

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT MICHAEL TYZBIR,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43121

**FILED**

MAR 22 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, entered pursuant to a jury trial, of possession of a stolen motor vehicle in violation of NRS 205.273. First Judicial District Court, Carson City; William A. Maddox, Judge. The district court sentenced appellant Scott Tyzbir to serve a prison term of 24 to 60 months. Tyzbir asks this court to reverse his conviction.

Tyzbir first claims that the district court erred by refusing to continue the trial until a witness favorable to the defense, Christopher Weddell, could be located. "The decision to grant or deny trial continuances is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion."<sup>1</sup> The denial of a motion for a reasonable continuance may be an abuse of discretion "where the purpose of the motion is to procure important witnesses and the delay is not the particular fault of counsel or the parties."<sup>2</sup> To determine whether an abuse of discretion occurred, this court weighs the prejudice to the defendant if the continuance is denied against the prejudice to the

<sup>1</sup>Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996).

<sup>2</sup>Lord v. State, 107 Nev. 28, 42, 806 P.2d 548, 557 (1991).

district court and the administration of justice if the continuance is granted.<sup>3</sup>

Given that Tyzbir is unable to demonstrate how Weddell would have testified, let alone whether Weddell's testimony would have been material to his defense, any prejudice he might have sustained from the denial of his motion was minimal. Whereas had the district court granted the continuance, the prejudice to the district court and the administration of justice would have been significant. Tyzbir appears to have asked to continue the trial until Weddell could be found, and, as the district court observed, there was no indication that Weddell would ever be found. We conclude that the continuance would have been unreasonable and that district court did not abuse its discretion by denying it. The cases cited by Tyzbir are inapposite.<sup>4</sup>

Tyzbir also claims that the district court erred by refusing to give his proposed jury instructions. Specifically, he contends that he was entitled to instructions concerning the lesser-included offense of unlawful taking of a motor vehicle.<sup>5</sup> A defendant in a criminal case is entitled to a lesser-included offense instruction when it is consistent with his or her theory of the case and is supported by some evidence.<sup>6</sup> Tyzbir's theory of

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<sup>3</sup>See Mulder v. State, 116 Nev. 1, 9, 992 P.2d 845, 850 (2000) (citing Lord, 107 Nev. at 41, 806 P.2d at 556).

<sup>4</sup>Lord, 107 Nev. 28, 806 P.2d 548; Colgain v. State, 102 Nev. 220, 719 P.2d 1263 (1986); Banks v. State, 101 Nev. 771, 710 P.2d 723 (1985).

<sup>5</sup>See NRS 205.2715.


<sup>6</sup>Wegner v. State, 116 Nev. 1149, 1156-57, 14 P.3d 25, 30 (2000); Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

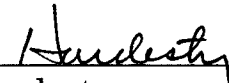
the case was not consistent with a charge of unlawful taking of a motor vehicle because he denied that he was in the Jeep.<sup>7</sup> Accordingly, Tyzbir was not entitled to the proposed instructions.

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

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

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

cc: Hon. William A. Maddox, District Judge  
Kay Ellen Armstrong  
Attorney General Brian Sandoval/Carson City  
Carson City District Attorney  
Carson City Clerk

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<sup>7</sup>See Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966); see also Ruland v. State, 102 Nev. 529, 531, 728 P.2d 818, 819 (1986).