IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON LEE HENRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50779

FILED

OCT 16 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of possession of a stolen vehicle, possession of stolen property and possession of burglary tools. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Jason Lee Henry to serve three concurrent terms totaling 12 to 48 months.

Sufficiency of the evidence

Henry contends that insufficient evidence was adduced at trial to support his convictions. Specifically, Henry asserts that no evidence was presented showing that he had knowledge that the truck or the power cable was stolen, and that insufficient evidence demonstrated that the bolt cutters and cable cutters were burglary tools. 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. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Possession of stolen vehicle

First, Henry asserts that the State failed to produce any evidence indicating that he knew that the truck was stolen.

"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." NRS 205.273(1)(b).

Here, the truck's owner testified that he did not give Henry permission to drive the truck. Both Detectives Schlimenti and Hartner testified that they observed Henry driving the stolen truck. Further, Henry and his codefendant, David Hosmer, told the detectives they got the truck from Steve and Rich, two white men who worked for Energetic Lawn Care and Landscapes.[1] Neither Henry nor Hosmer knew Steve's or Rich's last names, addresses or phone numbers. Henry and Hosmer claimed they saw Steve and Rich driving the truck for two weeks prior to the day Steve and Rich gave it to Henry and Hosmer. However, this claim was contradicted by the truck's owner's testimony that he only let his employees drive the truck, that he had no employees named Steve or Rich, and that all his employees were Hispanic. And the truck was stolen only two days prior to the day Henry and Hosmer were found in it.

Henry makes much of the fact that he was driving the truck with its key. However, testimony at trial revealed that the truck was left at the owner's house unlocked, with the key on top of the visor. And, tellingly, after the detectives placed Henry in custody, but before even mentioning the truck, Henry asked, "Why? Is the vehicle stolen?" From this evidence, a reasonable jury could have concluded, beyond a reasonable doubt, that Henry possessed a motor vehicle which he knew or had reason to believe was stolen. Thus, we conclude this contention lacks merit.

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[1]Although Henry and Hosmer correctly identified the unmarked truck as belonging to Energetic Lawn Care and Landscapes, numerous business cards and papers were present in the truck bearing the company's name.

To the extent Henry argues the State failed to prove that Henry possessed the intent to permanently deprive the truck's owner of the vehicle, this court has held 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." Montes v. State, 95 Nev. 891, 894, 603 P.2d 1069, 1071 (1979). Thus, this argument is without merit.

Possession of stolen property

Second, Henry asserts that insufficient evidence was adduced at trial to prove that he knew the power cable was stolen or that he intended to permanently deprive Nevada Power of the cable.

> A person commits an offense involving stolen property if the person, for his own gain or to prevent the owner from again possessing his property, buys, receives, possesses or withholds property:
>
> (a) Knowing that it is stolen property; or
>
> (b) Under such circumstances as should have caused a reasonable person to know that it is stolen property.

NRS 205.275(1).

Here, Henry and Hosmer told the detectives that they were either given the power cable or that they found the cable at a construction site and a worker waved at them as if to say "go ahead and take it." They stated that the construction site was behind, or in the area of a local WalMart. However, the detectives testified that they could not locate a construction site in that area, and that the construction company Hosmer indicated was working at the site did not use the type of cable possessed by Henry and Hosmer.

An employee of Nevada Power testified that the cable found in the bed of the truck was stamped with the letters NPC, which stand for

Nevada Power Corporation. Nevada Power's policy is to take any scrap back to the company to be salvaged, and no employee is authorized to give scrap away. The employee also testified that Nevada Power orders that particular cable directly from the manufacturer in lengths closely approximating the length necessary for each project; accordingly, pieces of scrap are usually only four to five feet long. In addition, any section of cable under 200 feet is unusable to the company. Thus, no Nevada Power employee would have cut an 18-foot section of cable like the one possessed by Henry and Hosner. Finally, Henry was arrested at the recycling center with the cable in the back of the truck. From this evidence, the jury could have determined, beyond a reasonable doubt, that Henry possessed property that he knew, or should have known was stolen, for his own personal gain.

Although it appeared that the cable was cut using Nevada Power's specialized tools, and that the tools found in the stolen truck were incapable of cutting the thick cable, it was for the jury to determine the weight and credibility of the conflicting testimony. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573. The jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict. Bolden, 97 Nev. at 73, 624 P.2d at 20; McNair, 108 Nev. at 56, 825 P.2d at 573.

Possession of burglary tools

Third, Henry asserts that his conviction for possession of burglary tools is infirm because there was insufficient evidence presented at trial to allow the jury to conclude that the bolt and cable cutters were burglary tools.

It is unlawful for a person to have in his possession any tool, "nippers or implement . . . commonly used for the commission of burglary, . . . larceny or other crime, under circumstances evincing an intent to use

or employ . . . the same . . . in the commission of a crime." NRS 205.080(1). The possession of such items, except by mechanics, artificers or tradesmen at their established business location, is prima facie evidence of intent to use the item in the commission of a crime. NRS 205.080(2).

Testimony at trial revealed that Henry was employed as a cook. Detective Schlimenti testified that cable cutters, such as the ones found in the stolen truck,[2] are commonly used by copper wire thieves, and that Henry possessed wires in the truck that were capable of being cut by the cutters. Henry also possessed a pair of binoculars, which Detective Schlimenti explained are often used by wire thieves to scope out items to steal. From this evidence, the jury could have concluded that Henry committed the crime of possession of burglary tools beyond a reasonable doubt.

Motion for mistrial

Henry next contends that the district court erred by denying his motion for a mistrial. Specifically, Henry contends that a mistrial was warranted because Detective Schlimenti referenced Henry's prior criminal history while testifying.

The decision to grant a mistrial rests within the judgment of the district court, and its determination will not be disturbed on appeal absent an abuse of discretion. Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). Following an inadvertent reference to other criminal activity, the district court should grant a mistrial if the reference "was so prejudicial as to be unsusceptible to neutralizing by an admonition to the

[2]Neither the bolt cutters nor the cable cutters belonged to the truck's owner.

jury." Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241-42 (1983). In determining whether an inadvertent reference to prior criminal activity is so prejudicial that it cannot be cured by a jury admonition, the district 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. Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996).

Here, on cross-examination, defense counsel asked Detective Schlimenti what he based his decision to arrest Henry on. The detective replied:

> Basically, that Mr. Henry confirmed that he saw a Rich and Steve driving the vehicle for the past two weeks when the vehicle was stolen two days upon contact with these guys. That was just one of them. The story that—I'm sorry. Just the story on where—reference the vehicle, basically, the, the two weeks. Also, that they said that Rich and Steve worked for this Energetic Lawn Care, which we confirmed that they didn't. Prior history and the suspected stolen property being in the back of the truck.

Henry did not object to the statement.

We conclude that the detective's inadvertent[3] reference to Henry's prior criminal history was not so prejudicial that it could not be neutralized by an admonition to the jury. First, the reference was not solicited by the prosecution. Second, defense counsel advised the district court that he did not want a jury admonition or limiting instruction,

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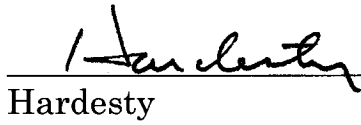
[3]The record does not indicate, and Henry does not allege, that the remark was intentionally made.

because he did not want to draw the jury's attention to the remark. See McLellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 111 (2008) (holding that a defendant may waive the giving of a limiting instruction if bad act evidence is admitted at trial). Third, the reference was vague and did not refer to any specific criminal act. Fourth, as discussed above, the evidence of guilt was convincing. Accordingly, we conclude that the district court did not abuse its discretion by denying Henry's motion for a mistrial.

Having considered Henry's contentions and concluded they lack merit, we

ORDER the judgment of conviction AFFIRMED.



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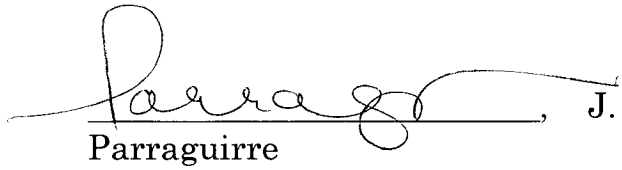

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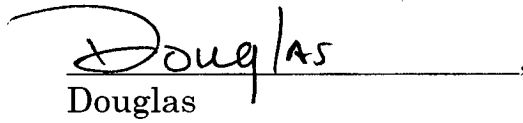
Parraguirre



_____, J.
Douglas

cc: Hon. Michelle Leavitt, District Judge
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Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk