IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERMAINE PERRY RICHARDSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38952

FILED

MAR 27 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of felony possession of a controlled substance.[1] The district court sentenced appellant Shermaine Perry Richardson to concurrent prison terms of 16-48 months, ordered the sentence suspended, and placed him on probation with conditions for an indeterminate period not to exceed three years.

First, Richardson contends that the State adduced insufficient evidence at trial to sustain his conviction. Richardson argues that the arresting officers provided inconsistent testimony and that their recollection of events was faulty, and therefore, a reasonable jury could not be convinced of his guilt beyond a reasonable doubt. We disagree with Richardson's contention and characterization of the evidence.

When reviewing a claim of insufficient evidence, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

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[1]Richardson was originally arrested and charged by way of an information of one count each of trafficking in a controlled substance and possession of a controlled substance with the intent to sell.

elements of the crime beyond a reasonable doubt.'"[2] Further, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."[3] In other words, a jury "verdict will not be disturbed upon appeal if there is evidence to support it. The evidence cannot be weighed by this court."[4]

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. Both of the arresting officers testified unequivocally that after observing Richardson driving erratically they conducted a traffic stop, and in a well-lit area (1) observed plastic bags containing drugs fall out from the inside of Richardson's right pant leg, and (2) discovered plastic bags containing drugs sitting on the front seat of Richardson's vehicle, of which he was the only occupant. Therefore, based on the testimony of the arresting officers, we conclude that a reasonable jury could infer that Richardson was guilty of possession of a controlled substance.

Second, Richardson contends that the district court erred by not sua sponte striking from the record and admonishing the jury to disregard a colloquy between the State and its witness, one of the arresting officers. The following exchange took place:

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[2]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted).

[3]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[4]Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972); see also Nev. Const. art. 6, § 4; NRS 177.025.

> PROSECUTOR: So is it your opinion then that these baggies, whoever possessed those baggies, those were not for personal use, but for distribution?
>
> WITNESS: Yes.
>
> DEFENSE COUNSEL: Your Honor, again, I think this is beyond the scope of your ruling. I think he was just to talk in generalities. That was my understanding.
>
> THE COURT: Sustained.

Richardson then failed to move the district court for a mistrial, request that the statement be struck from the record, or have the jury admonished to disregard the exchange. This court has long held that in order to preserve the issue for appeal that "it was necessary that a request be made at the time [by the objecting counsel] that the court instruct the jury to disregard such remarks, and refused to do so."[5] Therefore, we conclude that this issue was waived and not preserved for review.

Third, Richardson contends that during closing arguments the State impermissibly referred to his failure to testify in violation of his federal and state constitutional rights.[6] More specifically, Richardson argues that the State's characterization of the evidence against him as "uncontested" indirectly implies that he should have come forward and testified in his defense. We disagree with Richardson's contention.

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[5]State v. Boyle, 49 Nev. 386, 402, 248 P. 48, 53 (1926). See State v. Hunter, 48 Nev. 358, 367, 232 P. 778, 781 (1925) ("to entitle a defendant to have improper remarks of counsel considered on appeal, objections must be made to them at the time, and the court must be required to rule upon the objection, to admonish counsel, and instruct the jury"); see also Woods v. State, 94 Nev. 435, 439, 581 P.2d 444, 447 (1978).

[6]U.S. Const. amend. V; Nev. Const. art. 1, § 8.

The following exchange occurred during the State's closing arguments:

> STATE: . . . Now, the Court talked about direct and indirect evidence and what that means. He gave you the illustration of the child, I believe, eating pie I believe it was and if you catch him eating, that's direct. If you catch the crumbs on his face or jelly on his face later, that's indirect evidence since you didn't catch him in the act. There is so much corroborated and uncontested direct evidence in this case it's almost not worth talking about any indirect evidence.
>
> DEFENSE COUNSEL: Your Honor, I'll object to him talking about uncontested. It's not a burden that the defendant contest the State's evidence.
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> THE COURT: I will sustain it as to the word uncontested. I believe the defense has contested everything. So the State has the burden of proving that beyond a reasonable doubt.
>
> . . . .
>
> STATE: I'll rephrase that. There is so much evidence, direct evidence of the defendant's guilt, that it's barely worth talking about the indirect evidence supported by direct evidence. In other words, there is more than one source of that direct evidence.

Our review of the exchange above does not indicate that the State manifestly intended to impermissibly refer to Richardson's failure to testify, or that the State's comment taken in context was "'of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.'"[7] The State was merely

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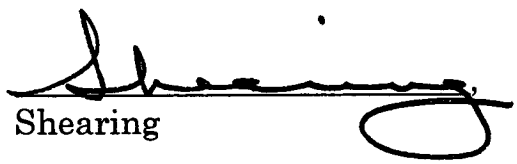
[7]Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989) (quoting United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968); see also Rippo v. State, 113 Nev. 1239, 1253-54, 946 P.2d 1017, 1026-27 (1997).

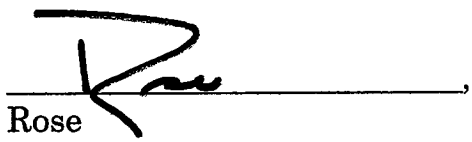
explaining to the jury the difference between direct and indirect evidence, and commenting on the amount of direct evidence linking Richardson to the charged offenses. Therefore, we conclude that the State did not impermissibly refer to Richardson's failure to testify in violation of his federal and state constitutional rights.

Having considered Richardson's contentions and concluded that they are without merit, we

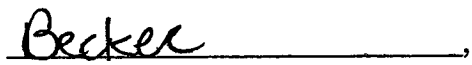
ORDER the judgment of conviction AFFIRMED.



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Mark W. Gibbons, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk