

IN THE SUPREME COURT OF THE STATE OF NEVADA

AVILIO LOPEZDOLORES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55023

**FILED**

SEP 09 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge; Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.<sup>1</sup>

Sufficiency of the evidence

Appellant Avilio Lopezdolores contends that there was insufficient evidence to prove that he did anything to plan and execute the robbery and had knowledge that a handgun would be used. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

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<sup>1</sup>Senior Judge Stewart Bell was the trial judge and District Judge Douglas Herndon was the sentencing judge.

The State's theory of the case was that Lopezdolores aided and abetted his accomplice by serving as a lookout. The State presented testimony that Lopezdolores and his accomplice entered the bar together, walking slowly in single file, looking around, and slowly moving around the bar. They sat down near the emergency exit and cash register, in a position where they could observe the entire bar and its entrance. They did not talk to each other. Neither of them wanted anything to drink. They took bills from their pockets and each put a dollar bill into a video poker machine. The accomplice's bill popped out of the machine and he summoned the bartender and asked for a crisp bill. All the while, Lopezdolores stared at the bartender. When the bartender opened the cash register, the accomplice pulled out a handgun, pointed it at the bartender, and said "why don't you give me all of it." Lopezdolores continued to stare at the bartender, he did not look at the handgun and he did not appear to be surprised or afraid of his accomplice. He had a "stone-faced" expression. The bartender gave the money to the accomplice and both the accomplice and Lopezdolores got up and started walking toward the exit. One of them banged into a wall and they both ran out of the bar together; the accomplice first and then Lopezdolores. The police were able to identify Lopezdolores as one of the robbers because he left his wallet behind. The jury also heard Lopezdolores's testimony and it was instructed that "[m]ere presence at the scene of a crime or knowledge that a crime is being committed is not sufficient to establish that a defendant is guilty of an offense, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator."

We conclude that a rational juror could reasonably infer from this testimony that Lopezdolores conspired with his accomplice to rob the

bar, entered the bar while in possession of a handgun and with the intent to commit robbery, and used the handgun to commit robbery. See NRS 193.165(1); NRS 199.480(1); NRS 200.380(1); NRS 205.060(1), (4). Although Lopezdolores presented conflicting testimony, it is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

#### Evidentiary issues

Lopezdolores contends that the district court erred by allowing (1) a detective to testify about the contents of a surveillance recording that was not preserved by the State without instructing the jury to assume that the recording was exculpatory, (2) a witness to vouch for the credibility of another witness, (3) a witness to speculate that Lopezdolores could have stayed at the crime scene instead of fleeing with his accomplice, and (4) the State to admit a witness's prior consistent statement. Lopezdolores did not object to the admission of this testimony or seek an instruction regarding the surveillance recording. The failure to object during trial precludes appellate consideration of an issue unless it rises to the level of plain error. Estes v. State, 122 Nev. 1123, 1131, 146 P.3d 1114, 1120 (2006). Under the plain-error standard, an error that is plain from review of the record does not require reversal unless the defendant demonstrates that the error affected his substantial rights by causing "actual prejudice or a miscarriage of justice." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). We conclude that Lopezdolores has not demonstrated reversible plain error entitling him to relief.

### Jury instructions

Lopezdolores contends that the district court improperly instructed the jury as to his liability for possession of a firearm during a burglary and use of a firearm during a robbery. Because Lopezdolores did not object to the jury instructions at trial, we review for plain error. See Berry v. State, 125 Nev. \_\_\_, \_\_\_, 212 P.3d 1085, 1097 (2009). Although we conclude that the jury was not properly instructed on whether an unarmed offender is subject to an enhanced sentence pursuant to NRS 193.165, see Brooks v. State, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008), no relief is warranted because Lopezdolores failed to demonstrate actual prejudice or a miscarriage of justice, see Green, 119 Nev. at 545, 80 P.3d at 95.

### Prosecutorial misconduct

Lopezdolores contends that the prosecutor committed misconduct during cross-examination by questioning him about the credibility of several of the State's witnesses, his pre-arrest silence, and the sentence he received for a prior felony conviction. Although we conclude that the prosecutor committed misconduct by asking Lopezdolores to comment on the credibility of other witnesses, see Daniel v. State, 119 Nev. 498, 517-19, 78 P.3d 890, 903-04 (2003), Lopezdolores did not object to these questions and he has failed to demonstrate prejudice that would entitle him to relief, see Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Lopezdolores's pre-arrest silence claim is without merit, see Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (holding that pre-arrest silence may be used to impeach a criminal defendant's credibility), and his alleged error regarding his felony

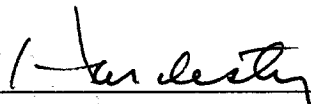
conviction is not plain or clear from the record, see Green, 119 Nev. at 545, 80 P.3d at 95.

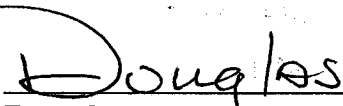
Cumulative error

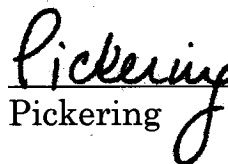
Lopezdolores contends that cumulative error deprived him of a fair trial. To the extent that there was error, we have balanced the relevant factors and we conclude that the cumulative effect of the errors did not deprive Lopezdolores of a fair trial and that no relief is warranted. See Valdez, 124 Nev. at 1195, 196 P.3d at 481 (when evaluating claims of cumulative error, we consider “(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged” (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000))).

Having considered Lopezdolores’ contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Pickering

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