IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO ROSALES-MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44082

FILED

JUL 0 5 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of trafficking in a controlled substance (counts I-II), one count of unlawful giving away of a controlled substance (count III), and one count of possession of a controlled substance (count IV). Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant Pedro Rosales-Martinez to serve a prison term of 24 to 48 months for count I, a concurrent prison term of 10 to 25 years for count II, a concurrent prison term of 12 to 36 months for count III, and a concurrent prison term of 12 to 32 months for count IV. The district court suspended execution of the sentence imposed for count IV only and placed Rosales-Martinez on probation for a time period not to exceed 6 months.

Rosales-Martinez first contends that his conviction was not supported by sufficient evidence. In particular, Rosales-Martinez contends that reasonable doubt existed because the confidential informant did not testify at trial and there were problems with the chain of custody of the controlled substances. Additionally, Rosales-Martinez contends that he was entrapped as a matter of law because the State presented no

evidence that he had any predisposition to commit criminal activity. We conclude that Rosales-Martinez's contentions lack merit.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[1] In particular, Reno Police Officer Rick Ayala testified that he was introduced to Rosales-Martinez by a confidential informant and, thereafter, on three different occasions purchased 28.6 grams of cocaine, 109 grams of methamphetamine, and one-half pound of methamphetamine, respectively, from Rosales-Martinez. During the first transaction, Rosales-Martinez gave Officer Ayala a small plastic bag of methamphetamine to sample for future purchases and his cellular phone number so that he could contact him directly. During the second transaction, Rosales-Martinez offered to sell Officer Ayala a form of methamphetamine called "chili" because of its red color.

In addition to Officer Ayala, Reno Police Officer Scott Smith testified that he searched the vehicle driven by Rosales-Martinez after he was taken into custody. Inside the center console, Smith found a small plastic bag containing a controlled substance, later identified as cocaine.

Rosales-Martinez testified in his own defense at trial. Rosales-Martinez testified that his friend of four years, whom he knew as Jorge Algarin,[2] asked him to do a favor for him. Specifically, Jorge asked him to deliver drugs to his cousin because Jorge did not want his cousin or

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[1]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

[2]The real name of the confidential informant was Guadalupe Cortez. Although the defense subpoenaed Cortez to testify, he failed to appear in court and, apparently, fled the jurisdiction.

his family to know that he was selling drugs. Rosales-Martinez admitted that on three different occasions he delivered controlled substances to Jorge's "cousin," who he later discovered was Officer Ayala. Rosales-Martinez testified that he gave the money he received to Jorge and that Jorge never paid him money for making the deliveries, but did give him some cocaine. Additionally, Rosales-Martinez testified that he did not want to bring drugs to Jorge's cousin but he had a "hard time saying no" to his friends, and Officer Ayala and Jorge called him repeatedly insisting that he help by delivering the drugs.

Although Rosales-Martinez argues that he was entrapped, the jury could reasonably infer from the testimony presented that Rosales-Martinez committed the offenses of trafficking in a controlled substance, unlawful giving away of a controlled substance, and possession of a controlled substance.[3] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.

Second, Rosales-Martinez contends that the district court erred in admitting the cocaine evidence against him because the State failed to establish a chain of custody. In particular, Rosales-Martinez notes that one police officer misidentified the drug taken from the vehicle as methamphetamine, when in actuality it was cocaine, and in some instances, the chain of custody sheet did not indicate who transported the drugs from the narcotics office to the crime lab. We conclude that Rosales-Martinez's contention lack merit.

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[3]See NRS 453.3385(2)-(3); NRS 453.321(1)(a); NRS 453.336(1).

This court has stated that "[i]t is not necessary to negate all possibilities of substitution or tampering with an exhibit, nor to trace its custody by placing each custodian upon the stand."[4] Rather, a proper chain of custody is established where "it is reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence."[5] In instances where there is a break in the chain of custody, the State must offer evidence indicating that the evidence was in "'substantially the same condition as when the crime was committed.'"[6]

In this case, we conclude that the State presented sufficient evidence to establish with reasonable certainty that the drugs were not tampered with. Officer Ayala testified that, after seizing the controlled substances at issue, he conducted presumptive field tests, placed the substances in sealed plastic bags, completed the lab request forms and chain of custody sheets, and placed the drugs into an evidence locker. Officer Ayala explained that, at the end of the day, the person in charge of administrative work at the police station would transport the evidence to the crime lab. Finally, Officer Ayala testified that each of the controlled substances at issue appeared to be in substantially the same condition as when he obtained them from Rosales-Martinez.

Even assuming there was a break in the chain of custody, we conclude that the State presented sufficient evidence that the controlled substances admitted into evidence at trial were in substantially the same

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[4]Sorce v. State, 88 Nev. 350, 352, 497 P.2d 902, 903 (1972).

[5]Id. at 352-53, 497 P.2d at 903.

[6]Collins v. State, 113 Nev. 1177, 1184, 946 P.2d 1055, 1060 (1997). (quoting United States v. Dickerson, 873 F.2d 1181, 1185 (9th Cir. 1988)).

condition as they existed at the time they were sold to Officer Ayala. Although Rosales-Martinez argues that someone could have tampered with the controlled substances before they were delivered to the crime lab, we conclude that any doubt about tampering in this case would go to the weight of the evidence, not its admissibility.

Third, Rosales-Martinez contends that the district court erred in refusing his requested jury instructions on entrapment patterned after Ninth Circuit Model Criminal Jury Instructions and jury instructions discussed in Foster v. State.[7] We conclude that Rosales-Martinez's contention lacks merit.

The district court has broad discretion in settling jury instructions that will not be disturbed absent an abuse of discretion or judicial error.[8] The district court may properly refuse to give a proposed jury instruction if it is substantially covered by the other jury instructions given.[9] After reviewing the record on appeal, we conclude that Rosales-Martinez's proposed instructions and entrapment theory of defense were substantially covered by the other jury instructions given.

Fourth, Rosales-Martinez contends that the statutorily mandated reasonable doubt instruction given in this case is unconstitutional.[10] In particular, Rosales-Martinez argues that the

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[7]116 Nev. 1088, 13 P.3d 61 (2000).

[8]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[9]See Bolin v. State, 114 Nev. 503, 529, 960 P.2d 784, 800-01 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002).

[10]NRS 175.211(1) provides that the district court must give the following reasonable doubt instruction:

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instruction improperly quantifies reasonable doubt and reduces the prosecutor's burden of proof. As Rosales-Martinez recognizes, this court has repeatedly upheld the statutory reasonable doubt instruction against similar constitutional challenges.[11] The Ninth Circuit Court of Appeals has also upheld the constitutionality of Nevada's reasonable doubt standard.[12] Accordingly, we decline Rosales-Martinez's invitation to revisit this issue.

Fifth, Rosales-Martinez contends that the district court "abused its discretion in interrupting [defense counsel's] closing argument before the jury in order to give a sua sponte jury instruction on the search of appellant's vehicle." During closing arguments, defense counsel argued that the jury should consider the propriety of the warrantless search of Rosales-Martinez's vehicle in deciding whether he was guilty of one of the counts, and the prosecutor objected. The prosecutor argued that that the legality of the search was not challenged prior to trial and was not

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> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

[11]See, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995).

[12]Nevius v. McDaniel, 218 F.3d 940, 944 (9th Cir. 2000) (citing Ramirez v. Hatcher, 136 F.3d 1209 (9th Cir. 1998)).

something for the jury to decide. In response, defense counsel argued that it was permissible for the jury to take into account whether the search was legal "as one of the actions in the whole panoply as we argued, sloppy police work." After discussing the matter off-the-record, the district court gave the following instruction:

> Ladies and gentleman, the Court instructs you that the legality of the search of the vehicle is not at issue. [Defense counsel] is entitled to argue the facts of this case, and I remind counsel that the statements and the arguments of both counsel are not evidence in the case. You are to rely upon your recollection of the facts and evidence presented to you.

Defense counsel then resumed his closing argument, reiterating that the jury could take into account the "convenient" fact that the forfeiture process ended right after the police found the drugs in considering the count involving the drugs in the vehicle.

In considering whether judicial commentary warrants reversal of a conviction, the key inquiry is whether "the judge's remarks may have had a prejudicial impact on the verdict."[13] The level of judicial misconduct necessary to reverse a conviction further depends upon the strength of the evidence of guilt.[14]

Even assuming without deciding that the district court's instruction to the jury that the legality of the search was not at issue was somehow improper, we conclude that reversal of Rosales-Martinez's conviction is not warranted on this basis. Our review of the trial

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[13]Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339-40 (1998).

[14]Id. at 624, 960 P.2d at 339.

transcripts indicates that the district judge acted fairly and impartially at trial. Further, in light of the evidence presented at trial of Rosales-Martinez's guilt and the innocuous nature of the admonition to the jurors, we conclude that the judicial commentary did not affect the verdict.

Having considered Rosales-Martinez's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Maupin

_____, J.
Douglas

_____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Marc P. Picker
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk