

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM EMERY FODOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51268

FILED

MAR 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY T. Williams
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict of burglary, possession of a stolen vehicle, and possession of stolen property. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

This case arises out of Henderson police officers finding William Fodor in possession of a truck and tools that were later determined to be stolen. Responding to a suspicious activity call, Officers Matthew Thomason and Michael Gower arrived at an apartment complex where they found Fodor and Todd Gibson, Fodor's friend, near a stolen truck. Fodor had the truck keys and possession of tools from the truck. After investigating the scene for about 45 minutes to an hour, the officers arrested Fodor. The manager of Rosendin Electric later identified the truck as belonging to Rosendin and the tools as belonging to Rosendin employees.

Fodor appeals the judgment of conviction, arguing: (1) the district court erred by admitting testimony in violation of Miranda; (2) prosecutorial misconduct violated his constitutional rights; (3) the district court erred by giving an unconstitutional presumption-of-innocence jury instruction; and (4) insufficient evidence supports the burglary conviction.

We conclude that (1) the district court properly admitted Fodor's pre-arrest, pre-Miranda statements; (2) the prosecutor did not

commit misconduct; (3) the jury instruction regarding the presumption of innocence was proper; and (4) sufficient evidence supports the burglary conviction. As such, we affirm the judgment of conviction.

The parties are familiar with the facts and procedural history of this case; therefore, we do not recount them in this order except as is necessary for our disposition.

The district court did not err by admitting Fodor's pre-arrest, pre-Miranda statements

Fodor argues that the district court should have sua sponte excluded his pre-arrest, pre-Miranda statements because the police had not Mirandized him, and the statements violated Fodor's Fifth Amendment right against self-incrimination. We disagree because Fodor was not in custody when he made the statements at issue.

We review the district court's admission of Fodor's statements for plain error affecting his substantial rights because Fodor did not object at trial. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001). Under the Fifth Amendment right against self-incrimination, a suspect's statements made during custodial interrogation are inadmissible unless the defendant was given a Miranda warning. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998). "To determine whether a custodial interrogation has taken place, a court . . . consider[s] the totality of the circumstances." Id. at 1081-82, 968 P.2d at 323. A person is in custody for Miranda purposes if he is under formal arrest or in comparable circumstances in which a reasonable person would not feel free to leave. Id. at 1082, 968 P.2d at 323. A person is not in custody when a police officer detains him on the scene to determine his identity and to investigate suspicious circumstances or questions him during fact-finding. Id.; see NRS 171.123.

Here, officers Thomason and Gower responded to a suspicious activity call from a witness, Alan Pratt. Pratt saw Fodor and Gibson near the truck and saw Fodor remove the front license plate from the truck. Pratt also saw Fodor siphon gas from the truck and move objects that appeared to be tools from the truck to Gibson's Jeep. The officers each initially questioned Fodor for about three minutes and then continued to question him periodically throughout the entire investigation, which lasted 45 minutes to one hour. Fodor voluntarily spoke to the officers, and the officers did not Mirandize him. During this questioning, Officer Gower asked Fodor why he had the keys to a stolen vehicle and whether he believed the truck was stolen. Fodor answered that a friend gave him the keys so he could siphon gas out of the truck and that he believed it was possible that the truck was stolen.

Because the officers were conducting a fact-finding investigation of suspicious activity, their questioning of Fodor did not constitute a custodial interrogation. NRS 171.123; Taylor, 114 Nev. at 1082, 968 P.2d at 323. The officers never told Fodor he could not leave, never brandished their weapons, and did not physically restrain him during the questioning. Fodor was not handcuffed or arrested until the end of the investigation. Therefore, the totality of the circumstances indicates that Fodor was not in custody until he was formally arrested. Because Fodor made the statements in question before he was in custody, he was not entitled to a Miranda warning. As such, we conclude that the district court properly admitted Fodor's pre-arrest, pre-Miranda statements.

The prosecutor did not commit misconduct in her closing statement by commenting on Fodor's right to remain silent

Fodor argues that the prosecutor, in her closing argument, improperly commented on his right to remain silent, which violated his

Fifth Amendment and due process rights and constituted plain error. We disagree because the prosecutor did not make any comment regarding Fodor's right to remain silent.

Fodor did not object to the prosecutor's closing argument at trial, so we review for plain error. Leonard, 117 Nev. at 63, 17 P.3d at 403-04. Prosecutorial misconduct violates the defendant's Fifth Amendment right to remain silent if the comment "was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to" testify. Deutscher v. State, 95 Nev. 669, 682, 601 P.2d 407, 416 (1979) (internal quotations omitted). Under plain error review, this court will consider whether prosecutorial misconduct violated the defendant's due process rights if it "(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings." Rose v. State, 123 Nev. 194, 208-09, 163 P.3d 408, 418 (2007) (internal quotations omitted).

In this case, the prosecutor mentioned in her closing argument that when the police were questioning Fodor, they gave him an opportunity to explain why he had the keys to a stolen vehicle in his pocket. The prosecutor stated:

[The police] certainly didn't rush to judgment here. They stood out there for an hour, 45 minutes to an hour trying to investigate it to determine what they had or who they had and based on a concerned citizen's phone call and they gave an opportunity to explain to him why he had vehicle keys from a stolen vehicle on him

(Emphasis added.) Fodor argues that the emphasized portion is a comment on his decision not to testify and violated his right to remain silent and his due process rights.

First, regarding Fodor's right to remain silent, this comment described the police investigation at the scene. Any inference regarding Fodor's explanation of his possession of the keys is not a comment on his right to remain silent because he explained why he had the keys and did not invoke his right to remain silent during the questioning. This comment does not reflect on Fodor's choice not to testify at trial. Therefore, the prosecutor did not improperly comment on Fodor's right to remain silent.

Second, regarding due process, this comment was not prejudicial to the verdict. The jury heard Officer Gower testify that Fodor said a friend gave him the keys so that he could siphon gas from the truck. Also, the defense argued in its closing that Fodor explained that a friend gave him the keys, and defense counsel highlighted this portion of the testimony as an innocent explanation for Fodor having the keys. Therefore, the prosecutor mentioning this in closing was an appropriate comment on admitted evidence and defense counsel's closing, and it was not prejudicial to the verdict. Such a comment does not affect the integrity or public reputation of the proceedings because it is a proper comment on the evidence. Therefore, we conclude that the prosecutor did not violate Fodor's due process rights. Thus, the prosecutor did not commit misconduct.

The presumption-of-innocence jury instruction was proper

Fodor argues that Jury Instruction No. 18 improperly stated the presumption of innocence and shifted the State's burden of proof to Fodor, thereby violating his right to a fair trial. We disagree because the jury instruction properly states the burden of proof pursuant to NRS 175.191.

Jury Instruction No. 18 stated, “The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.” (Emphasis added.) The instruction then defines reasonable doubt using the language mandated in NRS 175.211.

Fodor argues that the use of the word “until” rather than “unless” presumes that the State will prove him guilty, thereby unconstitutionally shifting the State’s burden of proof to the defendant. We explicitly rejected this argument in Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005). In Blake, this court held that the language in the instruction was the exact language in NRS 175.191, defined reasonable doubt pursuant to NRS 175.211, and therefore, the instruction as a whole was a proper statement of the State’s burden of proof. Id. Here, the instruction tracks NRS 175.191 and defines reasonable doubt pursuant to NRS 175.211. Therefore, the instruction, as a whole, properly explains the State’s burden of proof and did not violate Fodor’s right to a fair trial.

Sufficient evidence supports the burglary conviction

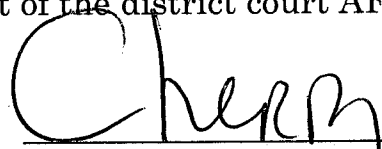
Fodor argues that insufficient evidence supports his burglary conviction because the State did not prove that he had the intent to commit a larceny as alleged in the Information. We disagree.

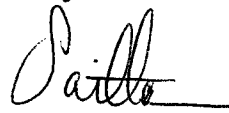
Sufficient evidence supports a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Rose, 123 Nev. at 202, 163 P.3d at 414. This court will not reweigh the evidence or witness credibility. Id. at 202-03, 163 P.3d at 414. In the underlying case, the State presented the theory that Fodor entered the


truck with the intent to commit a larceny, thereby committing a burglary under NRS 205.060(1), which defines burglary as entering any building or vehicle with the intent to commit larceny, assault or battery, any felony, or to obtain money or property by false pretenses. Larceny is the intentional taking and carrying away of the property of another. See NRS 205.220.

Here, Fodor drove the truck to the back of an apartment complex where he did not live and called Gibson to come pick him up, apparently planning to leave the truck there. Fodor told Officer Thomason that he believed the truck could be stolen. Later, Rosendin Electric's manager identified the truck as belonging to Rosendin Electric. He also identified the tools that the police had taken from Gibson's Jeep as belonging to Rosendin employees. At trial, Pratt and Gibson testified that Fodor moved tools from the truck to Gibson's Jeep. Given this evidence, a rational trier of fact could have found beyond a reasonable doubt that the tools belonged to Rosendin and that Fodor intentionally took the tools from the truck and put them in Gibson's Jeep, thereby acting with the intent to commit a larceny. Therefore, substantial evidence supports the jury's burglary conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 8, 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