IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD G. WHITFIELD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46765

FILED

APR 05 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. The district court sentenced appellant Ronald Gene Whitfield to serve a prison term of 19 to 48 months. It further ordered the sentence to be suspended and placed Whitfield on probation for an indeterminate period not to exceed three years.

First, Whitfield contends that there was insufficient evidence to support his conviction for possession of a stolen vehicle. However, our review of the record reveals sufficient evidence to establish Whitfield's guilt beyond a reasonable doubt as determined by a rational trier of fact.[1] In particular, we note that the jury heard testimony that Whitfield was found in possession of a 2003 Dodge Durango that had been stolen from Thrifty Rent-A-Car. Whitfield rented the Durango from someone allegedly named "Happy" for $300.00 a month. Whitfield did not know Happy. The rental agreement was confirmed with a handshake, and made without a

[1]See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

contract or the vehicle registration. Whitfield stored the Durango in his girlfriend's garage for three weeks without driving it and he told his girlfriend not to drive it until he got the registration. When Whitfield was unable to get the registration from Happy, he called a friend at the California Department of Motor Vehicles and asked her to run the license plate number and see if the Durango was stolen. However, she was unable to run the plate number, and Whitfield did not further investigate the Durango's status. We conclude that the jury could reasonably infer from the circumstantial evidence presented at trial that Whitfield possessed a vehicle which he had reason to believe had been stolen.[2] 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, substantial evidence supports the verdict.[3]

Second, Whitfield contends that the district court abused its discretion by admitting improper opinion testimony. Whitfield claims that, over his objections, Las Vegas Metropolitan Police Detective Nathan Chio was allowed to present opinions as to the value of the stolen vehicle and whether a reasonable person would have known that the vehicle was stolen. The record reveals that Detective Chio was allowed to testify as a lay witness. Lay witnesses may offer opinions that are rationally based on their perception and helpful to the jury's understanding of their testimony

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[2]See NRS 205.273(1)(b); Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (providing that circumstantial evidence alone may sustain a conviction).

[3]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

or determination of a fact in issue.[4] Detective Chio's opinion as to the value of the stolen Durango was based on his observations of the Durango at the time it was recovered and his experience in determining vehicle values. His opinion was helpful in determining whether Whitfield should have known the vehicle was stolen based on the amount of rent he agreed to pay. Detective Chio's testimony that he "believed any reasonable person should have known better or would have known that the vehicle was stolen" was not offered as an opinion. Instead, it was offered in response to the defense question, "Why didn't you respond to [Whitfield's interview] statement, 'I never thought it was stolen.'" Under these circumstances, we conclude that the district court did not abuse its discretion.

Third, Whitfield contends that the district court abused its discretion by admitting hearsay testimony under the business record exception.[5] 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.[6] The trial transcript reveals that Edward Wendlenner testified that he was the security manager for the Dollar Thrifty Group, a number of cars were discovered missing following an inventory, and by virtue of his position he had access to the inventory records. Thereafter, the State asked Wendlenner whether

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[4]NRS 50.265.

[5]See NRS 51.135.

[6]Thomas v. State, 114 Nev. 1127, 1147-48, 967 P.2d 1111, 1124-25 (1998).

he had "any record showing how mileage was on that car at the time it was reported stolen," and Whitfield objected on grounds that Wendlenner was not a record custodian. We conclude that the State laid an adequate foundation for admitting the information contained in the inventory records and that the district court did not abuse its discretion by overruling Whitfield's objection.

Fourth, Whitfield contends that the prosecutor committed misconduct by improperly impeaching him during cross-examination. Whitfield specifically claims that the prosecutor did not have a good faith factual basis for asking questions about his nephew. However, Whitfield failed to object to this line of questioning at trial, and he has not demonstrated that the prosecutor's questions were patently prejudicial.[7]

Fifth, Whitfield contends that the prosecutor committed misconduct by shifting the burden of proof to the defense. Specifically, Whitfield claims that during cross-examination the prosecutor improperly asked him if had any documentation that would prove that he had lost his mother's house and whether his mother, nephew, girlfriend, or Happy were present in court to back-up his story. We have repeatedly stated that it is improper for a prosecutor to comment on the defense's failure to produce evidence because such comments shift the burden of proof to the defense.[8] In Evans v. State, however, we agreed with the proposition that

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[7]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (holding that when appellant fails to object below, this court reviews alleged prosecutorial misconduct only if it constitutes plain error, i.e., if it is shown to be patently prejudicial).

[8]See Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996).

"as long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented."[9] In other words, "in some instances the prosecutor may comment on a defendant's failure to substantiate a claim."[10] We conclude that the prosecutor's questions were properly made in response to unsubstantiated claims presented during Whitfield's direct examination.

Sixth, Whitfield contends that the prosecutor committed misconduct by characterizing his testimony as lies. He points to the following comments, which the prosecutor made during his final rebuttal argument:

> Now, going back to credibility, you can't have missed that the defendant started telling lies very quickly after he hit the witness stand. The first things out of his mouth were -- well, he had just said that he had lost his business, that he had lost his home. But then when you pressed him on any of these things, you found out that he didn't have a home in the first place, and he didn't have a business in the first place either. He had lied. He made that up. And whenever you try to tighten the screws on him and get some hard information, was he forthcoming with anything to show that he was being truthful? No. How many times did he get caught backing up and say, Okay, well, actually I didn't have a home. He even offered something that wasn't asked. So you lost your mother's home, not your home, but your

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[9]117 Nev. 609, 631, 28 P.3d 498, 513 (2001) (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992)).

[10]Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001).

> mother's home? Yes, but then I bought her another one. Oh, oh, well, actually I didn't, she did. I mean, just reflectively, instinctively he lied about that, and it wasn't even asked. He was -- He was doing that repeatedly when a little bit of pressure was on him to provide any kind of details whatsoever.
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> A person that will do that on the witness stand, under oath, shows themselves not to be credible. Why are they lying? Why are they repeatedly asserting things that aren't true that they have no evidence for and they know no evidence is obtainable? Even when you're trying to get information so you can verify the story and they refuse to give to give it to you, why? Because they know they're lying, and they don't have any trouble lying even though they took a solemn oath to tell the truth before they started testifying.

We have long held that a prosecutor is prohibited from calling a defendant a "liar."[11] In Rowland v. State, we relaxed this prohibition and set a new standard for determining when the prosecutor's characterization of the credibility of a witness amounts to misconduct.[12] We explained that

> A prosecutor's use of the words 'lying' or 'truth' should not automatically mean that prosecutorial misconduct has occurred. But condemning a defendant as a 'liar' should be considered prosecutorial misconduct. For those situations that fall in between these two examples, we must

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[11]See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990); see also Rowland v. State, 118 Nev. 31, 39 n.6, 39 P.3d 114, 119 n.6 (2002).

[12]118 Nev. at 39-40, 39 P.3d at 119.

> look to the attorney for the defendant to object and the district judge to make his or her ruling on a case-by-case basis.[13]

Whitfield did not object to the prosecutor's comments. However, the error is plain,[14] the prosecutor committed misconduct by condemning Whitfield as a liar. Nonetheless, given the strength of the evidence presented by the State, we conclude that the prosecutor's misconduct was harmless.[15]

Seventh, Whitfield contends that the district court erred by denying proposed jury instructions. Whitfield specifically claims that he was entitled to a "two reasonable interpretations" instruction and a lesser-included-offense instruction on unlawful taking of a vehicle. As a general rule, a defendant is entitled to jury instructions on his or her theory of the case so long as some evidence, "no matter how weak or incredible," exists to support it, and if the proposed instruction contains the correct law.[16] However, the district court may refuse jury instructions on the defendant's theory of the case which are substantially covered by other instructions.[17] Whitfield's "two reasonable interpretations" instruction was substantially covered by the reasonable doubt instruction,[18] and unlawfully taking a

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[13]Id.

[14]See NRS 178.602.

[15]See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991).

[16]Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 895 (1987).

[17]Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995).

[18]See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002).

vehicle is not a lesser-included-offense of possession of a stolen vehicle.[19] Accordingly, the district court did not abuse its discretion by refusing to give Whitfield's proposed instructions.

Eighth, Whitfield contends that the district court abused its discretion by improperly instructing the jury that "You are further instructed that knowledge by the defendant of the stolen nature of the vehicle may be inferred from all of the evidence and the reasonable inferences which may be drawn therefrom." Whitfield claims that this instruction misstates our holding in Montes v. State[20] and is therefore erroneous. In Montes, we held that a rebuttable presumption instruction was erroneous because the presumption was not recognized by statute or case law and the jury was not properly instructed as required by NRS 47.230(3).[21] Here, the instruction was phrased in the form of a permissible inference, which did not violate NRS 47.230.[22] Accordingly, the district court did not abuse its discretion by giving this instruction.

Ninth, Whitfield contends that the district judge committed judicial misconduct. Whitfield claims that at the conclusion of the trial

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[19]See NRS 205.273(1)(b); NRS 205.2715(1); Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001) ("an offense is not a lesser included offense unless the elements of the lesser offense are an entirely included subset of the elements of the charged crime").

[20]95 Nev. 891, 603 P.2d 1069 (1979).

[21]Id. at 895-96, 603 P.2d at 1072-73.

[22]Hollis v. State, 96 Nev. 207, 209, 606 P.2d 534, 536 (1980); NRS 47.230 sets forth the general guidelines regarding presumptions against defendants in criminal cases.

and during jury deliberations, the district judge asked him to sign a proposed misdemeanor deal or guilty plea agreement without first allowing him to read the agreement. Whitfield further claims that he refused to sign the agreement and soon thereafter the jury returned a guilty verdict on the felony charge. There is absolutely no factual basis for this claim.

Tenth, Whitfield contends that the cumulative effect of his assignments of error deprived him of his right to a fair trial. "The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."[23] Only one of Whitfield's assignments of error had merit and we determined that that error was harmless. Accordingly, Whitfield was not deprived of his right to a fair trail.

Having considered Whitfield's contentions and concluded that he has not demonstrated any reversible error, we

ORDER the judgment of conviction AFFIRMED.

Maupin, C.J.

Gibbons, J.

Douglas, J.

[23]Evans, 117 Nev. at 647, 28 P.3d at 524.

cc: Eighth Judicial District Court Dept. 17, District Judge
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