IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY DEROSA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35032

FILED

JUN 13 2000

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

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving under the influence and/or driving while having 0.10 percent or more by weight of alcohol in the blood and/or having a blood alcohol content of 0.10 percent or more by weight of alcohol in the blood within two hours of driving. The district court subsequently sentenced appellant to twelve (12) to thirty (30) months in prison and a $2,000.00 fine.

Appellant contends that prosecutorial misconduct during voir dire examination of jurors and closing argument warrant reversal of the conviction. We disagree.

As a preliminary matter, we note that appellant concedes that he failed to object to either alleged instance of prosecutorial misconduct. As a general rule, the failure to object to prosecutorial misconduct precludes appellate review. See Williams v. State, 103 Nev. 106, 110-111, 734 P.2d 700, 703 (1987). After considering the comments challenged by appellant, we further conclude that they do not rise to the level of plain or constitutional error that would warrant deviation from this general rule. Moreover, even if we were to consider appellant's contentions, we would conclude that they lack merit.

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Appellant next contends that the district court erred in refusing to give two instructions proffered by the defense. We have considered both instructions and conclude that the district court did not err because the instructions were adequately covered by other instructions given to the jury. See Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) (stating general rule that criminal defendant is entitled to have jury instructions on defendant's theory of case unless instruction misstates law or is adequately covered by other instructions); see also Jefferson v. State, 108 Nev. 953, 954, 840 P.2d 1234, 1235 (1992). With respect to proffered Instruction No. 29, we further conclude that any error in the failure to give the instruction was harmless as there is sufficient evidence, even giving appellant the benefit of any margin of error in the test results, to support appellant's conviction under NRS 484.379(1)(a).

Having considered appellant's contentions and concluded that they lack merit, we

ORDER this appeal dismissed.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Michael E. Fondi, District Judge
Attorney General
Carson City District Attorney
State Public Defender
Carson City Clerk