

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCELO J. GUERRA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45519

**FILED**

MAR 14 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, one count of conspiracy to commit kidnapping, two counts of first-degree kidnapping with use of a deadly weapon, and two counts of robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant Marcelo Guerra was sentenced to a prison term of 26-120 months on count I, burglary while in possession of a firearm. On count II, conspiracy to commit robbery, Guerra was sentenced to a prison term of 12-48 months concurrent with count I. On count III, conspiracy to commit kidnapping, Guerra was sentenced to a prison term of 12-48 months, concurrent with counts I and II. On count IV, first-degree kidnapping with use of a deadly weapon, Guerra was sentenced to a prison term of 60-180 months, plus an equal and consecutive term for the use of a deadly weapon, concurrent with counts I-III. On count V, robbery with use of a deadly weapon, Guerra was sentenced to a prison term of 26-120 months, plus an equal and consecutive term for use of a deadly weapon, concurrent with counts I-IV. On count VI, first-degree kidnapping with use of a deadly weapon, Guerra was sentenced to a prison term of 60-180



months, plus an equal and consecutive term for use of a deadly weapon, concurrent with counts I-V. On count VII, robbery with use of a deadly weapon, Guerra was sentenced to a prison term of 26-120 months, plus an equal and consecutive term for the use of a deadly weapon, concurrent with counts I-VI.

Guerra puts forth three issues on appeal. First, Guerra contends the State improperly commented on his post-arrest silence during cross-examination. On direct examination, Guerra professed his innocence several times. He further stated that nobody in law enforcement took a statement from him at various jails, prior to, during and after his extradition back to Nevada. During cross-examination, the State questioned Guerra regarding the time he spent in the San Mateo and the Clark County Jail. The State then asked Guerra, "you must have called the detectives you wanted to talk to them about your innocence, correct?" Guerra objected to this question contending it was an improper shifting of the burden of proof.

The prosecution is forbidden to comment at trial upon a defendant's election to remain silent after being arrested.<sup>1</sup> Guerra's testimony on direct examination, specifically, his claim that nobody came up to him, nobody asked him anything and that nobody wanted to hear his version of the story opened the door to the prosecution's questions on cross-examination. This court has affirmed decisions to admit otherwise impermissible testimony because defense counsel had opened the door to the testimony.<sup>2</sup> Further, such comment is harmless beyond a reasonable

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<sup>1</sup>Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267 (1996).

<sup>2</sup>Cordova v. State, 116 Nev. 664, 670, 6 P.3d 481, 485 (2000).

doubt and does not require reversal if the prosecution made only passing reference to the defendant's post-arrest silence or if there is overwhelming evidence of guilt.<sup>3</sup> In this case, there was overwhelming evidence of guilt and the remark regarding the post-arrest silence was isolated.

Next, Guerra asserts he is entitled to a new trial because the State improperly shifted the burden of proof in closing arguments. Guerra specifically contends that the State's comments regarding Guerra's failure to corroborate various details of his alibi constitutes error necessitating a new trial.

Rather than impermissibly shifting the burden, the State's comments were in response to Guerra's own testimony and comments in closing. Guerra presented evidence of an alibi, and the State discussed the weaknesses of Guerra's alibi. The United States Supreme Court has determined that the State on rebuttal is entitled to a fair response to arguments presented by defense counsel at closing.<sup>4</sup>

Lastly, Guerra contends there was insufficient evidence at trial to sustain the jury's verdict of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>5</sup>

In particular, we note that multiple victims identified Guerra as one of the assailants. Additionally, police found paperwork from the victim's home at Guerra's residence approximately 4 hours after the

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<sup>3</sup>Morris, 112 Nev. at 264, 913 P.2d at 1267-68.

<sup>4</sup>United States v. Robinson, 485 U.S. 25 (1988).

<sup>5</sup>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).

commission of the crime. Also, police found a hat and sunglasses at Guerra's home that a victim described as being worn by one of the assailants. Guerra's fingerprints were found on the sunglasses. Further, there was no documentation to corroborate Guerra's alibi claim. Moreover, \$9300 was found under the bed at Guerra's residence. The victim stated \$10,000 was taken from his safe.

The jury could reasonably infer from the evidence presented that Guerra was guilty of the crimes. 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.<sup>6</sup>

Having concluded that appellant's contentions lack merit, we ORDER the judgment of conviction AFFIRMED.

Maupin, J.  
Maupin

Gibbons, J.  
Gibbons

Hardesty, J.  
Hardesty

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<sup>6</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

cc: Hon. Jennifer Togliatti, District Judge  
Joseph S. Caramagno  
Christopher R. Oram  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk