

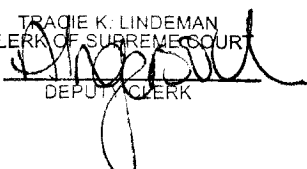
IN THE SUPREME COURT OF THE STATE OF NEVADA

HERMINIO RAMIREZ-LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62902

FILED

NOV 14 2013

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Herminio Ramirez-Lopez was arrested after a confrontation with his girlfriend. Upon his arrest, police found a baggie containing cocaine in his pocket. Ramirez-Lopez was charged with trafficking in a controlled substance and second-degree kidnapping. A jury found him guilty of the trafficking charge but acquitted him of the kidnapping charge. He raises six issues in this appeal from the judgment of conviction.

First, Ramirez-Lopez contends that insufficient evidence supports his trafficking conviction because his intoxication precluded a finding that he was “knowingly or intentionally” in possession of a controlled substance as required by NRS 453.3385. We disagree and conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as

determined by a rational trier of fact. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Two police officers testified that they found a bag which contained approximately 22 grams of a cocaine admixture in Ramirez-Lopez's front pocket. Although the officers noted that Ramirez-Lopez seemed intoxicated, they testified that he was alert and responsive. We conclude that the jury could reasonably infer from the evidence presented that Ramirez-Lopez was knowingly or intentionally in possession of a trafficking quantity of a controlled substance. *See* NRS 453.3385(2).

Second, Ramirez-Lopez contends that the State committed misconduct by claiming that his intoxication did not negate the required intent unless he "didn't know what he was doing." Because Ramirez-Lopez did not object, we review for plain error which affected his substantial rights. *See Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005). We conclude that this comment was not improper. *See* NRS 193.220. Therefore, there was no plain error.

Third, Ramirez-Lopez contends that the State committed misconduct during closing argument by speculating about his mental state and implying that he was guilty of other crimes. Because Ramirez-Lopez did not object to these comments, we review them for plain error. Having considering the comments in context, we conclude that they were fair argument and Ramirez-Lopez fails to demonstrate plain error entitling him to relief.

Fourth, Ramirez-Lopez contends that the State committed misconduct during closing argument by using a theme which described

him as a “wolf” and his girlfriend as a “sheep.” The State continued this theme by asserting that Ramirez-Lopez liked to control others, insinuating that he had abused his girlfriend since the beginning of their relationship, and admonishing the jury not to let him “pull the wool” over their eyes. Ramirez-Lopez asserts that these comments belittled him, argued facts not in evidence, vouched for the girlfriend’s credibility, denigrated his defense, shifted the burden of proof, and inappropriately inflamed the jurors’ passions.

While we conclude that some of the prosecutor’s comments may have crossed the line of appropriate advocacy, we also conclude that any misconduct was harmless. The district court sustained Ramirez-Lopez’s objection to the most troubling comment, which implied that he abused his girlfriend, and thereby remedied any potential for prejudice. *See Miller*, 121 Nev. at 99, 110 P.3d at 58. The comments that were not objected to were not of such a nature as to warrant relief under plain error review, *see id.*, or impose a duty on the district court to intervene, *see Collier v. State*, 101 Nev. 473, 477, 705 P.2d 1126, 1128 (1985), *holding modified by Howard v. State*, 106 Nev. 713, 800 P.2d 175 (1990). We also note that several of those comments were a fair response to Ramirez-Lopez’s argument regarding the girlfriend’s demeanor while testifying. Most importantly, Ramirez-Lopez was acquitted of kidnapping and there was overwhelming evidence that he trafficked in a controlled substance. *See King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (“[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error.”). As a result, we can see no

possibility that the comments at issue affected the jury's finding on the trafficking offense.

Fifth, Ramirez-Lopez contends that the district court abused its discretion by admitting prejudicial and irrelevant photographs of his girlfriend's injuries. "Admissibility of photographs lies within the sound discretion of the district court and, absent an abuse of that discretion, the decision will not be overturned." *Sipsas v. State*, 102 Nev. 119, 123, 716 P.2d 231, 234 (1986) (internal quotation marks omitted). The State claimed that Ramirez-Lopez kidnapped the girlfriend by biting her and dragging her by the neck to prevent her from seeking aid. The district court concluded that the photographs were relevant to the kidnapping charge and were not more prejudicial than probative. We conclude that the district court did not abuse its discretion.

Sixth, Ramirez-Lopez contends that the State committed misconduct by commenting on his post-arrest silence. During closing argument, the State referred to Ramirez-Lopez's spontaneous statement that the drugs were not his and argued that his "cocky" and "arrogant" attitude was inconsistent with innocent behavior. Because Ramirez-Lopez did not object, we review this claim for plain error.

We conclude that Ramirez-Lopez fails to demonstrate plain error entitling him to relief. Rather than commenting on his silence, the prosecutor commented on what Ramirez-Lopez chose to say and his demeanor when saying it. In that context, the comments were not improper. *See, e.g., United States v. Beechum*, 582 F.2d 898, 906 (5th Cir. 1978). Moreover, there was overwhelming evidence that Ramirez-Lopez trafficked in a controlled substance, and therefore Ramirez-Lopez cannot


demonstrate prejudice. *See Morris v. State*, 112 Nev. 260, 264, 913 P.2d 1264, 1267 (1996).

Having considered Ramirez-Lopez's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Elissa F. Cadish, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk