

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY VERNON GREEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43421

**FILED**

NOV 16 2005

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
*J. Riva*  
CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of unlawful taking of a vehicle. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Anthony Vernon Green was found guilty of unlawful taking of a vehicle. He challenges the jury verdict, arguing that the district court erred by not allowing him to present two witnesses and by refusing to give requested jury instructions. He also argues that the prosecutor committed misconduct by commenting during closing argument on Green's lack of witnesses.<sup>1</sup> The parties are familiar with the facts, and we do not recount them in this order except as is necessary for our disposition.

Exclusion of Green's witnesses

We review a district court's decision to admit or exclude evidence for a clear abuse of discretion.<sup>2</sup> Under NRS 174.234(3)(a), parties have a continuing duty to provide the opposing party with notice of witnesses "as soon as practicable after the party determines that he

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<sup>1</sup>Green also argues that there were numerous other errors. We have considered his other assertions and conclude that they are without merit.

<sup>2</sup>Brown v. State, 110 Nev. 846, 852, 877 P.2d 1071, 1075 (1994); Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984).

intends to call an additional witness during the case in chief.” Under the circumstances, Green substantially complied with the requirements of NRS 174.234 when he notified the State via email as soon as was practicable after he learned of the two witnesses late on the Friday afternoon before trial. Green’s counsel also arranged a time for the State to interview the witnesses prior to trial, and although this would have slightly delayed the start of trial, it was a reasonable solution when compared to the harm that Green would have suffered by not having been allowed him to present evidence central to his defense.

Additionally, defendants have the constitutional right to discredit their accuser and this right “can be but limitedly circumscribed.”<sup>3</sup> To protect this constitutional right, there is a strong presumption to allow the testimony of even late-disclosed witnesses and evidence should be admitted when it goes to the heart of the case.<sup>4</sup> The witnesses Green sought to introduce were to speak to the relationship of the parties involved, which was central to Green’s defense. Thus, the district court abused its discretion when it excluded this testimony.

Even where the district court errs, this court will not reverse a conviction where the error is harmless beyond a reasonable doubt.<sup>5</sup> But where the error is not harmless, the conviction must be overturned.<sup>6</sup>

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<sup>3</sup>Reese v. State, 458 A.2d 492, 496 (Md. Ct. Spec. App. 1983).

<sup>4</sup>Farris v. State, 818 N.E.2d 63, 69 (Ill. App. Ct. 2004); see U.S. v. Shay, 57 F.3d 126, 134 (1st Cir. 1995).

<sup>5</sup>Rudin v. State, 120 Nev. 121, 136-37, 86 P.3d 572, 582 (2004); see Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

<sup>6</sup>See Ducksworth v. State, 114 Nev. 951, 954, 966 P.2d 165, 166 (1998); Summers v. State, 102 Nev. 195, 202, 718 P.2d 676, 681 (1986).

Here, the evidence of Green's guilt is not overwhelming. There are several inconsistencies in the testimony concerning Tamekia Brown's relationship with Green, and whether or not Green had her consent to drive her vehicle is a central question in determining his guilt. Therefore, because the witnesses Green attempted to introduce would have spoken to the relationship of the parties, and because the State's evidence against Green was certainly not overwhelming, the exclusion of Green's witnesses was not harmless and requires that this court reverse his conviction.

### Jury Instruction

We review the district court's decision to give a jury instruction for abuse of discretion.<sup>7</sup> Green offered proposed Jury Instruction No. 1, which states, "Once a person obtains permission to use a vehicle, he cannot be found guilty of stealing that vehicle, even if he subsequently exceeds scope of that permission." Green cites to State v. Clark,<sup>8</sup> a Washington case, to support this instruction. Although not a Nevada case, Green is correct that Clark is applicable here. Similar to the statute addressed in Clark, NRS 205.2715 requires that the State prove that the vehicle was taken both without the intent to permanently deprive and without the consent of the owner. However, the instruction offered at Green's trial made no mention that the jury had to find that Green took the vehicle without consent of the owner before it could find him guilty.

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<sup>7</sup>Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

<sup>8</sup>See State v. Clark, 638 P.2d 572, 574-75 (Wash. 1982) (determining that once a person obtains permission to use a vehicle, he cannot be guilty of joyriding, instead he should be charged with theft because Washington's joyriding statute includes lack of consent or permission as an element of the crime).

“[T]he defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be.”<sup>9</sup> The district court may “refuse a jury instruction on the defendant’s theory of the case [if it] is substantially covered by other instructions” or misstates the law.<sup>10</sup> Green maintained that Brown was his girlfriend and that initially she consented to his taking the vehicle. He offered evidence to support his theory, and, therefore, the district court erred by not instructing the jury accordingly. This error was plain and requires that his conviction be reversed.

#### Prosecutorial Misconduct

Green argues that the State committed prosecutorial misconduct because, during closing argument, the State commented that Green failed to produce either his sister or her friend as witnesses to support his defense that he was using Brown’s car to help his sister’s friend move. A conviction will be overturned where prosecutorial misconduct impacts the substantial rights of the defendant.<sup>11</sup> “[I]t is generally improper for a prosecutor to comment on the defense’s failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense.”<sup>12</sup> By making these comments during closing, the State impermissibly inferred that Green had a burden to

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<sup>9</sup>Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002) (quoting Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991)).


<sup>10</sup>Id. at 372, 46 P.3d at 77.


<sup>11</sup>Garner v. State, 78 Nev. 366, 372-73, 374 P.2d 525, 529 (1962).

<sup>12</sup>Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996); Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990).

produce witnesses and evidence of innocence. This impacted Green's substantial rights by shifting the burden of proof to Green. Therefore, this error was not harmless beyond a reasonable doubt, and Green's conviction must be reversed. Accordingly we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

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

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

 \_\_\_\_\_, J.  
Parraguirre

cc: Honorable Jackie Glass, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk