

IN THE SUPREME COURT OF THE STATE OF NEVADA

KARL JOSEPH MITCHELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43673

FILED

APR 19 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of theft. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge. The district court sentenced appellant Karl Joseph Mitchell to serve a prison term of 28 to 70 months.

Mitchell first contends that the district court erred in giving a jury instruction on embezzlement. Jury instruction number 17 stated:

Whenever any person who has leased or rented a vehicle willfully and intentionally fails to return the vehicle to its owner within 72 hours after the lease or rental agreement has expired, that person may reasonably be inferred to have embezzled the vehicle.

Mitchell contends that jury instruction number 17 was erroneous because he could not legally be convicted of theft¹ under a theory of embezzlement because the vehicle taken was not lawfully entrusted to him. More particularly, Mitchell notes that he obtained the vehicle pursuant to a sublease from Elizabeth Glennen that he argues was an illegal agreement because it was not permitted under the terms of Glennen's lease with

¹Mitchell was charged under NRS 205.0832, the omnibus theft statute. The amended information alleged theft by alternative means.

General Motors Corporation. Additionally, Mitchell contends that the permissive inference contained in jury instruction number 17 is improper because (1) it allowed the jurors to infer the crime of embezzlement from four isolated facts rather than consider all the evidence presented at trial; and (2) failed to inform the jurors that "it was the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in Mr. Mitchell's case warranted any inference which the law permitted the jury to draw."

Preliminarily, we note that Mitchell failed to preserve this issue for appeal because, at the proceedings below, he did not challenge jury instruction 17 on the record on the grounds that he could not legally be convicted of theft by means of embezzlement or that it contained an improper permissive inference. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights.² Generally, a defendant must show that he was prejudiced by a particular error in order to prove that it affected substantial rights.³

In this case, we conclude that the giving of jury instruction number 17 did not prejudice Mitchell. We note that the jury instruction contained a correct statement of Nevada law with respect to the willful or intentional failure to return a leased vehicle.⁴ Additionally, this court has recognized that jury instructions phrased in the form of permissible

²See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

³Id.

⁴See NRS 205.312.

inferences comport with Nevada law.⁵ Finally, any error involving jury instruction number 17 was harmless beyond a reasonable doubt because it did not affect the reliability of the jury's verdict.⁶

Second, Mitchell contends that the district court abused its discretion in granting the State's motion to admit other bad act evidence. Specifically, Mitchell argues that evidence that he had, on two previous occasions, purchased or rented a vehicle and failed to either make payments under the contracts or return the vehicle was highly prejudicial. We conclude that Mitchell's contention lacks merit.

In this case, the record indicates that the district court admitted the prior bad act evidence at issue after conducting a Petrocelli hearing⁷ and considering the factors set forth in Tinch v. State⁸ and NRS 48.045(2).⁹ We conclude that the district court did not commit manifest error in admitting the other bad act evidence. The evidence was relevant

⁵Hollis v. State, 96 Nev. 207, 209, 606 P.2d 534, 536 (1980), modified on other grounds by Thompson v. State, 108 Nev. 749, 838 P.2d 452 (1992); see also NRS 47.230.

⁶See Collman v. State, 116 Nev. 687, 722-23, 7 P.3d 426, 449 (2000).

⁷Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

⁸113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

⁹Mitchell also argues that the district court erred in failing to make a specific finding that the other bad acts were proven by clear and convincing evidence and were relevant to the crime charged. While we note that specific district court findings are more conducive to appellate review, the record is sufficient for this court to determine that each Tinch factor is satisfied and, therefore, any lack of specificity in the district court's express finding is harmless. See Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

to negate Mitchell's claim that he did not have the intent to steal when he failed to make payments under the lease agreement or return the vehicle.¹⁰ Further, the other bad acts were proven by clear and convincing evidence, namely, through witness testimony at trial. Finally, any danger of unfair prejudice was alleviated because in charging the jury the district court gave a limiting instruction.¹¹ Because the district court properly analyzed the admissibility of the prior bad act evidence by the standard set forth in NRS 48.045(2), we conclude that it did not abuse its discretion in granting the State's motion to admit prior bad act evidence.

In a related argument, Mitchell contends that reversal of his conviction is warranted because the district court failed to give a limiting instruction prior to the introduction of the prior bad act evidence.

In Tavares v. State, this court concluded that “the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of trial.”¹² Nevertheless, this court recently stated that “under Tavares we consider the failure to give such a limiting instruction to be harmless if the error did not have a substantial and injurious effect or influence the jury’s verdict.”¹³ Although

¹⁰See Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996) (vehicular and store burglaries would be admissible in vehicular burglary trial to show felonious intent at time of entry).

¹¹See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001) (discussing the importance of a limiting instruction).

¹²Id. at 733, 30 P.3d at 1133.

¹³Rhymes v. State, 121 Nev. ___, ___, 107 P.3d 1278, 1282 (2005) (citing Tavares, 117 Nev. at 732, 30 P.3d at 1132).

a limiting instruction was not given before admission of the bad act evidence, before the jury heard the bad act evidence, the prosecutor explained the limited purpose of the bad act evidence in opening argument. Additionally, the State presented overwhelming evidence of Mitchell's guilt. Accordingly, we conclude that the failure of the district court to provide a limiting instruction before the testimony in question did not influence the jury, and therefore, was harmless error.

Third, Mitchell contends that the district court erred in admitting hearsay testimony under the business records exception.¹⁴ In particular, Mitchell contends that Shannon Mickelson, an employee of Ford Motor Credit, was not qualified to testify about the records because there was no evidence that she had the care, custody, and control of the records of regularly conducted business activity of Ford Motor Company. We conclude that Mitchell's contention lacks merit.

A trial court has considerable discretion in determining whether the requisite foundation has been laid to admit evidence under the business records exception to the hearsay rule.¹⁵ A "qualified person" to authenticate a business record is "anyone who understands the record-keeping system involved" and knows "the documents were kept in the

¹⁴Mitchell also states, in a single sentence in a footnote in his brief, that the trial court erred in admitting the hearsay testimony of the State's rebuttal witness, Ory Norris. We need not consider his argument because Mitchell failed to make any cogent argument or cite any legal authority in support of his contention that the district court erred in admitting the testimony. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

¹⁵Thomas v. State, 114 Nev. 1127, 1147-48, 967 P.2d 1111, 1124-25 (1998); see also NRS 51.135.

ordinary course of business and the procedures for completing those writings."¹⁶

In this case, the district court did not err in ruling that Mickelson was a qualified person to authenticate the business records of Ford Motor Credit. Mickelson testified that she had been employed as a team leader with Ford Motor Credit for fifteen years, supervised eleven employees in the account service department, and that she had "working knowledge" of the business records involving the Ford vehicle sold to Mitchell. Accordingly, Mickelson was adequately qualified to authenticate the business records.

Finally, relying on Daniel v. State,¹⁷ Mitchell contends that reversal of his conviction is warranted because the prosecutor committed misconduct. In particular, Mitchell argues that the prosecutor acted improperly (1) on cross-examination, when he "required both defense witnesses to state other witnesses were lying"; (2) in closing argument, by arguing that the defense witnesses were lying, while the State's witnesses had no motive to lie; and (3) by expressing his personal opinions of the evidence and essentially providing unsworn testimony through his trial objections and his requests to admit evidence.

Our review of the record indicates that Mitchell failed to object to the prosecutorial misconduct. That failure generally precludes

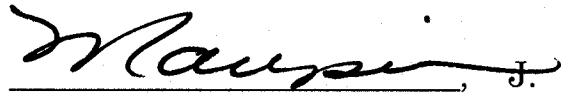
¹⁶Id. at 1148, 967 P.2d at 1125.

¹⁷119 Nev. 498, 519, 78 P.3d 890, 904 (2003) (adopting a rule "prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses").

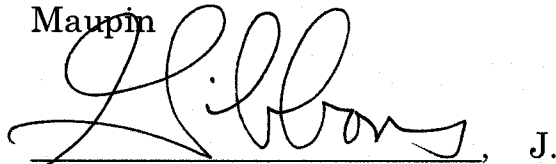
appellate consideration absent plain error affecting substantial rights.¹⁸ We conclude that the prosecutor's conduct did not prejudice Mitchell's defense. This court has stated that "[t]he level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt."¹⁹ "If the issue of guilt or innocence is close, [and] if the [S]tate's case is not strong, prosecutor[ial] misconduct will probably be considered prejudicial."²⁰ In this case, the State presented overwhelming evidence of Mitchell's guilt. Therefore, we conclude that the prosecutor's misconduct was harmless beyond a reasonable doubt.²¹

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

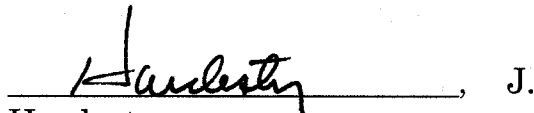
ORDER the judgment of conviction AFFIRMED.



Maupin



Gibbons



Hardesty

¹⁸See Gallego, 117 Nev. at 365, 23 P.3d at 239.

¹⁹Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998).

²⁰Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

²¹See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (holding "where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error").

cc: Hon. Robert W. Lane, District Judge
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