

IN THE SUPREME COURT OF THE STATE OF NEVADA

XAVIER ALEXANDER MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56884

FILED

JUL 15 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance and transport of a controlled substance. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Gang affiliation

Appellant Xavier Martinez contends that the district court abused its discretion by denying his motion for a mistrial after a witness's testimony linked him to a "notorious" gang. We disagree. Even if the witness's testimony was an express reference to a gang, the reference was not so "clearly and enduringly prejudicial" as to require a mistrial, Meegan v. State, 114 Nev. 1150, 1155, 968 P.2d 292, 295 (1998) (internal quotation marks omitted), abrogated on other grounds by Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001), and there is overwhelming evidence of guilt, see, e.g., Rosky v. State, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005). We conclude the district court acted within its discretion by denying the motion for a mistrial. Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007).

To the extent Martinez contends that the district abused its discretion by denying his motion for a mistrial based in part on the witness's testimony regarding Martinez's "obvious gang moniker," Martinez did not base his motion on the use of the moniker and he has failed to demonstrate plain error, see Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003), especially in light of Martinez's concession before trial that use of the moniker could not be avoided.

Martinez also contends that the district court abused its discretion by allowing the gang affiliation evidence to be admitted. The district court, however, did not make any ruling admitting this evidence as the matter was not raised via a pretrial motion in limine or an objection during trial. We conclude Martinez has failed to demonstrate any error. See id.

Sin City, Inc.

Martinez alleges that the district court erred by allowing the State to refer to the larger investigation encompassing the instant offenses by its name, Sin City, Inc., because the name of the investigation was not relevant. Martinez did not object to use of the investigation's name on a relevancy basis below, and he has failed to demonstrate plain error. See id.

Martinez also contends that the investigation's name should have been excluded as overly prejudicial because it was widely publicized as involving gangs, weapons, drugs, and violent suspects. We conclude that the district court did not abuse its discretion by determining that use of the name was not overly prejudicial. See NRS 48.035(1). We note that the members of the jury voir dire were expressly questioned about their

knowledge of the Sin City, Inc. investigation, only one venireperson had ever heard of it, and that venireperson was not seated on the jury.

To the extent Martinez contends the name of the investigation was admitted in violation of NRS 48.045, we conclude this contention lacks merit because the name of the investigation does not constitute evidence of Martinez's character. See NRS 48.045(1).

Insinuation that Martinez is a criminal

Martinez alleges that the district court erred by allowing Detective Gomez to insinuate that he was a criminal in violation of NRS 48.045. The challenged testimony did not specifically reference Martinez and Martinez did not object to it, and we conclude Martinez has failed to demonstrate plain error. See Green, 119 Nev. at 545, 80 P.3d at 94-95. Further, any error was invited because the testimony was elicited on cross-examination and was a fair response to defense counsel's questioning. See Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (a party may not challenge an error on appeal that he provoked or induced the other party to commit).

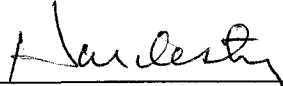
Prosecutorial misconduct

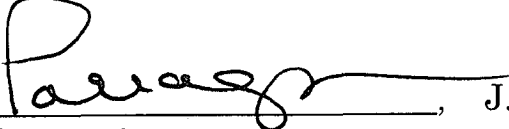
Martinez asserts that the State committed prosecutorial misconduct by insinuating that he was a drug dealer during rebuttal argument. The prosecutor's statement did not specifically refer to Martinez and was a fair response to defense counsel's closing argument. Therefore, we conclude the statement did not constitute error. See Pascua v. State, 122 Nev. 1001, 1008, 145 P.3d 1031, 1035 (2006); see also Pearson, 110 Nev. at 297, 871 P.2d at 345.

Cumulative error

Finally, Martinez contends that cumulative error violated his right to a fair trial. Balancing the relevant factors, we conclude that this contention lacks merit. See Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (stating the three-part test for a cumulative error analysis). Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre

SAITTA, J., concurring:

I concur with the result but believe that the "28th Street" reference was an express gang reference.


_____, J.
Saitta

cc: Hon. Douglas W. Herndon, District Judge
James J. Ruggeroli
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk