

IN THE SUPREME COURT OF THE STATE OF NEVADA

NOEL MAYORGA-VARGAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53708

FILED

JUL 19 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

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

Dual convictions

Appellant Noel Mayorga-Vargas challenges his dual convictions for kidnapping and robbery and argues that the kidnapping conviction should be reversed because it was incidental to the attempted robbery. We agree. Dual convictions for robbery and kidnapping arising from the same course of conduct will not be sustained unless the restraint or movement of the victim “stand[s] alone with independent significance from the act of robbery itself, create[s] a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve[s] movement, seizure or restraint substantially in excess of that necessary to its completion.” Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006). Here, neither the movement of the victim nor her

short detention in the bedroom had independent significance, increased her risk of harm, or exceeded that required to attempt the robbery. We further conclude that there is insufficient evidence supporting the existence of an agreement to commit first-degree kidnapping and therefore the associated conspiracy charge must also be reversed.

Jury instructions

Mayorga-Vargas assigns claims of error to five jury instructions. Because Mayorga-Vargas failed to object to any of these instructions below, we review for plain error and will reverse the judgment only if Mayorga-Vargas demonstrates that his substantial rights were adversely affected by error which is clear from the record. See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

First, Mayorga-Vargas challenges three jury instructions on accomplice liability for aiding and abetting and claims the State impermissibly altered and expanded its theory of the case beyond the charges in the information. We conclude that Mayorga-Vargas has failed to demonstrate any error. See Randolph v. State, 117 Nev. 970, 977, 36 P.3d 424, 429 (2001) (when the defendant raises a defense implicating a theory of accomplice liability, the prosecution is entitled to instructions on aiding and abetting even if it did not charge the defendant under that theory).

Second, Mayorga-Vargas claims that instruction 8, which appears to relate to the admission of coconspirator statements, was improper, misled the jury on the State's burden of proof, and deprived him of his rights to a fair trial, due process, and equal protection. We conclude that Mayorga-Vargas has not demonstrated plain error warranting relief. The jury was properly instructed that to establish the existence of a conspiracy the State was required to prove that the defendant had a specific intent to either commit or to aid in the commission of the specific

crime agreed to, and that the State bore the burden of proving beyond a reasonable doubt every element of each offense. And it is presumed that the jury follows the district court's instructions. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006).

Third, Mayorga-Vargas claims the jury was improperly instructed on vicarious coconspirator liability in violation of Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), receded from by Cortinas v. State, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008), cert. denied, ___ U.S. ___, 130 S.Ct. 416 (2009). We agree; however, Mayorga-Vargas has not demonstrated that any relief is warranted because the State presented strong evidence that he directly participated in the burglary and was armed with a firearm. See Green, 119 Nev. at 545, 80 P.3d at 95 (in plain error review, the defendant has the burden to show actual prejudice or a miscarriage of justice).

State's peremptory challenges

Mayorga-Vargas claims that the State improperly exercised peremptory challenges to dismiss two prospective jurors on the basis of race in violation of Batson v. Kentucky, 476 U.S. 79 (1986). We conclude that Mayorga-Vargas has failed to demonstrate any error under Batson because the prosecutor provided race-neutral explanations for dismissing the two prospective jurors and there is nothing in the record to suggest that the challenges were anything but race-neutral. See Batson, 476 U.S. at 96-98 (establishing three-part test for determining whether the State purposefully discriminated in the exercise of a peremptory challenge).

Prosecutorial misconduct

Mayorga-Vargas claims the prosecutor improperly interjected his own beliefs and disparaged Mayorga-Vargas' theory of defense during rebuttal closing argument by referring to an uncharged alleged accomplice as a "phantom" and a "myth" and suggesting Mayorga-Vargas was

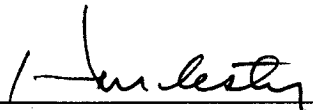
fabricating his testimony concerning the accomplice's participation in the charged offenses. Because he failed to object to the prosecutor's comments below, we review for plain error. See NRS 178.602; Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). After considering the context of the prosecutor's comments, see Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005), we conclude that Mayorga-Vargas has not demonstrated plain error warranting relief. Although the prosecutor's comments regarding the existence of the alleged accomplice were needlessly sarcastic, they were appropriately made as deductions or conclusions from evidence introduced at trial, see Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989), and the prosecutor did not call Mayorga-Vargas a liar or assert that he was lying, see Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). To the extent that any of the prosecutor's comments exceeded the boundaries of acceptable rebuttal argument, we conclude that the comments were not prejudicial because they did not divert the jury's focus from the evidence reflecting on the credibility of the witnesses. See Klein v. State, 105 Nev. at 884, 784 P.2d at 973.

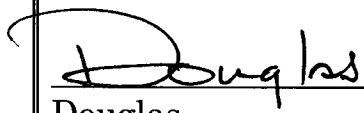
Mayorga-Vargas claims that his rights to a fair trial, due process and equal protection were violated when the prosecutor questioned him concerning his use of a false social security number. He argues that this reference to his status as an illegal alien likely prejudiced the jury against him and prevented it from making a fair determination regarding his guilt. Because Mayorga-Vargas failed to object to the prosecutor's comments, we review for plain error. See NRS 178.602; Valdez, 124 Nev. at 1190, 196 P.3d at 477. We conclude that Mayorga-Vargas has failed to demonstrate plain error warranting relief. Mayorga-Vargas twice disclosed his illegal status to the jury before the prosecutor posed the challenged questions on cross-examination and, as he concedes,


the questions were permissible under NRS 50.085(3) (specific instances of conduct may be inquired into on cross-examination if relevant to truthfulness). Further, the district court properly instructed the jury that the protections of the United States Constitution extend to all persons within its borders regardless of their nationality, and we must presume that the jury followed this instruction, see Summers, 122 Nev. at 1333, 148 P.3d at 783.

Having considered Mayorga-Vargas' contentions and concluded that relief is warranted only on the kidnapping and conspiracy to commit kidnapping convictions, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to vacate the kidnapping and conspiracy to commit kidnapping convictions and enter a corrected judgment of conviction.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Kathy A. Hardcastle, District Judge
Bellon & Maningo, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk