IN THE SUPREME COURT OF THE STATE OF NEVADA

AL DONALD YOUNG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47208

FILED

SEP 27 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of grand larceny of a motor vehicle. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. The district court sentenced appellant Al Donald Young to serve a prison term of 16-72 months to run consecutively to the sentence imposed in district court case no. C182400, and ordered him to pay $4,750.00 in restitution.

First, Young contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Specifically, Young claims there was no evidence that he ever possessed or controlled the stolen vehicle after he returned it and the keys to the home of the vehicle's owner, where he had been living. We disagree with Young's contention.

A review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[1] In particular, we note that trial testimony indicated that Young

[1]See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

had the keys and access to the vehicle on the day it disappeared. Moreover, Young disappeared the same day as the vehicle. Along with the vehicle, the victim's cellular telephone was missing. Detective Jeff Stuart of the Las Vegas Metropolitan Police Department testified that after the cell phone disappeared, it was used to call short-term rental apartments and businesses involved in buying and selling vehicles; one such establishment was an auto wrecking shop. All of the telephone numbers were unfamiliar to the victim. Also, when Young was not living with the victim's family, he often stayed at short-term rental apartments. Several weeks after Young and the vehicle disappeared, an ex-girlfriend of Young's informed the victim about his location, and when Young was confronted by the victim and her husband, he ran. The vehicle and cell phone were never recovered.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Young committed the crime of grand larceny of a motor vehicle.[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, sufficient evidence supports the verdict.[3] Moreover, we note that circumstantial evidence alone may sustain a conviction.[4] Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

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[2]See NRS 205.228(1).

[3]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).

[4]See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

Second, Young contends that the prosecutor committed misconduct during rebuttal closing argument by impermissibly shifting the burden of proof. Specifically, Young challenges the following two statements made by the prosecutor:

> "Well, as I talked about on . . . my first close, all the circumstantial evidence points to [Young]. Who else could have done it?
>
> . . . .
>
> Ladies and Gentleman, I don't want to go on much longer with this case, I think it's pretty straightforward. . . . It's a common sense type case. There's circumstantial evidence that shows the defendant was the last one with the keys, the last one with the cell phone, the last one with the car, knows where the title is, has access to the house, and when you go back there, ask yourself who else could have done it.

(Emphasis added.) Young claims that the statements above impermissibly "invited the jury to examine whether the Defense had produced evidence of alternative suspects." We disagree.

This court has 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.[5] In Evans v. State, however, this court cited approvingly to the proposition that "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

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

counter or explain evidence presented."[6] In other words, "in some instances the prosecutor may comment on a defendant's failure to substantiate a claim."[7]

Initially, we note that Young failed to object to the prosecutor's statements. The failure to raise an objection with the district court generally precludes appellate consideration of an issue.[8] This court may nevertheless address an alleged error if it was plain and affected the appellant's substantial rights.[9] Young fails to demonstrate how the prosecutor's statements actually prejudiced his defense, let alone shifted the burden of proof. Moreover, the jury was instructed prior to deliberations about the presumption of innocence and the State's burden to prove "beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense." Therefore, we conclude that no plain error occurred and that the State did not commit prosecutorial misconduct.

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[6]117 Nev. 609, 631, 28 P.3d 498, 513 (2001) (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992)).

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

[8]See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993) (holding that the failure to object to prosecutorial misconduct generally precludes appellate consideration).

[9]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002); Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

Third, Young contends that he is entitled to a new sentencing hearing because the verdict form did not require the jury to determine the value of the vehicle, and therefore, due to the verdict's ambiguity, he was "constructively convicted . . . of a Category C felony, not the Category B felony for which he was sentenced." We disagree.

Initially, we note that Young did not object to the verdict form, the jury instructions defining the elements of the crime, or the sufficiency of the charging document.[10] Moreover, we conclude there was no plain error. Despite Young's apparent claim to the contrary, the State proceeded on one theory only: the amended criminal information charged Young with committing a Category B felony. The State did not alternatively charge Young with a Category C felony. The district court properly instructed the jury that for a Category B felony, the value of the vehicle in question must be equal to or greater than $2,500.00. According to the jury instructions, if the jury believed that the vehicle was not worth $2,500.00, it was required to find Young not guilty. The victim testified at trial that her vehicle was worth approximately $4,200.00. During closing arguments, Young claimed that the State failed to prove beyond a reasonable doubt that the vehicle was worth more than $2,500.00. By finding Young guilty, the jury believed that the vehicle's value was $2,500.00 or more. We conclude that the verdict form was not ambiguous and that Young's contention is belied by the record.

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[10]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) ("Generally, the failure to clearly object on the record to a jury instruction precludes appellate review."); see also Collura v. State, 97 Nev. 451, 453, 634 P.2d 455, 456 (1981).

Therefore, having considered Young's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Becker

_____, J.
Hardesty

_____, 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