

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS M. HARDIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43222

FILED

MAY 18 2005

ORDER OF AFFIRMANCE

[Signature]
SARAH T. SLOAN
CLERK OF SUPREME COURT
DEPUTY CLERK

This is a direct appeal from a judgment of conviction, upon a jury verdict, of robbery. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On April 22, 2004, the district court convicted appellant Thomas M. Hardin, pursuant to a jury verdict, of robbery. The district court adjudicated Hardin a habitual criminal and sentenced him to a life term in the Nevada State Prison without the possibility of parole.

Hardin raises three allegations of error in his appeal. First, he argues that the district court erred in refusing to give his proposed instructions regarding reasonable doubt. We conclude that the district court did not err. The district court need not give a proffered instruction when the law encompassed in that instruction is fully covered by another instruction.¹ The reasonable doubt instruction given precisely followed the language in NRS 175.211 and has been constitutionally upheld.²

¹See Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995); Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

²See Johnson v. State, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002); Parker v. State, 109 Nev. 383, 389, 849 P.2d 1062, 1066 (1993).

Moreover, NRS 175.211 specifically provides that no other reasonable doubt instruction may be given.

Second, Hardin complains that several comments made by the prosecutor during his trial constituted prosecutorial misconduct. Where, as here, Hardin's counsel did not object to any of the challenged statements, this court may address the error sua sponte if the error was plain and affected the defendant's substantial rights.³ Hardin must show that the error was prejudicial in order to establish that it affected his substantial rights.⁴

"To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."⁵ However, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone."⁶ Improper comments may constitute harmless error when there is overwhelming evidence of guilt and the remarks did not contribute to the verdict.⁷

Although we conclude that the prosecutor committed misconduct, we further conclude that Hardin has failed to demonstrate

³See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

⁴See Green, 119 Nev. at 545, 80 P.3d at 95; Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

⁵Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

⁶Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

⁷See Pellegrini v. State, 104 Nev. 625, 628-29, 764 P.2d 484, 486-87 (1988).

any prejudice suffered from the improper comments in light of the overwhelming evidence of his guilt.⁸ The evidence adduced at trial reveals that a man entered a Sav-On drugstore in Sparks and demanded money from Alice Jarva, a cashier in the slot machine area of the store. Jarva placed \$2,575.00 in a plastic grocery bag, and the man fled. Jarva unequivocally identified Hardin as the robber shortly after the event and at trial. Hardin was apprehended driving the getaway car, as described by another witness, Kenneth Foster. Additionally, a starter pistol and a blue, hooded sweatshirt, matching the description of the one worn by the assailant, were recovered from Hardin's car. Finally, an amount of money nearly equaling the amount stolen from Jarva was recovered from Hardin's car and his person, bundled with paperclips precisely as Jarva described.⁹ Accordingly, we conclude that any prosecutorial misconduct was harmless beyond a reasonable doubt.

Lastly, Hardin contends that there was insufficient evidence presented at trial to support his robbery conviction. The standard of

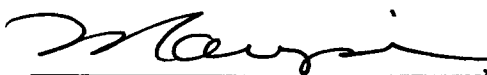
⁸Specifically, we conclude that prosecutor's questioning of Hardin regarding whether a State's witness had lied when Hardin had not directly challenged the veracity of the witness during direct examination was impermissible. See Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003), cert. denied, ___ U.S. ___ (2004). We further conclude that the prosecutor's statement during closing argument that Hardin lost his presumption of innocence prior to deliberations was impermissible. See McGuire v. State, 100 Nev. 153, 158-59, 677 P.2d 1060, 1064 (1984); State v. Teeter, 65 Nev. 584, 642, 200 P.2d 657, 685 (1948), overruled on other grounds by Application of Wheeler, 81 Nev. 495, 406 P.2d 713 (1965).

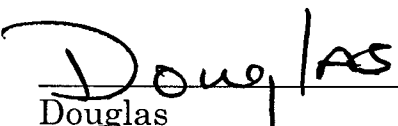
⁹There was a ten-dollar discrepancy between the amount stolen and the amount recovered from Hardin's car and person. Hardin admitted to using ten dollars of the stolen money to pay for gas.

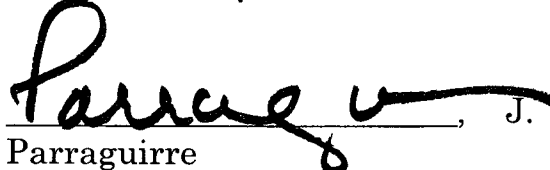
review for a sufficiency of the evidence challenge is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."¹⁰ Moreover, it is within the province of the jury to assess the weight of the evidence and to determine the credibility of the witnesses.¹¹ We conclude that the evidence adduced at trial, as outlined above, sufficiently supported Hardin's conviction beyond a reasonable doubt. Accordingly, we conclude that Hardin's claim is without merit.

Having considered Hardin's allegations and concluded they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

¹⁰Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000).

¹¹See Furbay, 116 Nev. at 486, 998 P.2d at 556; Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994).

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk