IN THE SUPREME COURT OF THE STATE OF NEVADA

RICARDO A. IRIVE A/K/A RICARDO IRIVE AVALOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56849

FILED

DEC 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature] DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping, conspiracy to commit robbery, and robbery. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Ricardo A. Irive raises four issues on appeal.

First, Irive argues that the evidence was insufficient to support his conviction for first-degree kidnapping because there was no showing of intent on his part and the victim's testimony was inconsistent. After reviewing the evidence in the light most favorable to the prosecution, we conclude that any rational juror would have found all of the essential elements of first-degree kidnapping beyond a reasonable doubt. See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002). At trial, the victim testified that she agreed to get into the SUV driven by Irive's codefendant after the codefendant insisted that the victim show her how to get to her destination. However, upon approaching her purported destination, the codefendant continued to drive despite the victim's request to stop the SUV and let her out. Irive, who had been hiding in the back seat, grabbed the victim around her neck and demanded her gold jewelry and her purse. After the victim gave Irive her purse and

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explained that her jewelry was not real gold, the codefendant stopped the SUV, and Irive pushed the victim out of the SUV. This evidence was sufficient to support the conviction. While Irive contends that some of the victim's testimony contradicted her prior statements, it was for the jury to determine the weight and credibility to give the conflicting testimony. See id. at 559-60, 51 P.3d at 524.

Second, Irive argues that the district court violated his right to testify on his own behalf when the court ruled that the State could use a prior robbery conviction to impeach him if he were to testify at trial. We conclude that Irive did not preserve this issue for appeal, as he did not make an offer of proof to the district court outlining his intended testimony, and it is not clear from the record that he would have testified but for the district court's ruling. See Warren v. State, 121 Nev. 886, 894-95, 124 P.3d 522, 528 (2005).

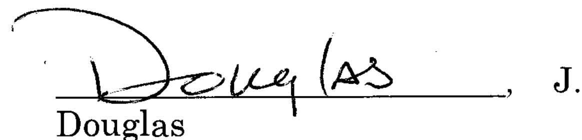
Third, Irive argues that the district court erred by allowing a police officer to give expert testimony, without proper notice or foundation, regarding marks on the victim's neck. We have held that the "admissibility and competency of opinion testimony, either expert or non-expert, is largely discretionary with the trial court." Watson v. State, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978). NRS 50.265 limits opinion or inference testimony of non-expert witnesses to that which is "[r]ationally based on the perception of the witness," and "[h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." Here, the police officer did not testify as an expert. Rather, the officer's opinion as to the cause of the marks on the victim's neck was based on his personal observations of the victim and the victim's statements to him that Irive had grabbed her by the neck. Therefore, we

conclude that the district court did not abuse its discretion in allowing the officer's opinion or inference testimony.

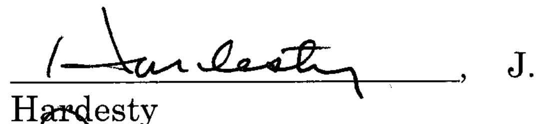
Finally, Irive argues that the prosecutor committed misconduct during rebuttal closing argument because the prosecutor's comments improperly shifted the burden of proof to Irive and drew attention to his decision not to testify. We conclude that the challenged comments were improper, but that the error was harmless given the overwhelming evidence of guilt. See Valdez v. State, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476-77 (2008). Further, to the extent that Irive argues that the challenged comments improperly referenced his failure to testify, we conclude that the comments did not directly remark on Irive's failure to take the stand and the prosecutor did not manifestly intend the comments as a reference to Irive's failure to testify on his own behalf. See Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989).

Having considered Irive's contentions and concluded that no relief is warranted, we

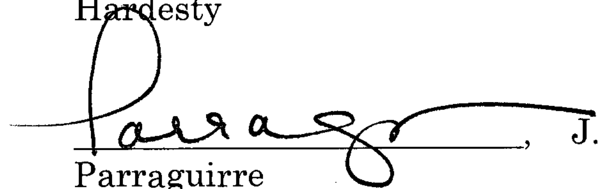
ORDER the judgment of conviction AFFIRMED.



_______________________, J.
Douglas



_______________________, J.
Hardesty



_______________________, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
Law Office of Jeannie N. Hua, Inc.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk