IN THE SUPREME COURT OF THE STATE OF NEVADA

BELISARIO RENTERIA-HUERTA, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 35889

FILED

NOV 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of trafficking in a controlled substance. The district court sentenced appellant Belisario Renteria-Huerta to twenty-five years in Nevada State Prison with parole eligibility after ten years.

Renteria-Huerta first contends that the evidence adduced at trial was insufficient to support his conviction of trafficking in a controlled substance. Specifically, Renteria-Huerta argues that the evidence only suggested that he was merely present at the scene or was a small pawn in a larger drug operation.

"[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt."'"[1] Moreover, it is for the jury to determine what weight, credibility and credence to give to witness testimony and other trial evidence.[2] Finally, circumstantial evidence alone may sustain a conviction.[3]

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[1]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

[2]Hutchins, 110 Nev. at 107, 867 P.2d at 1139.

[3] McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992).

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Our review of the record reveals sufficient evidence from which the jury, acting reasonably and rationally, could have found the elements of trafficking in a controlled substance beyond a reasonable doubt. NRS 453.3385 provides that "a person who . . . is knowingly or intentionally in actual or constructive possession of . . . any controlled substance which is listed in schedule I . . . shall be punished . . . if the quantity involved . . . [i]s 28 grams or more, for a category A felony by imprisonment in the state prison . . . ."[4] Although mere presence at the scene of a crime cannot support an inference that one is a party to an offense, presence together with other circumstances, including the defendant's companionship and conduct before, during and after the crime, may support such an inference.[5]

In this case, police discovered almost ten pounds of methamphetamine, cash, a handgun, and drug paraphernalia in room number ten, the motel room that Renteria-Huerta had rented. Renteria-Huerta was the only individual observed entering and exiting that room, and he had the only key to the room in his possession when he was stopped by police. Additionally, Renteria-Huerta had approximately $1,200.00 in cash in his possession when he was stopped by police, yet he told them that he was unemployed. Accordingly, we conclude that substantial evidence supports Renteria-Huerta's conviction of trafficking in a controlled substance.

Renteria-Huerta next contends that his conviction must be reversed because the jury returned a general verdict form which found him guilty of "trafficking in a controlled substance" but did not include a finding that he was guilty of third-level trafficking or trafficking in more than twenty-eight grams of methamphetamine. He argues that the amount of controlled substance involved in this case should have been specifically submitted to the jury because it increased the crime of trafficking in a controlled substance from a category B felony to a category A felony.

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[4]NRS 453.3385(3).

[5]Walker v. State, 113 Nev. 853, 869, 944 P.2d 762, 772-73 (1997) (citing Palmer v. State, 112 Nev. 763, 769, 920 P.2d 112, 115 (1996)).

The United States Supreme Court in Apprendi v. New Jersey, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[6] In Nevada, the crime of trafficking in a controlled substance may be a category A felony or a category B felony depending on the amount of a controlled substance involved.[7]

We conclude that Renteria-Huerta's contention lacks merit. He failed to object at trial to the general verdict form and thus, he has waived this issue on appeal.[8] Further, the record reveals that the charging document in this case specifically charged Renteria-Huerta with trafficking in twenty-eight grams or more of a controlled substance pursuant to NRS 453.3385(3). At trial, the defense theory of the case was

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[6]Apprendi, 530 U.S. 466, 490 (2000).

[7]NRS 453.3385 provides that:

> [A] person who knowingly or intentionally sells, manufactures, delivers or brings into this state or who is knowingly or intentionally in actual or constructive possession of . . . any controlled substance which is listed in schedule I . . . shall be punished . . . if the quantity involved:
>
> 1. Is 4 grams or more, but less than 14 grams, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years and by a fine of not more than $50,000.
>
> 2. Is 14 grams or more, but less than 28 grams, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years and by a fine of not more than $100,000.
>
> 3. Is 28 grams or more, for a category A felony by imprisonment in the state prison:
>
> (a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
>
> (b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served, and by a fine of not more than $500,000.

[8]See Clark v. State, 89 Nev. 392, 393, 513 P.2d 1224, 1225 (1973) (as a general rule, failure to object precludes appellate review).

that Renteria-Huerta was merely present in the motel room, and all parties conceded the amount of drugs involved. Moreover, Jury Instruction 18 defines the crime of trafficking in a controlled substance as (1) the knowing or intentional (2) actual or constructive possession (3) of a quantity of twenty-eight grams or more (4) of a Schedule I controlled substance. Finally, Renteria-Huerta did not request a jury instruction, and none were given, on lesser included offenses. Thus, it is reasonable to infer from the record that before signing the general verdict form, which referred to the crime only as "trafficking in a controlled substance," the jury made a finding that Renteria-Huerta was trafficking in twenty-eight grams or more of methamphetamine. Accordingly, we conclude that Renteria-Huerta is not entitled to a new trial based on the jury's return of a general verdict form which did not include a finding that he was guilty of third-level trafficking or trafficking in more than twenty-eight grams of methamphetamine.

Renteria-Huerta also contends that his conviction should be reversed because the state failed to disclose the identity of the confidential informant involved in this case, a material witness whom he was entitled to confront and cross-examine. However, the record reveals that he stipulated to the confidentiality of the informant's identity in exchange for the informant not testifying at trial. Further, NRS 49.335 permits the state to refuse to disclose the identity of an informant,[9] and dismissal pursuant to NRS 49.365 is not mandatory unless the informant's testimony is necessary to a fair determination of the issue of guilt or innocence.[10] Accordingly, we conclude that this contention lacks merit.

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[9]NRS 49.335 provides:

> The state or a political subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished to a law enforcement officer information purporting to reveal the commission of a crime.

[10]NRS 49.365 provides:

> If the state or a political subdivision elects not to disclose the identity of an informer and the circumstances indicate a reasonable probability that the informer can give testimony necessary to a fair determination of the issue of guilt or

continued on next page . . .

Renteria-Huerta next contends that he is entitled to a new trial because the warrantless searches of a vehicle he was driving and his motel room were illegal. He asserts that the drug evidence seized as a result of the searches should have been suppressed because the police did not have reasonable suspicion or probable cause to search his vehicle or to search his motel room. However, Renteria-Huerta did not file a motion to suppress below nor did he object to the admission of the drug evidence at trial. Thus, he has waived this issue on appeal.[11] Additionally, the record reveals that Renteria-Huerta signed a consent to search form authorizing the police to search the vehicle and his motel room, and nothing in the record suggests that his consent was not knowing or voluntary. Accordingly, we conclude that this contention also lacks merit.

Finally, Renteria-Huerta contends that the prosecutor's references to defense theories of the case as "red herrings" were improper and warrant reversal of his conviction. This court has stated that "the prosecution should not disparage legitimate defense tactics" and that characterizing defense tactics as "red herrings" is highly improper.[12] However, Renteria-Huerta did not object to the prosecutor's comments at trial and has therefore waived this issue on appeal.[13] Further, even if the prosecutor's comments in this case were error, reversal is not mandated here because Renteria-Huerta has failed to show that the remarks made by the prosecutor were patently prejudicial.[14]

. . . *continued*

> innocence, the judge shall on motion of the accused dismiss the proceedings, and he may do so on his own motion.

[11]See Clark, 89 Nev. at 393, 513 P.2d at 1225.

[12]Pickworth v. State, 95 Nev. 547, 550, 598 P.2d 626, 627-28 (1979).

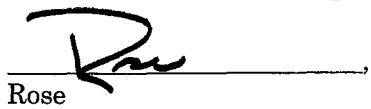
[13]See Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (in general, the defendant must raise timely objections and seek corrective instructions in order to preserve the issue of prosecutorial misconduct for appeal).

[14]See id. (if the defendant failed to object below, this court reviews alleged prosecutorial misconduct only if it is plain error and the defendant must show that the prosecutor's remarks were patently prejudicial).

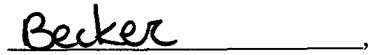
Having reviewed Renteria-Huerta's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.[15]

_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Steven P. Elliott, District Judge
Edwin T. Basl
Pokorny & Associates
Robert C. Bell
Attorney General/Carson City
Washoe County District Attorney
Washoe County Clerk

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[15]Renteria-Huerta also contends that cumulative error denied him a fair trial. Having concluded that his other assignments of error lack merit and that substantial evidence supports his conviction, we further conclude that this contention lacks merit.