IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES BURNELL LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46924

FILED

DEC 06 2006

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of grand larceny auto. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. The district court sentenced appellant James Burnell Lewis to a prison term of 24 to 60 months and ordered Lewis to pay restitution in the amount of $1,200.00.

Lewis first contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[1]

In particular, we note that the victim, Patricia Preston testified that she owned a 2003 Mitsubishi automobile. Preston further testified that she left town and when she returned the vehicle was missing from her driveway. Preston further testified that she had not given anyone permission to take the car. Lewis was later stopped for speeding in Preston's automobile. At trial, he admitted that he did not have permission to take the car and that Preston did not know that he had

[1]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

taken the car. Lewis did not phone or leave a message for Preston informing her that he had the car.

The jury could reasonably infer from the evidence presented that Lewis took the car with the intent to deprive Preston permanently of the vehicle, despite his testimony to the contrary. 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.[2]

To the extent that Lewis argues that the information and jury instructions did not inform the jury that they had to determine that Preston was the owner of the car, we conclude that any error was harmless beyond a reasonable doubt.

Lewis next contends that the district court erred by admitting letters written by Lewis while he was in jail. Specifically, Lewis argues that the letters were not relevant and were highly prejudicial. Lewis also argues that a mistrial should have been declared when Preston testified that Lewis wrote her the letters while he was in jail.

The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.[3] In the instant case, the district court concluded that the letters did not constitute evidence of other bad acts and that they were relevant as an admission of guilt. Lewis has not

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[2]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).

[3]See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

demonstrated that the district court's decision was manifestly wrong. Moreover, any error was harmless beyond a reasonable doubt.[4]

As to Lewis' argument that the district court should have granted his motion for a mistrial, "it is within the sound discretion of the trial court to determine whether a mistrial is warranted. Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal."[5] In the instant case, Preston's reference to the fact that the letters were written while Lewis was in jail was very brief and was not elicited by the State. Further, during defense counsel's opening statement, the jury had been informed that Lewis was taken to jail when he was arrested for the instant charge. Accordingly, the district court did not abuse its discretion by denying the motion for a mistrial.

Finally, Lewis contends that the restitution order must be reversed because he was never charged with, or convicted of taking a laptop or a television set. This court has held that "a defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution."[6] Lewis was charged only with grand larceny auto. There was no mention in the information or at trial of the laptop and television missing from Preston's apartment. The presentence investigation report recommended a total of $1,200.00 restitution which was attributable solely to the laptop and television.

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[4]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.")

[5]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996) (citations omitted).

[6]Erickson v. State, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991).

Prior to Lewis' decision to go to trial, there were attempts to negotiate a guilty plea. As part of the proposed agreement, Lewis agreed to pay restitution for the laptop and television, but that agreement subsequently fell apart. We conclude that a failed negotiation is not sufficient to constitute an agreement by a defendant to pay restitution for crimes that he is not subsequently convicted of at trial. The district court therefore erred by ordering Lewis to pay restitution for the laptop and television. Accordingly, we reverse the order of restitution.

In light of the foregoing, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for the entry of an amended judgment of conviction.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, 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