IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE JAIRO MARTINEZ-PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71563

ORDER AFFIRMING IN PART AND VACATING IN PART

Jose Jairo Martinez-Perez appeals from a judgment of conviction, pursuant to a jury verdict, of trafficking in a schedule I controlled substance, possession with intent to sell a schedule I controlled substance, and possession of a schedule I controlled substance. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Martinez-Perez makes two primary arguments on appeal: (1) the district court erred by denying his motion for a mistrial based on two instances of prosecutorial misconduct; and (2) his convictions for both trafficking and for simple possession violate the Double Jeopardy Clause.[1]

The prosecutor's conduct was proper

Martinez-Perez complains that two statements made by the prosecutor during his closing argument to the jury constitute prosecutorial misconduct. Because of these instances of alleged prosecutorial misconduct, Martinez-Perez argues the district court erred in denying both his motion for a mistrial and his alternative motion to admonish the jury regarding these statements. Martinez-Perez further argues that these instances of alleged prosecutorial misconduct along with the district

[1]We do not recount facts except as necessary to our disposition.

court's erroneous denial of his requests to remedy this misconduct constitutes cumulative error that warrants reversal of his conviction.

We review claims of prosecutorial misconduct using a two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "First, we must determine whether the prosecutor's conduct was improper." *Id.* Second, if the conduct was improper, "we must determine whether the improper conduct warrants reversal." *Id.* A prosecutor may "suggest reasonable inferences that might be drawn from" the evidence presented at trial. *Klein v. State*, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989).

The first statement concerned the truck Martinez-Perez was driving at the time of his arrest. The prosecutor stated that the truck was "his [Martinez-Perez's] truck" and "[i]t's not like he was borrowing the truck or driving a truck and he had never driven it before and he didn't know the contents of it." Martinez-Perez did not contemporaneously object to these statements. Instead, during an oral motion for mistrial after the prosecutor's closing argument, he argued the State knew he was not the legal owner of the truck, and so these statements about the ownership of the truck were impermissibly misleading.

"As a general rule, '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.'" *Riley v. State*, 107 Nev. 205, 218, 808 P.2d 551, 559 (1991) (quoting *State v. Hunter*, 48 Nev. 358, 367, 232 P. 778, 781 (1925)). Because Martinez-Perez's counsel failed to object to these statements, we are not required to address them on appeal. *See id.*

Nonetheless, even if considered, the evidence presented in this case, including the testimony of one of the defense witnesses, supported the prosecutor's statements about the truck. Accordingly, we conclude the prosecutor's statements were not improper.

The second statement concerned a potential drug sale between Martinez-Perez and a passenger in the truck, Jesse Gangl. The prosecutor suggested that such a sale took place was "a logical inference" based on evidence presented that Gangl was removed from the passenger seat of the truck and that a small bag of methamphetamine was found near that seat. At trial, Martinez-Perez contemporaneously objected to this statement on the ground that the prosecutor had gone beyond the evidence presented in making these statements. The district court sustained this objection, but did not admonish the jury or counsel.

Martinez-Perez argues this statement "infected the trial with unfairness" because the jury submitted a question asking whether the act required for a conviction of possession with intent to sell had to be a physical exchange of material.[2] We disagree.

The record demonstrates that detectives found a small bag of methamphetamine on the passenger's side floorboard of the truck immediately after they removed Gangl from the passenger's seat. They also found a scale covered with methamphetamine residue and a ledger with names and amounts of money owed, described as a pay/owe sheet, on Martinez-Perez. Accordingly, we conclude the prosecutor's invitation for

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[2]The district court informed the jury that a physical exchange of material was not required for a conviction of possession with intent to sell.

the jury to infer that Martinez-Perez had sold that small bag to Gangl was not improper.[3]

Because neither of the prosecutor's statements Martinez-Perez complains of were improper, we conclude that no prosecutorial misconduct occurred in the proceedings below. Consequently, Martinez-Perez's two remaining arguments based on the alleged impropriety of these statements must also fail.

In particular, we conclude the district court did not abuse its discretion in denying Martinez-Perez's motion for a mistrial concerning these two proper statements as there was no prejudice. *Cf. Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004) (holding that a defendant's motion for a mistrial may be granted "where *some prejudice* occurs . . . .") (emphasis added). Moreover, because these statements were proper, the district court did not abuse its discretion by failing to admonish the jury about these statements specifically. *See Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Finally, because these statements were proper, they, or any rulings based on them, cannot be grounds for cumulative error.

Martinez-Perez's convictions for trafficking and simple possession violate the Double Jeopardy Clause

Martinez-Perez argues his convictions for both simple possession of methamphetamine and trafficking methamphetamine violate the Double Jeopardy Clause's prohibition on multiple punishments

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[3]Additionally, the language in the second amended information alleged Martinez-Perez committed a trafficking offense and included the elements of possession, sale, and/or delivery of methamphetamine.

for the same offense. He asks this court to vacate his conviction for possession.

At the outset, we conclude that the record demonstrates the State treated Martinez-Perez's offenses as stemming from a single criminal action: possession of a single large bag of methamphetamine. While a second, smaller bag of methamphetamine was found in the truck, the State specifically suggested this bag belonged to Gangl, not Martinez-Perez.

"A claim that a conviction violates the Double Jeopardy Clause generally is subject to de novo review on appeal." *Davidson v. State*, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008). The Double Jeopardy Clause protects against, *inter alia*, "multiple punishments for the same offense." *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012).

Because of this protection, "[a] person cannot be convicted of both a greater- and lesser-included offense." *LaChance v. State*, 130 Nev. 263, 273, 321 P.3d 919, 926 (2014). However, multiple punishments for the same offense are permissible when authorized by the legislature. *Id.* To determine whether the legislature has authorized multiple punishments, this court applies the elements test established in *Blockburger v. United States*, 284 U.S. 299 (1932). *Id.* Under this test, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses." *Barton v. State*, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), *overruled on other grounds by Rosa v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

Here, Martinez-Perez was convicted of both simple possession of methamphetamine and possession of a trafficking quantity of

methamphetamine, which is impermissible. NRS 453.3385(1), the trafficking statute, states that possession of a trafficking quantity occurs when "a person . . . who is knowingly or intentionally in actual or constructive possession of . . . any controlled substance which is listed in schedule I . . . or any mixture which contains any such controlled substance, shall be punished . . . if the quantity involved: (a) Is 4 grams or more . . . ."[4] NRS 453.336(1), the simple possession-of-a-controlled substance statute, prohibits a person from "knowingly or intentionally possess[ing] a controlled substance . . . ." Because the elements of simple possession are "entirely included" within the elements of possession of a trafficking quantity, possession is a lesser-included offense of possession of a trafficking quantity. *Compare* NRS 453.3385(1), *with* NRS 453.336(1). Thus, the Double Jeopardy Clause prohibits Martinez-Perez's conviction for both simple possession and trafficking in this case. *See LaChance*, 130 Nev. at 273-74, 321 P.3d at 927. Accordingly, we must vacate one of his convictions.

"Because the double-jeopardy analysis is based solely on the elements of the principal offenses, [we] look to the range of punishment for the principal offenses in deciding which conviction to vacate." *Id.* at 274, 321 P.3d at 928. Based on Martinez-Perez's criminal history, the charge for simple possession is a Category D felony, NRS 453.336(2)(b), with a sentencing range of 1 to 4 years, NRS 193.130(2)(d). Martinez-Perez's

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[4]While trafficking proscribes the sale or manufacture as well as the possession of more than 4 grams of any schedule I substance, we conclude that the record demonstrates the State treated Martinez-Perez's criminal act as limited to possession of methamphetamine, not a sale of the substance or the manufacture of the substance.

charge for trafficking is a Category B felony with a sentencing range of 1 to 6 years. NRS 453.3385(1)(a). As a result, we vacate Martinez-Perez's conviction for simple possession and direct the district court to enter an amended judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART.[5]


Silver, C.J.


Tao, J.


Gibbons, J.

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Washoe County District Attorney
Attorney General/Carson City
Washoe District Court Clerk

[5]We have carefully considered Martinez-Perez's remaining arguments and conclude they are without merit.