:

While it is true that not every remark of the trial court will constitute reversible error, where it is made with reference to the admissibility of evidence, yet there is nothing of which a nisi prius judge should be more careful than in his remarks or assertions made with reference to admitted or rejected testimony during the course of a trial. The average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the trial judge. Human opinion is oft times formed upon circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, is liable, however unintentional, to mould the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby.¹⁰⁰

Since *Peterson*, the Nevada Supreme Court has periodically been faced with deciding whether or not a trial judge’s comments on the evidence warranted a new trial. Unfortunately, the court has not announced any bright-line test for determining which comments amount to reversible error and which comments do not. Thus, the scope of Nevada’s constitutional and statutory prohibitions against judicial comments on the evidence has not been defined.¹⁰¹

Nonetheless, until *Oade*,¹⁰² each of the cases in which the Nevada Supreme Court ordered a new trial for improper comments, the court evaluated the comments in light of the rule of harmless error and held that the improper

⁹⁴ NEV. CONST. art. VI, § 12.

⁹⁵ NEV. REV. STAT. 3.230 (2001).

⁹⁶ See *Peterson v. Pittsburg Silver Peak Gold Mining Co.*, 140 P. 519, 521 (Nev. 1914) (requiring new trial where trial judge made “[p]rejudicial statements and remarks . . . during the course of the trial”); *Wheeler v. Twin Lakes Riding Stable, Inc.*, 500 P.2d 572 (Nev. 1972) (requiring new trial where “the district court impermissibly commented upon the evidence by jury instruction”); *Gordon v. Hurtado*, 541 P.2d 533 (Nev. 1975) (holding “trial court’s comment on the quality and quantity of the direct evidence” and “referring to the inadmissible testimony” of a witness as “particularly appropriate and particularly probative” as warranting new trial).

⁹⁷ *Wheeler*, 500 P.2d at 573.

⁹⁸ 140 P. 519 (Nev. 1914).

⁹⁹ *Id.* at 521.

¹⁰⁰ See *id.* at 520-21.

¹⁰¹ *Id.* at 521.

¹⁰² Cf. *Foster*, *supra* note 38, at 816 (stating that the Arkansas Supreme Court has similarly failed to define “the parameters of the constitutional prohibition”).

comments were not harmless.¹⁰³ A review of these cases provides insight into the types of judicial commentary that may be deemed so improper as to require a new trial.

1. *Improper Comments Warranting a New Trial*

The following Nevada decisions reveal that a new trial is generally required when judicial commentary is inconsistent with the established evidence, or relates to subjects not supported by the evidence. For example, when a trial court has determined that issues of fact remain for the jury's consideration on any given claim, the court should not thereafter state that the evidence is insufficient to support that claim.¹⁰⁴

In *Wheeler v. Twin Lakes Riding Stable, Inc.*,¹⁰⁵ the Nevada Supreme Court held that a fair trial cannot occur where a trial judge comments upon the evidence, "by jury instruction or otherwise," after having determined that the issue must be resolved by a jury.¹⁰⁶ There, the appellant fell from a rented horse when he ran into "an overhanging tree branch while riding down a trail under the control of the respondent-defendant from whom he had rented the horse."¹⁰⁷ The appellant argued at trial that the respondent-defendant failed to warn him of the horse's dangerous propensities and failed to adequately maintain the trail on which the appellant was riding.¹⁰⁸ When the presentation of evidence closed, the defendant moved for a directed verdict, which the judge denied.¹⁰⁹ "Apparently, the court believed that the evidence and all reasonable inferences therefrom . . . presented a jury question."¹¹⁰ Nonetheless, by way of jury instruction, the court commented to the jury that there was insufficient evidence to prove negligence, at least regarding the horse's dangerous tendencies.¹¹¹

Citing Nevada's constitutional¹¹² and statutory¹¹³ prohibitions against judicial comments on the evidence, the Nevada Supreme Court stated, "[the] barrier between court and jury preserves their respective functions and insures freedom in the jury to decide facts and the reasonable inferences therefrom without influence or direction from the court except as to applicable law."¹¹⁴

¹⁰³ *Oade v. State*, 960 P.2d 336 (Nev. 1998).

¹⁰⁴ See *Wheeler v. Twin Lakes Riding Stable, Inc.*, 500 P.2d 572, 573 (Nev. 1972); *Gordon v. Hurtado*, 541 P.2d 533, 535-36 (Nev. 1975).

¹⁰⁵ See *Wheeler*, 500 P.2d at 573.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* The challenged instruction read as follows:

There has not been sufficient evidence adduced during the course of this trial upon which this jury could base a determination or finding of negligence of the defendant by virtue of any inherent propensities of the horse to act in an erratic manner. Therefore, there has been insufficient evidence to find that the defendant corporation was negligent by virtue of having failed to inform the plaintiff of any propensities of the horse behaving in an erratic manner.

Id. at 573 n.2.

¹¹³ NEV. CONST. art. VI, § 12.

¹¹⁴ NEV. REV. STAT. 3.230 (2001).

Because the trial judge had violated the pertinent prohibitions, the Supreme Court evaluated the violations in light of the rule of harmless error.¹¹⁵ The court could not conclude, however, that the judge's comments were harmless because "[o]ne half of the plaintiff's claim of negligence was removed from jury consideration."¹¹⁶ Furthermore, any closing argument presented by plaintiff's counsel was, as a result of the improper instruction, "concomitantly curtailed."¹¹⁷ Consequently, a new trial was ordered.¹¹⁸

Similarly, judicial comments that speak to a witness's qualifications or commend a witness for offering what the trial judge believes to be an impressive testimony are prohibited, particularly when the witness's testimony is inadmissible.¹¹⁹ Such was the case in *Gordon v. Hurtado*.¹²⁰ There, after denying appellant's motion to exclude the testimony of a traffic reconstruction analyst, whose testimony should not have been admitted,¹²¹ the trial judge stated the following in the presence of the jury:

The court is substantially impressed in this case not only by the qualification of this witness and the validity to formulate opinions enunciated by him, but also by the fact there was virtually no direct testimony whatsoever to assist or aid or direct testimony whatsoever to assist or aid or direct or guide the jury with regard to circumstances surrounding the accident in concluding that in this case the testimony in the line of accident construction is particularly appropriate and particularly probative and, therefore, more than justified on the basis of the record before the court at this time.¹²²

Again citing the constitutional and statutory prohibitions, the Nevada Supreme Court held that the trial judge's statement was improper because he directly commented on the evidence before the jury and also improperly spoke to the witness's credibility.¹²³ Like the comments made in *Wheeler*, the trial judge's remarks here did not withstand scrutiny under the harmless error rule.¹²⁴ Quoting *Wheeler*, the court held that a fair trial could not have occurred in this case and remanded for a new trial.¹²⁵

Interestingly, the issue of improper judicial comments was addressed in *Ginnis v. Mapes Hotel Corp.*,¹²⁶ two years prior to the *Wheeler* decision. In *Ginnis*, the Nevada Supreme Court disapproved of several inappropriate remarks made by the trial court judge.¹²⁷ These included inappropriate comments "on the credibility of expert witnesses and on testimony," as well as offering remarks which were unrelated to the court's rulings.¹²⁸ Notwithstanding its disapproval of the judge's comments, the Nevada Supreme Court chose not to decide the prejudicial effects of such remarks because counsel for appel-

¹¹⁵ *Wheeler*, 500 P.2d at 573.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Gordon v. Hurtado*, 541 P.2d 533, 534-35 (Nev. 1975).

¹²¹ *Id.*

¹²² *Id.* at 535.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 536.

¹²⁶ *Id.*

¹²⁷ 470 P.2d 135 (Nev. 1970).

¹²⁸ *Id.* at 141.

lant failed to preserve the issue for appeal.¹²⁹ Even so, *Ginnis* constitutes additional evidence that Nevada does not tolerate inappropriate comments on the credibility of expert witnesses, or remarks that distract from the evidence presented.

The Nevada Supreme Court has also held that when a jury instruction inappropriately comments on the evidence, it is not error for the trial court to refuse it.¹³⁰ In *In re Peterson's Estate*,¹³¹ the trial court refused the following jury instruction:

The probability that a guided signature can be written by a feeble hand without a tremor or without interruptions and violent variations is very remote and adverse to experience. Arbitrary angles or erratic [sic] pen strokes may be certain evidence of the testator's resistance, indicating that the unwilling hand had been forced to write by the stronger guiding hand. Such factor would show the element of control, and not the genuine signature of the testator.¹³²

Without much analysis, the Nevada Supreme Court refused to find error with the trial court refusing this instruction because "it was an improper comment on the evidence."¹³³

2. *Comments Not Warranting a New Trial*

Nevada cases in which the Supreme Court has refused to order new trials where trial judges made improper comments on the evidence far outnumber those in which new trials were granted. Generally, each of these courts based their refusal to grant a new trial on one of the following theories: (1) the comments constituted the judge's opinion formed during trial, but were expressed after the jury had rendered its verdict;¹³⁴ (2) the comments, while improper, were harmless under the harmless error rule;¹³⁵ or (3) the comments did not constitute commentary on the facts because they were not made in a "charge" to the jury.¹³⁶

*Evans v. State*¹³⁷ is an example of the first category of cases where a trial judge's comments may have been improper had they actually been expressed during the trial. *Evans* held that a trial judge's comments made in a written opinion after the case had concluded did not prejudice the appellant's right to a fair trial.¹³⁸ Concerning the losing party, the judge wrote:

¹²⁹ *Id.* at 140.

¹³⁰ *Id.* at 141. Note, however, that in *Parodi v. Washoe Medical Center, Inc.*, 892 P.2d 588 (Nev. 1995), the Supreme Court of Nevada held "that the failure to object will not always preclude appellate review in instances where judicial deportment is of an inappropriate but non-egregious and repetitive nature that becomes prejudicial when considered in its entirety." *Id.* at 591. Thus, the failure to object to judicial misconduct will not necessarily preclude a determination that the trial judge's inappropriate comments on the evidence prejudiced a litigant's right to a fair trial.

¹³¹ *In re Peterson's Estate*, 360 P.2d 259, 272 (Nev. 1961).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See *Evans v. Dorman*, 402 P.2d 652, 655 (Nev. 1965).

¹³⁶ See *Pertgen v. State*, 774 P.2d 429, 431-32 (Nev. 1989); *Barrett v. State*, 776 P.2d 538, 541 (Nev. 1989).

¹³⁷ See *Barrett*, 776 P.2d at 541; *Shannon v. State*, 783 P.2d 942, 945-46 (Nev. 1989).

¹³⁸ 402 P.2d 652 (Nev. 1965).

Miss Evans is an arrogant, haughty, irrepressible person. She has little ability to see the truth when it doesn't suit her purpose and will say anything that suits her whim of the moment or to accomplish her objectives. She is a matriarch who demands that she rule and none, in her opinion, should dare encroach upon what she considers as her prerogatives.¹³⁹

While these comments might have constituted improper commentary on the evidence had the trial judge made the remarks during trial, the comments were held to be of no consequence since the statement was merely "the candid observation of one charged with the duty of decision."¹⁴⁰

*Pertgen v. State*¹⁴¹ and *Barrett v. State*¹⁴² are illustrative of the second variety of cases which, while not condoning a trial judge's comments, have held that the comments constituted harmless error. For example, improper comments made in the presence of the jury may, in fact, be cured if the trial judge later explains to the jury the context of his or her comments.¹⁴³ In *Pertgen*, the trial judge, during voir dire proceedings, responded as follows to a prospective juror who knew one of the State's witnesses and expressed her willingness to believe that witness:

I am not suggesting [the witness] is not going to be telling the truth because she is going to be telling the truth. There is no question about that. But what I am saying is she is one of the witnesses in the case. Would you put undue emphasis more on her testimony than on somebody else's testimony?¹⁴⁴

Later, the judge explained to the selected jury before *Pertgen* moved for a mistrial that what he

[m]eant to say by that statement was that [the witness] would be sworn under oath and would be sworn to tell the truth, as all the witnesses would. But as to whether or not, in fact, you want to believe that testimony, it is up to you to decide. You make the determination as regarding the credibility of any witness that testifies.¹⁴⁵

Evaluating the alleged constitutional and statutory violations in light of the harmless error rule,¹⁴⁶ the court held that, because the judge had made an effort to cure his mistake by way of his "subsequent explanation and instruction to the jury," the comment was harmless and would not require a new trial.¹⁴⁷

Similarly, potentially prejudicial remarks made by a trial judge constitute harmless error, nearly by definition, when the appellant cannot demonstrate that any prejudice resulted therefrom.¹⁴⁸ Thus, in *Barrett v. State*,¹⁴⁹ the Nevada Supreme Court refused to find that a trial judge's remarks prejudiced the appellant's right to a fair trial when the appellant "failed to demonstrate any prejudice."¹⁵⁰

¹³⁹ *Id.* at 655.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² 774 P.2d 429 (Nev. 1989).

¹⁴³ 776 P.2d 538 (Nev. 1989).

¹⁴⁴ *Pertgen*, 774 P.2d at 431-32.

¹⁴⁵ *Id.* at 431.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 432.

¹⁴⁸ *Id.*

¹⁴⁹ *Barrett v. State*, 776 P.2d 538, 541 (Nev. 1989).

¹⁵⁰ *Id.*

Barrett's refusal to grant a new trial also exemplifies the third variety of cases which have refused to grant new trials for improper comments on the evidence: those in which the comments were not made while "charging" the jury.¹⁵¹ In *Barrett*, a witness testified that she had overheard the wife of the defendant accused of murder state, "I wish I wouldn't of did it."¹⁵² When "[o]n cross-examination, the prosecution asked if the witness knew what [the defendant's wife] wished she had not done," the defense objected to the question.¹⁵³ However, before the court ruled on the objection, the witness stated, "I think she was talking about the murder."¹⁵⁴ The trial court belatedly sustained the objection, but declared, "I don't know if we're going to be able to erase the obvious conclusion that is unsupported by any facts of what this witness has volunteered."¹⁵⁵

In a curious, but very technical application of Article 6, section 12 of the Nevada Constitution and NEVADA REVISED STATUTE 3.230, which prohibit a judge from commenting on evidence, the court held that neither provision was applicable in this case because the judge "was not 'charging' the jury."¹⁵⁶ Thus, the court held that the appellant "was fairly tried and convicted below."¹⁵⁷

*Shannon v. State*¹⁵⁸ also serves as an example of the rule that a judge's comments may not require a new trial when they are not made as part of a "charge" to the jury.¹⁵⁹ There, the Nevada Supreme Court distinguished instances where a trial court improperly charges the jury as to facts and those where a court merely states the evidence.¹⁶⁰ *Shannon* did not warrant a new trial because the judge's comments "were made during the course of formulating a hypothetical question for the expert witness," and were made during a conversation between the court and defense counsel "in order to settle properly a hypothetical posed to the expert witness, not as a comment on the facts."¹⁶¹

B. *Analysis and Discussion of Oade v. State*

Taking into consideration Nevada case law, *Oade* reveals a number of procedural defects in the Nevada Supreme Court's analysis of improper comments on the evidence. The Nevada Supreme Court in *Oade* appears to have reached the correct result, ordering a new trial based on the judge's improper remarks regarding the rules of blackjack and his assertion that the defense's theory of the case was untenable.¹⁶² But the court reached its decision through a means inconsistent with the established law. First and foremost, the court did not evaluate the judge's comments on the evidence in light of the applicable

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 783 P.2d 942 (Nev. 1989).

¹⁶⁰ *Id.* at 945-46.

¹⁶¹ *Id.* at 946.

¹⁶² *Id.*

constitutional¹⁶³ and statutory¹⁶⁴ prohibitions against commentary on the evidence. Second, had the court addressed the constitutional and statutory prohibitions, it then should have analyzed the comments in light of the rule of harmless error, as prior courts had done. However, instead of following established precedent, *Oade* cumulatively analyzed the trial judge's comments and conduct using a "potentially prejudicial" analysis. While this deflated standard might arguably be appropriate, given that the Nevada Supreme Court looked at the entirety of the misconduct in concluding that it was plain error because it was "potentially prejudicial," this standard could prove to be a thorn in the Nevada Supreme Court's side if interpreted as the necessary analysis of improper judicial commentary on the evidence. So interpreted, this standard might unnecessarily and inadvertently increase the chances that a trial judge's comments will require a new trial. Such a result is inconsistent with judicial economy, litigants' rights to a fair and speedy trial, and, in civil cases,¹⁶⁵ the intent of the rules of civil procedure.¹⁶⁶

Article VI, section 12 of the Nevada Constitution and NEVADA REVISED STATUTE 3.230 expressly prohibit judicial comments on the evidence. In *Oade*, the judge's remarks on the rules of blackjack,¹⁶⁷ and his implication that "Oade's voluntary intoxication defense was untenable,"¹⁶⁸ clearly fall within the scope of these prohibitions. The Nevada Supreme Court condemned the comments:

It was improper for the judge to expand on his reasons for sustaining objections and to comment on the strength of the defense's theory. In doing so, the judge injected into the proceedings his belief as to the merits of Mr. Oade's defense

....

The above errors were individually neither prejudicial nor egregious; however, viewed in their entirety, they were clearly erroneous and potentially prejudicial to Oade's case.

... The judge's remarks may have lessened the defense's credibility and prevented the defense from obtaining full and fair consideration from the jury. We therefore, conclude that the judge's remarks *may have* had a prejudicial impact on the verdict and thus constitute plain error warranting reversal.¹⁶⁹

Like *Wheeler v. Twin Lakes Riding Stable, Inc.*,¹⁷⁰ the trial judge in *Oade* prejudiced the defense's right to a fair trial by commenting on the presented evidence and suggesting that the defense could not prove its case. Surely, a

¹⁶³ *Oade v. State*, 960 P.2d 336, 339 (1998).

¹⁶⁴ NEV. CONST. art. VI, § 12.

¹⁶⁵ NEV. REV. STAT. 3.230 (2001).

¹⁶⁶ While *Oade* is a criminal case, the rule of harmless error, as provided by NEV. R. CIV. P. 61, no doubt, applies equally.

¹⁶⁷ See NEV. R. CIV. P. 1 (stating, in part, "[The Nevada Rules of Civil Procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action."). See also U.S. Const. amend. VI; 18 U.S.C.A. § 3161 (2003).

¹⁶⁸ *Oade v. State*, 960 P.2d 336, 339 (Nev. 1998).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 339-40 (internal citations omitted) (emphasis added). It also appears from the opinion that the Nevada Supreme Court took into account other remarks by the trial judge, many of which did not constitute commentary on the evidence, but rather fell under another category of judicial misconduct addressed in this note. The cumulative effect of the judge's comments on the evidence and his expression of impatience with Oade's counsel required a

jury hearing such words from a judge would take them to heart and possibly side with the judge, regardless of the basis for the remarks.¹⁷¹ Given the prejudicial nature of the judge's comments, the inquiry should then have turned to whether the judge's remarks were harmless in light of other considerations, such as the extent of the evidence and whether a party has satisfied its burden of proof. There can be little doubt that *any* remark by a judge relating to the presented evidence weighs heavily in a lay juror's personal evaluation of the evidence, and may be *potentially* prejudicial to a party's case. But "potentially prejudicial" is not the applicable standard. Actual prejudice to a party's substantial rights must first have occurred before a new trial can be ordered.

Despite this, the Nevada Supreme Court reversed the decision of the district court and remanded for a new trial based on a "potentially prejudicial" standard. The Nevada Supreme Court's analysis was not confined to the judge's comments on the evidence alone, its opinion including analysis of the judge's other inappropriate conduct. However, the Nevada Supreme Court nonetheless based its reversal on a standard that did not truly reflect whether Oade's substantive rights had been violated, a showing required under Nevada law to support a new trial. The most obvious explanation for the Nevada Supreme Court's deviation from its prior precedents is its failure to recognize anywhere in its opinion that the judge's comments violated either the constitutional or statutory prohibitions against commenting on the evidence. Previous decisions of the same court, as noted above, clearly hold that any violation of the constitutional or statutory prohibitions against improper commentary should be followed with a harmless error analysis.¹⁷² Further, the fact that *Oade* is a criminal case does not, of itself, damage that result. Thus, in adverse deviation from precedent, the Nevada Supreme Court altered the long-established standard of review in cases where such violations exist by holding that the remarks were "clearly erroneous and potentially prejudicial."¹⁷³

Requiring a new trial because remarks may have *potentially* prejudiced a case is significantly different than requiring a new trial because the remarks were not harmless. Potentially prejudicial remarks, by definition, do not require a showing of actual prejudice. Rather, "potentially prejudicial" only requires a showing that remarks *may have been* prejudicial to an inequitable extent. To allow a new trial where a party may not have actually been prejudiced does not comport with the goals of judicial efficiency and the fair and speedy resolution of legal actions.

Requiring a new trial when a judge's comments *potentially* prejudice a case is wholly inconsistent with established Nevada law.¹⁷⁴ As noted above,

new trial in this case. *Id.* Note also here that even the court's "plain error" conclusion does not require *actual* prejudice.

¹⁷¹ 500 P.2d 572 (Nev. 1972).

¹⁷² See *Oade*, 960 P.2d at 339, stating:

It must be remembered that "the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby." (citations omitted).

¹⁷³ See, e.g., *Wheeler*, 500 P.2d at 573.

¹⁷⁴ *Oade*, 960 P.2d at 339.

Barrett v. State held that a litigant could not claim to have been deprived of a fair trial when, in fact, the litigant was unable to demonstrate that any prejudice resulted from improper comments.¹⁷⁵ In *Oade*, it is clear that, given the nature of the judge's comments, the *Barrett* standard probably could have been satisfied; that is, *Oade* might well have shown, under the proper analysis, that the judge's comments were, in fact, prejudicial. Under *Oade*'s potentially prejudicial standard, however, a new trial might be ordered when a litigant cannot demonstrate that actual prejudice resulted from a judge's improper comments. Litigants, under the *Oade* standard, would merely be required to show that the judge's comments *could have* prejudiced the right to a fair trial. Such a result is inconsistent with *Barrett*.

Additionally, the *Oade* standard, if followed, may have unfortunate effects on appellate practice in Nevada. Adherence to a "potentially prejudicial" standard could increase the number of appeals filed in cases where a litigant's rights have not been substantially prejudiced. Litigants would not be required to demonstrate actual prejudice under the *Oade* standard, but would merely have to show that their right to a fair trial *might have been* prejudiced. Litigants would thus have a better chance for a new trial on appeal and be willing to test the appellate waters. Logically, these results lead to a larger appellate docket, longer waiting periods for case resolution, and, ultimately, higher costs for litigants, their attorneys, and the court.

Conversely, the rule of harmless error requires a litigant to show that the substantial right to a fair trial has been *actually* prejudiced before granting a new trial.¹⁷⁶ While not every unseemly comment made by a trial judge will qualify as improper and require reversal, under the rule of harmless error, only those which actually impair the substantial rights of the parties will justify a new trial.¹⁷⁷ Indeed, only those litigants whose rights actually have been substantially violated *deserve* new trials. The Nevada Supreme Court was on the right track when it noted, "[t]he above errors were individually neither prejudicial nor egregious"¹⁷⁸ But the court reversed direction immediately, stating that "viewed in their entirety, [the conduct and comments] were clearly erroneous and potentially prejudicial to *Oade*'s case."¹⁷⁹ Thus, in one sentence, the rule of harmless error analysis, long recognized and solidified by Nevada law, was turned on its head. Thankfully for *Oade*, he obtained what he wanted and most certainly deserved – a new trial. Unfortunately, however, the Nevada Supreme Court made more convoluted that which before has not been in dispute: in cases involving judicial commentary on the evidence, the rule of harmless error applies and no new trial should be ordered unless the appellant's substantial rights have been violated.

Accordingly, the Nevada Supreme Court's "potentially prejudicial" analysis in *Oade* is erroneous to the extent it applies to judicial commentary on the

¹⁷⁵ See *Barrett v. State*, 776 P.2d 538 (Nev. 1989).

¹⁷⁶ *Id.* at 541.

¹⁷⁷ See NEV. R. CIV. P. 61, which states, in pertinent part: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which *does not affect* the substantial rights of the parties." (emphasis added).

¹⁷⁸ See *id.*

¹⁷⁹ *Oade v. State*, 960 P.2d 336, 339 (Nev. 1998).

evidence. Such analysis is not supported by Nevada law, and should be regarded as an inappropriate deviation from established procedure.

VI. CONCLUSION

The Nevada Supreme Court's determination in *Oade v. State* that the trial judge's comments were potentially prejudicial to the defendant's right to a fair trial constitutes an impermissible deviation from Nevada law. Trial judges are prohibited from commenting on evidence presented at trial both by the Nevada Constitution and by Nevada statute.¹⁸⁰ When there is a violation of those provisions, as there unmistakably was in *Oade*, the court should evaluate the comments in light of the rule of harmless error.¹⁸¹ This rule requires a showing that a party was *actually* prejudiced before a new trial will be granted.¹⁸²

In light of these rules and clearly established procedure for evaluating improper comments, the Nevada Supreme Court's decision in *Oade* to treat improper comments as potentially prejudicial should not be given much weight. To the extent that *Oade*'s "potentially prejudicial" standard applies to judicial commentary on the evidence, it may indeed stand for the unfortunate principle that a new trial may be granted merely because a judge's comments are potentially prejudicial. Indeed, *Oade* does not require a showing of actual prejudice in reversing and ordering a new trial. This standard violates the sound policy of judicial efficiency and the quick resolution of legal disputes.

Moreover, a "potentially prejudicial" standard will likely increase a litigant's chances for a new trial even where a judge's comments may not have actually prejudiced his case. Consequently, litigants are more likely to venture an appeal. If the standard is accepted and followed, the number of cases ordered re-tried may increase dramatically. This is a wasteful and unnecessary result. The Nevada Supreme Court's "potentially prejudicial" standard announced in *Oade* should be disregarded, and in all cases involving improper judicial commentary on the evidence, the rule of harmless error should apply.

¹⁸⁰ *Id.*

¹⁸¹ NEV. CONST. art. VI, § 12; NEV. REV. STAT. 3.230 (2001).

¹⁸² *Wheeler v. Twin Lakes Riding Stable, Inc.*, 500 P.2d 572, 573 (Nev. 1972).