IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS OMAR LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49687

ORDER AFFIRMING IN PART, REVERSING IN PART, VACATING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a stolen vehicle and one count of stop required on the signal of a police officer. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. The district court sentenced appellant Nicholas Omar Lewis to serve two concurrent prison terms of 15 to 48 months, with credit for 337 days of time served. This timely appeal followed.

First, Lewis contends that he was denied his constitutional right to a fair trial when his jury venire did not represent a fair cross-section of the community. The forty-person venire contained two African-American individuals. Lewis argues that the jury selection process in Clark County results in a systematic exclusion of certain groups because the jury pool is limited to persons in the DMV records.

Lewis did not preserve this issue for appeal when he failed to object to the jury venire in the district court. Thus, we review the issue under a plain error standard, which requires Lewis to show that the error

was plain and affected his substantial rights.[1] The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a fair and impartial jury trial from a fair cross-section of the community.[2] To demonstrate a prima facie violation of the Sixth Amendment's fair cross-section requirement, the defendant must show:

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[3]

Having reviewed the record, we conclude that the jury venire did not constitute plain error affecting Lewis's substantial rights. The record contains no evidence that any underrepresentation of African-American individuals on Lewis's jury venire was due to systematic exclusion of the group in the jury-selection process.

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[1]Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005); see also NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.")

[2]U.S. Const. amends. VI, XIV; Williams v. State, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005).

[3]Williams, 121 Nev. at 940, 125 P.3d at 631 (quoting Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996) (emphasis omitted)).

Second, Lewis contends that he was denied the right to a fair trial when the prosecutor used preemptory challenges to remove the only two African-American individuals from the venire panel in violation of Batson v. Kentucky.[4] The United States Supreme Court held in Batson that using preemptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause of the United States Constitution.[5] It outlined a three-step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the peremptory challenge then has the burden of providing a race-neutral explanation; and (3) the trial court must decide whether the proffered explanation is merely a pretext for purposeful racial discrimination.[6] The trial court's findings on the issue of discriminatory intent are accorded great deference on appeal.[7]

We conclude that discriminatory intent was not inherent in the State's justification for its preemptory challenges of prospective jurors 75 and 93. The State set forth race-neutral explanations for its preemptory challenges that were persuasive and nondiscriminatory.

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[4]476 U.S. 79 (1986).

[5]Id. at 96-98.

[6]Id.; Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006).

[7]Kaczmarek v. State, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

Therefore, the district court did not abuse its discretion in rejecting Lewis's Batson challenge.

Third, Lewis contends that he was denied a fair trial because a State's witness testified about Lewis's home invasion arrest despite the district court's pretrial ruling that the arrest not be mentioned at trial. Lewis asserts that the district court erred in denying his motion for a mistrial or by failing to give the jury a limiting instruction.

An improper reference to a defendant's criminal history may be harmless error in certain circumstances.[8] In determining whether an inadvertent reference to prior criminal activity is unduly prejudicial, the court may consider: "(1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing."[9] The decision to grant or deny a motion for a mistrial is within the district court's sound discretion and will not be disturbed on appeal absent a clear showing of an abuse of discretion.[10]

Having reviewed the record, we conclude that the district court did not abuse its discretion in denying Lewis's motion for a mistrial.

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[8]Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998); Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996).

[9]Geiger, 112 Nev. at 942, 920 P.2d at 995-96 (citing Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983)).

[10]Id. at 942, 920 P.2d at 995.

Sergeant Burgess's remark about a home invasion and burglary was inadvertent, isolated, and did not include reference to any arrest, charges, or prosecution for home invasion or burglary. Further, defense counsel declined the district court's offer for a limiting instruction, and the evidence of Lewis's guilt was convincing.

Next, Lewis contends that the district court erred by failing to instruct the jury sua sponte on eyewitness identification. Lewis also contends that Jury Instruction 17 improperly directed the jury to find that the 2000 Plymouth Neon was a motor vehicle, and that Jury Instruction 14 contained an erroneous standard for determining the vehicle's value. However, Lewis neither requested an eyewitness identification instruction nor objected to Jury Instructions 14 and 17 in the district court. Failure to object below precludes appellate review, and this court will only consider an error that is plain and that affected a defendant's substantial rights.[11] Having reviewed the record, we conclude that Lewis's substantial rights were not affected.

Lewis also contends that Jury Instruction 13 erroneously instructed the jury to determine the value of the vehicle at the time the vehicle was taken, rather than at the time it was possessed, for purposes of the possession of a stolen vehicle charge. Jury Instruction 13 stated: "If you find that the defendant is guilty of the offense of Possession of Stolen Vehicle, you must also determine if the value of the property taken is less

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[11]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003).

than $2,500.00 or $2,500.00 or more." (Emphasis added). Lewis argues that the vehicle's value was significantly greater at the time it was taken on February 1, 2005, than at the time Lewis was charged with being in possession of it, on February 3, 2005.

Because Lewis failed to object to this instruction below, we must evaluate the claim for plain error and determine whether it affected Lewis's substantial rights.[12] We conclude that Jury Instruction 13 contained a plain error that affected Lewis's substantial rights.

Possession of a stolen vehicle is defined under NRS 205.273 as follows: "A person commits an offense involving a stolen vehicle if the person . . . [h]as in his possession a motor vehicle which he knows or has reason to believe has been stolen."[13] "If the prosecuting attorney proves that the value of the vehicle involved is $2,500 or more, the person . . . is guilty of a category B felony."[14] Otherwise, the person is guilty of a category C felony.[15] We have stated that NRS 205.273 "makes mere possession of a vehicle, with the requisite knowledge of its stolen character, a crime," and "does not require the state to prove that appellant intended to deprive the owner permanently of his vehicle."[16]

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[12]Id.

[13]NRS 205.273(1)(b).

[14]NRS 205.273(4).

[15]NRS 205.273(3).

[16]Montes v. State, 95 Nev. 891, 894, 603 P.2d 1069, 1071 (1979).

Here, Lewis was charged with possession of a vehicle that he knew or had reason to believe was stolen. The State did not charge Lewis with taking the vehicle, or present any evidence that Lewis actually stole it. The vehicle could have sustained the damage before it came into Lewis's possession. Therefore, the vehicle's value must be determined on the date that Lewis was found to have actually possessed it. Jury Instruction 13 was erroneous because it referred to the value of the property taken.

This error was plain and affected Lewis's substantial rights because there was insufficient evidence that the vehicle was worth $2,500 or more at the time in was found in Lewis's possession. The standard of review for challenging the sufficiency of the evidence to support a criminal conviction is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[17] NRS 205.273(6) sets forth the legal standard for determining the value of a stolen vehicle: "[T]he value of a vehicle shall be deemed to be the highest value attributable to the vehicle by any reasonable standard."[18] We have stated that the fair market value of the property must be used, unless

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

[18]NRS 205.273(6).

market value cannot be reasonably determined, and then other evidence of value, such as replacement cost or purchase price, may be considered.[19]

To establish value, the State presented testimony from the vehicle's owner that she purchased the vehicle one year before it was stolen for $8,000. When the vehicle was recovered by the police, she bought it back for $700, after her insurance company wrote off the vehicle as a total loss and paid the balance of her loan for $4,500. The owner testified that the windows and dash had been broken, and several parts were missing.

Having reviewed the record, we conclude that there was insufficient evidence that the vehicle in Lewis's possession had a value of $2,500 or more at time of the offense. Therefore, the judgment of conviction for possession of a stolen vehicle, a category B felony, should be reversed. However, we conclude that there was sufficient evidence to support a conviction for possession of a stolen vehicle with a value less than $2,500, a category C felony under NRS 205.273(3).

Finally, Lewis challenges the $5,200 order of restitution, which included the $4,500 loan balance paid by the victim's insurance company and the $700 paid by the victim to reacquire the car. We have 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

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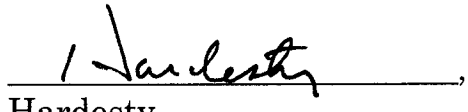
[19]Cleveland v. State, 85 Nev. 635, 637, 461 P.2d 408, 409 (1969); see also Bryant v. State, 114 Nev. 626, 630, 959 P.2d 964, 966 (1998).

upon which he has agreed to pay restitution."[20] In light of our holding that there was insufficient evidence that the vehicle had a value of $2,500 or more at the time of the offense, we conclude that the $5,200 order of restitution was not adequately supported by the record.

Accordingly, we affirm the judgment of conviction for stop required on signal of a police officer. We reverse the judgment of conviction for the category B felony possession of a stolen vehicle, vacate the $5,200 order of restitution, and remand this matter to the district court with instructions to enter a judgment of conviction for a category C felony possession of a stolen vehicle, for resentencing, and for further proceedings consistent with this order.

It is so ORDERED.



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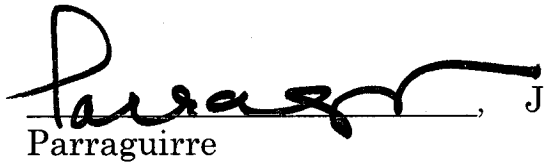

_____, J.
Parraguirre

_____, J.
Douglas

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

cc: Hon. Douglas W. Herndon, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk