

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROY ABBOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56713

DAVID ROY ABBOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56714

FILED

JUL 14 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *H. Anderson*
DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND

These are consolidated appeals from two judgments of conviction. In Docket No. 56713, appellant David Abbott was convicted, pursuant to a jury verdict, of trafficking in a controlled substance, conspiracy to sell a controlled substance, and ex-felon in possession of a firearm. In Docket No. 56714, Abbott was convicted, pursuant to a guilty plea, of possession of a controlled substance. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. Abbott raises four claims of error as to Docket No. 56713.¹

First, Abbott claims that insufficient evidence supports his convictions. We disagree. Abbott's co-conspirator testified that when a confidential informant approached her about buying a large amount of methamphetamine, she reached out to Abbott for the supply. She further

¹Abbott presents no argument attacking his plea or sentence in Docket No. 56714. Accordingly, we affirm Abbott's conviction in that case.

testified that she went to Abbott's hotel room to finalize the sale and that Abbott was to give the informant the drugs when the informant arrived. Instead, the police arrived pursuant to a no-knock warrant. Detectives testified that they found the trafficking amount of methamphetamine next to Abbott and drug paraphernalia indicating intent to sell in a bag that also contained Abbott's debit and identification cards. Next to that bag, police found another bag containing a loaded firearm. Hotel security testified that the hotel room where the transaction was to take place was registered to Abbott and a surveillance video was published to the jury showing Abbott checking in and carrying two bags to the room. Additionally, forensic specialists testified that Abbott's DNA was found on the drug paraphernalia and that, of the occupants of the room when police arrived, his was the only DNA not excluded as a match to the DNA found on the firearm. We therefore conclude that, viewing the evidence in the light most favorable to the prosecution, a rational juror could have found that Abbott committed the crimes charged. See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Jackson v. Virginia, 443 U.S. 307, 319 (1979); see also NRS 202.360; NRS 453.3385(2); NRS 453.401.

Second, Abbott claims that an instance of prosecutorial misconduct was reversible error. After the prosecutor made what the State now concedes was an objectionable comment in rebuttal argument, the district court interrupted and instructed the jury to disregard it. Abbott did not ask for any further remedy. We conclude that the jury admonishment was sufficient and reversal is not warranted. See 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).

Third, Abbott argues that the statutory reasonable doubt instruction is unconstitutional and lessens the State’s burden of proof. Abbott did not object to this instruction, precluding appellate review. Walker v. State, 116 Nev. 670, 673, 6 P.3d 477, 479 (2000). Additionally, we notice no plain error as we have repeatedly held that the instruction codified in NRS 175.211 is constitutional. See Garcia v. State, 121 Nev. 327, 339-40, 113 P.3d 836, 844 (2005); Noonan v. State, 115 Nev. 184, 189-90, 980 P.2d 637, 640 (1999); Bolin v. State, 114 Nev. 503, 530, 960 P.2d 784, 801 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002).


Fourth, Abbott contends that cumulative error denied him a fair trial. Because we have rejected Abbott’s assignments of error, we conclude that his allegation of cumulative error also lacks merit. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) (“[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.”).

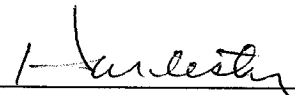
Finally, we note that although the record shows that the district court sentenced Abbott to life without parole under the habitual criminal statute for each conviction appealed in Docket No. 56713, the resulting judgment of conviction lists only one sentence. Therefore, we remand the matter to the district court for the entry of a corrected judgment of conviction following the issuance of the remittitur. See NRS 176.565 (providing that clerical errors in judgments may be corrected at any time); Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994)

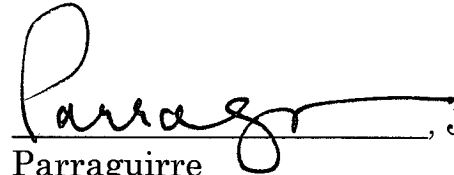
(the district court does not regain jurisdiction following an appeal until the supreme court issues its remittitur).

Accordingly, we

ORDER the judgment of conviction AFFIRMED AND REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk