

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY LEE JONES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43949

**FILED**

NOV 16 2005

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT  
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a stolen vehicle. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge. The district court sentenced appellant Johnny Lee Jones to serve a prison term of 18 to 48 months.

First, Jones contends that the district court erred in granting his request for self-representation. In particular, Jones contends that: (1) the district court did not make an adequate inquiry into his competency; (2) Jones was not competent to represent himself because he had a history of mental health problems and was taking Seroquil, a medication for his psychiatric condition; (3) the Faretta<sup>1</sup> canvass was inadequate because he was not advised about the penalty for the charged crime; and (4) his decision to represent himself was coerced by disagreement with defense counsel over the theory of defense. Additionally, Jones contends that the district court should have denied his request for self-representation because it concluded that "it would be a terrible miscarriage of justice if

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<sup>1</sup>Faretta v. California, 422 U.S. 806 (1975).

[he] represented [himself]" because he did not "know what [he] was doing." We conclude that Jones' contentions lack merit.

On two occasions, the district court thoroughly canvassed Jones, ensuring that his waiver of the right to counsel was voluntary, knowing and intelligent as required by Faretta and codified in SCR 253. Despite his contention otherwise, Jones was canvassed with respect to the penalty for the charged offense and correctly informed the court that the possible sentencing range was "one to ten and a fine of \$10,000.00." Before granting Jones' request for self-representation, the district court ordered a competency evaluation, and the evaluation concluded that Jones was competent to assist his attorney in his defense. The district court also appointed Jones stand-by counsel, with whom Jones had the opportunity to consult at all times during the trial. Moreover, we note that the rational nature of Jones' conduct at trial belies his claim that he was not competent to choose self-representation. Finally, the transcripts of the Faretta canvasses indicate that Jones' decision to exercise his right to self-representation was voluntary and not the product of coercion.<sup>2</sup> After the district court advised Jones that he would be "far better off" if he let his attorneys handle the case, Jones responded: "[b]ut they haven't really went through the case like I have. I've been going through this case over six months." Based on the foregoing, we conclude that the record as a whole demonstrates that appellant was competent to choose self-representation, and that the district court adequately canvassed appellant regarding his decision. Accordingly, the district court did not err in allowing Jones to represent himself at trial.<sup>3</sup>

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<sup>2</sup>See generally Harris v. State, 113 Nev. 799, 942 P.2d 151 (1997).

<sup>3</sup>See Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996).

Second, Jones contends that the district court violated his constitutional rights to due process, self-representation and equal protection by refusing to allow him to question the prospective jurors during voir dire. In particular, Jones contends that the district court's voir dire procedure of requiring him to submit all written questions in advance improperly and arbitrarily denied him the right to ask supplemental questions during the voir dire process. We conclude that Jones' contention lacks merit.

As a preliminary matter, we note that Jones failed to object to the voir dire procedure conducted by the district court. Generally, the failure to object below precludes appellate review absent plain or constitutional error.<sup>4</sup> We conclude that no such error occurred here. The record indicates that Jones actively participated in the voir dire process. He submitted written questions to the district court outside the presence of the proposed jurors, and the district court incorporated some of those questions into the voir dire examination. Moreover, the questions posed by the district court were sufficient for Jones to determine whether the jurors could consider the facts impartially and properly apply the law as charged by the court, and Jones passed the jury for cause without requesting supplemental examination.<sup>5</sup> Accordingly, we conclude that the district court did not violate Jones' constitutional rights by limiting the scope of voir dire.

Third, Jones contends that the district court erred by selecting the alternate juror in a manner that did not comply with NRS 175.061. In

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<sup>4</sup>See NRS 178.602; Collins v. State, 113 Nev. 1177, 1184, 946 P.2d 1055, 1060 (1997).

<sup>5</sup>See Witter, 112 Nev. at 914, 921 P.2d at 891.

particular, Jones contends that the district court erred "because all the peremptories were lumped together" thereby impairing his right to exercise a peremptory challenge against the alternate. We conclude that Jones' contention lacks merit.

As previously discussed, Jones failed to object to the manner in which voir dire was conducted and, therefore, has waived the issue absent plain or constitutional error. We conclude that the voir dire procedure employed by the district court did not rise to the level of plain or constitutional error. After voir dire examination, the district court instructed Jones and the district attorney to submit their peremptory challenges in writing. After doing so, nine potential jurors were dismissed by the district court, and twelve jurors and an alternate were impaneled. There is no indication in the record that Jones' right to exercise a peremptory challenge was impaired or curtailed and, even assuming that the district court did not comply with the procedures set forth in NRS 175.061, Jones has failed to show that he was prejudiced by any purported error.

Fourth, Jones contends that district court violated NRS 175.161(1)<sup>6</sup> and his right to due process of law by giving oral jury instructions before opening statements without the permission of either party. Specifically, Jones argues that the introductory remarks made to the jurors at the beginning of trial were tantamount to jury instructions because the district court explained the difference between direct and circumstantial evidence, discussed how to determine the credibility of

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<sup>6</sup>NRS 175.161(1) states that "[u]pon the close of the argument, the judge shall charge the jury" but the court may give the jury instructions before the closing if either side so requests.

witnesses, and admonished the jurors not to be influenced by personal feelings and sympathy for either side. We conclude that Jones' contention lacks merit.

Again, we note that Jones failed to object to the district court's introductory comments at trial and, therefore, has waived his right to appeal this issue, absent plain or constitutional error. We conclude that no such error occurred, and disagree that the introductory remarks of the district court were tantamount to jury instructions. In context, the purpose of the district court's opening remarks was to advise the jurors about basic courtroom procedure and rules. To the extent that some of the commentary included language similar to the jury instructions, there is no indication that the judicial commentary contained an incorrect statement of law or prejudiced Jones. To the contrary, the district court stated that: "No statement, ruling, remark or comment which I may make during the course of this trial is intended to indicate my opinion as to how you should decide the case." Accordingly, we conclude that the district court's opening remarks did not result in a violation of Jones' statutory or constitutional rights.

Fifth, Jones contends that the district court erred in granting the State's oral motion to amend the information to add the allegation that the value of the vehicle stolen exceeded \$2,500.00 because the additional allegation changed the penalty for the charged offense from a category C felony to a category B felony.<sup>7</sup> For the first time on appeal, Jones argues that he was prejudiced by the amendment "because he was not present when the amendment occurred and it is not clear from the record if he was

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<sup>7</sup>Compare NRS 205.273(3); 193.130(2)(c) with NRS 205.273(4).

ever put on notice that the additional element of value was added." We conclude that Jones' contention lacks merit.

In particular, we conclude that the amendment to the information did not prejudice Jones' substantial rights. First, we note that the oral motion to amend the information was granted approximately one month before trial, on April 30, 2004. Additionally, the amendment did not arise from a fundamental change in the State's theory of the case, but instead was necessary to correct a clerical error in the information. In particular, the information did not accurately reflect the fact that Jones was bound over on the category B felony.<sup>8</sup> At the preliminary hearing, on November 7, 2003, Jones received notice that he was being charged with the category B felony when in the presence of Jones and his former defense counsel, the justice court stated:

It appears from the Complaint on file herein and the evidence introduced at this preliminary hearing that there is probable cause to find that the car described in the Criminal Complaint was, in fact, stolen and it had a value in excess of \$2,500.00, and there's slight or marginal evidence that indicates that the defendant, Johnny Lee Jones, knew the car was stolen; therefore, the defendant is bound over on the charge of possession of a stolen vehicle.

Because the record does not indicate that Jones was prejudiced by a material change in the information, we conclude that the district court did not err in granting the State's motion to amend.

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<sup>8</sup>See generally Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995) and Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983) (reversing the appellant's conviction because the charging documents permitted the State to change the theory of the case without affording sufficient notice to the defense).

Sixth, Jones contends that the district court erred by failing to suppress evidence of a key to the stolen vehicle found in Jones' pocket after a pat-down search because its incriminating nature was not apparent until after the police officer removed it from his pocket. Jones also contends that the district court erred by failing to suppress his statement made to a police officer because it was taken in violation of his Miranda<sup>9</sup> rights. Jones, however, failed to raise these issues in a pretrial motion to suppress filed in the district court. As we have previously discussed, we will not consider issues raised for the first time on appeal absent plain or constitutional error. We decline to consider the issues of the legality of the pat-down search or whether Jones was entitled to Miranda warnings because they involve factual and credibility determinations that should be made by the district court in the first instance.

Seventh, Jones contends that the district court erred by failing to suppress his statement to a police officer because it was coerced. Citing to McMorran v. State,<sup>10</sup> Jones contends that the police officer's threats to arrest him unless he gave a statement rendered the statement involuntary. We conclude that Jones' contention lacks merit.

As a preliminary matter, we note that Jones failed to file a pretrial suppression motion challenging the voluntariness of his statement to the police. However, after the police officer testified at trial, Jones made an oral motion to suppress his statement to the police on the grounds that it was coerced. After hearing argument from Jones and the

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<sup>9</sup>Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>10</sup>118 Nev. 379, 46 P.3d 81 (2002) (recognizing that acquiescence due to official intimidation is not a voluntary waiver of a constitutional right).

prosecutor, the district court denied the oral motion to suppress. We conclude that the district court did not err in denying the motion.

At trial, North Las Vegas Police Officer Charles Stucky testified that he observed Jones exit a stolen truck. Officer Stucky observed that Jones appeared to be nervous and looked like he was going to attempt to run away. Officer Stucky approached Jones, informed him that he just gotten out of a stolen vehicle, and explained that he was investigating why Jones was in the car. Officer Stucky handcuffed Jones to prevent him from escaping and for purposes of officer safety, but testified that Jones was not under arrest at that time because he had not yet determined whether Jones knew the vehicle was stolen. Officer Stucky then asked Jones about the truck, and Jones stated that he was sitting at a bus stop and an individual drove up and offered to rent him the truck for \$20.00 for one hour. According to Officer Stucky, Jones gave several versions of the story and eventually admitted that although the individual who rented him the truck said it was not stolen, "he thought that the vehicle might be stolen but he didn't have very far to drive so he would chance it." Officer Stucky described Jones' demeanor as calm and cooperative throughout the encounter and, notably, Officer Stucky did not testify that he threatened Jones with arrest in order to get him to make a police statement. Accordingly, we conclude that the district court did not err in denying the oral motion to suppress.

Eighth, Jones contends that the evidence was insufficient to convict him of the category B felony because the State did not present any evidence of the fair market value of the truck on the day it was stolen. We disagree. NRS 205.273(6) specifically provides that the value of the vehicle "shall be deemed to be the highest value attributable to the vehicle by any reasonable standard." The victim testified that he paid \$24,000.00



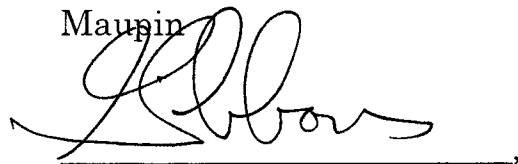
for the 2000 Ford F-150 truck when he bought it three years before it was stolen. We conclude that the jury applied a reasonable standard based on the purchase price and appropriately determined that the value of the truck was greater than \$2,500. Moreover, we reject appellant's contention that the jury was improperly instructed regarding the determination of the value of the truck. The jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.<sup>11</sup>

This court notes, however, that the judgment of conviction states that appellant was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. Therefore, we conclude that this matter must be remanded to the district court for the limited purpose of entering a corrected judgment of conviction. Accordingly, we

ORDER the judgment of conviction AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

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<sup>11</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

cc: Hon. John S. McGroarty, 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