

IN THE SUPREME COURT OF THE STATE OF NEVADA

BALMORE ALEXANDER VILLATORO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54488

FILED

SEP 29 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingersoll*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault: count I (oral penetration) and count II (penile penetration). Second Judicial District Court, Washoe County; Janet J. Berry, Judge. Appellant Balmore Villatoro raises two issues.

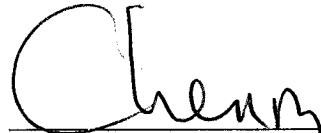
First, Villatoro argues that insufficient evidence supports his conviction for count I because the State failed to prove the corpus delicti of the crime apart from Villatoro's extrajudicial statements. We disagree and affirm his conviction on this count. While the victim could not recall the oral sexual assault, she testified to the assault charged in count II with specificity as well as to her failure to affirmatively assent, attempts to resist, and extreme intoxication. In addition, Villatoro's DNA was discovered on her genital region. While the corpus of a crime must be proven by evidence independent of Villatoro's extrajudicial statements, Doyle v. State, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004), that independent evidence may be circumstantial and need not be proven


beyond a reasonable doubt. Gaxiola v. State, 121 Nev. 638, 650, 119 P.3d 1225, 1234 (2005). The victim's testimony to the closely-related crime charged in count II and the presence of Villatoro's DNA permits the "reasonable inference that [oral sexual assault] was committed." Id. (internal quotations and citations omitted). Then, as this threshold requirement was met, the jury properly considered Villatoro's various extrajudicial statements admitting to the oral sexual assault and rationally found the essential elements of the crime beyond a reasonable doubt. See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002); NRS 200.366.


Second, Villatoro claims that the district court abused its discretion in denying his motion for mistrial and rejecting a proposed jury instruction to correct an instance of prosecutorial misconduct. In its opening statement, the State projected a slide which, Villatoro asserted, insinuated to the jury that one of his counsel met with a State's witness and, by sharing discovery with the witness, attempted to influence her into changing her testimony. After a recess where the district court considered and rejected Villatoro's motion for mistrial and his jury instruction, the court instructed the jury that statements of counsel were not evidence. Given the passing nature of the prosecutor's insinuation and the district court's instruction to the jury, we find no abuse of discretion in either the denial of Villatoro's motion or the rejection of his proposed jury instruction. See Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004); Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991) (stating that "even aggravated prosecutorial remarks will not justify reversal" where substantial evidence supports the conviction).

Accordingly, having considered Villatoro's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Washoe District Court Clerk
Attorney General/Carson City
Washoe County District Attorney
Washoe County Public Defender