

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEE KIMMELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44443

**FILED**

OCT 25 2005

ORDER OF AFFIRMANCE

JANEITE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Rehaide*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Robert Lee Kimmell to serve a prison term of 48-120 months to run consecutively to the sentence imposed in district court case no. CR04-0796.

First, Kimmell contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Specifically, Kimmell claims that "[t]he frailty of the eyewitness" testimony was insufficient to connect him to the crime. We disagree with Kimmell's contention. Alternatively, Kimmell contends that he is entitled to a new trial based on conflicting evidence. Kimmell, however, did not file a motion for a new trial in the district court, as required by NRS 176.515,<sup>1</sup> and therefore, we will not address this contention. Additionally, Kimmell provides numerous citations to cases

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<sup>1</sup>NRS 176.515(4) provides that "[a] motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period." See also Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

addressing issues related to pretrial identification procedures, however, he has not provided any cogent argument or applied those principles to the facts of his case in any manner, and our review of the record reveals that Kimmell did not raise this issue in the district court. Therefore, we will not address this issue either.<sup>2</sup>

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>3</sup> In particular, we note that eyewitness, Micah Kengle, testified that he was walking with his son and dogs when he observed a woman climbing over a chain-link fence onto the property of Camping Companies, a business that repossesses collateral for different lending agencies. The woman climbing over the fence was Kimmell's codefendant, Lisa Grant. It was a Saturday, and Camping Companies was closed. There was a white male with a shaved head and short hair, wearing brown pants, already inside the property, and Kengle watched him help Grant climb over the fence. Kengle also noticed a white car, with its trunk open, parked next to the fence, outside the business' property. For approximately ten minutes before calling the police, Kengle watched Grant and the man, later identified as Kimmell, checking out a boat and a trailer on the Camping Companies lot. Later, after both Grant and

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<sup>2</sup>See generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

<sup>3</sup>See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Kimmell were taken into custody, Kengle identified them as the two individuals that were on the property of Camping Companies.

The police arrived at the scene approximately 10-15 minutes after Kengle's call. Sparks Police Officer Eric Curtis testified that he eventually spotted Grant and Kimmell "real close together walking on the north side of the Truckee River up against the bank in the bushes. . . . [T]hey were wading in the river." Officer Curtis stated that Grant and Kimmell were moving "[l]ike they were hiding from something." Grant and Kimmell were directed out of the river by Officer Curtis and his partner, and they both matched the general description provided by Kengle.

Officer Andrew Schreiber testified that Kimmell gave inconsistent statements regarding his whereabouts prior to being detained, and that Kimmell claimed to have never seen the white car parked by the fence with its trunk open. Kimmell told the officer that he had been with his girlfriend, Lisa Grant, throughout the day. Grant, as well, denied knowing anything about the white vehicle parked next to the fence. An inventory search of the white vehicle revealed a black purse containing Grant's identification and two framed photographs of Kimmell. There were also various documents in the name of Greg Tollen, along with a car key found in a duffel bag. The manager of Camping Companies, Robert Brookshire, informed Officer Schreiber that the key belonged to a truck that the business had repossessed. Officer Schreiber and Brookshire walked through the yard and located a red GMC Jimmy with its front passenger door ajar. Brookshire noted that it was unusual to have a vehicle on the property left with an open door when the business was closed. Brookshire also testified that "there was a bunch of stuff in this

vehicle that looked like maybe possibly somebody had gone through it.” The red GMC Jimmy, prior to being repossessed, belonged to Greg Tollen.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Kimmell committed the crime of burglary.<sup>4</sup> It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury’s verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.<sup>5</sup> We also note that circumstantial evidence alone may sustain a conviction.<sup>6</sup> Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Kimmell contends that the district court erred in rejecting his proffered jury instruction on circumstantial evidence. Citing to Buchanan v. State<sup>7</sup> for support, Kimmell requested the following instruction: “Circumstantial evidence alone can certainly sustain a criminal conviction. However, to be sufficient, all the circumstances taken together must exclude to a reasonable certainty every hypothesis but the single one of guilt.” The district court rejected Kimmell’s instruction, stating, “I believe that when we start talking about all of the circumstances and moral certainty hypothesis, I think it has a tendency to confuse and mislead a jury.” We conclude that Kimmell’s contention is without merit.

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<sup>4</sup>See NRS 205.060(1).

<sup>5</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).

<sup>6</sup>See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

<sup>7</sup>Id.

The district court's broad discretion in settling jury instructions will not be disturbed absent an abuse of discretion or judicial error.<sup>8</sup> The district court may refuse to give a proposed jury instruction if the content is substantially covered by other jury instructions.<sup>9</sup> Although Kimmell's proposed instruction is a correct statement of law, we conclude that the instruction was substantially covered by other jury instructions, specifically, those explaining the presumption of innocence, reasonable doubt, and the State's proffered instruction on intent, direct and circumstantial evidence. Accordingly, we conclude that the district court did not abuse its discretion.

Finally, Kimmell contends that the district court erred in allowing the State to commit prosecutorial misconduct. Kimmell challenges the following exchange between the prosecutor and the manager of Camping Companies, Robert Brookshire, during the State's case-in-chief:

STATE: If Mr. Kimmell or Miss Grant was [sic] in possession of some property from Mr. Tollen, would that have been without anyone's consent?

BROOKSHIRE: Yes, it would.

Defense counsel objected on the grounds of speculation. The district court overruled the objection. Kimmell claims that "[t]he result of the question and answer was that the State's burden was improperly reduced as to a material issue and the jury was handed a factual conclusion that they then did not have to arrive at on their own." We disagree with Kimmell's contention.

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<sup>8</sup>Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).


<sup>9</sup>See Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002).

“The decision to admit or exclude evidence rests within the trial court’s discretion, and this court will not overturn that decision absent manifest error.”<sup>10</sup> In this case, Brookshire had already testified, without objection from Kimmell, that the business was closed on the day in question, that neither Kimmell nor Grant had permission to be on the property at the time, that only employees have permission to go into a vehicle, and that once a vehicle is repossessed, it becomes the property of the business. Further, Brookshire testified that personal property found in a repossessed vehicle becomes the property of the business if not claimed within 60 days. Based on the above, we cannot conclude that prosecutor improperly elicited testimony amounting to inadmissible evidence. And finally, we conclude that the district court did not commit manifest error in overruling Kimmell’s objection to the State’s line of questioning.

Therefore, having considered Kimmell’s contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

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

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

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<sup>10</sup>Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

cc: Hon. Steven R. Kosach, District Judge  
John P. Calvert  
Attorney General Brian Sandoval/Carson City  
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Washoe District Court Clerk