IN THE SUPREME COURT OF THE STATE OF NEVADA

SABAS PENA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58692

FILED

NOV 14 2012

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of operating premises to alter, destroy, or disassemble illegally obtained motor vehicles and possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Abbi Silver, Judge. Appellant Sabas Pena raises five errors on appeal.

First, Pena contends that the district court erred by denying his pretrial petition for a writ of habeas corpus because the inoperable van found on his property was not a "motor vehicle" under NRS 482.075 and NRS 482.135.[1] We review questions of statutory interpretation de novo. State v. Lucero, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (2011). Pena claims that because the van was inoperable it was not a self-propelled device that could transport people or property upon a public highway. See NRS 482.075; NRS 482.135. This interpretation is unreasonable and

[1]We need not address Pena's contention with respect to two other counts of possession of a stolen vehicle because he was granted a judgment of acquittal on those counts.

would produce absurd results. Under Pena's statutory construction, a car thief need only remove the spark plugs from a stolen vehicle to avoid criminal liability. Because "we construe statutory language to avoid an absurd or unreasonable result," Wilson v. State, 121 Nev. 345, 357, 114 P.3d 285, 293 (2005), we conclude that the term "self-propelled" found in NRS 482.075 refers to "the design, mechanism, and construction of the vehicle rather than . . . its temporary condition, and a motor vehicle does not cease to be such merely because it is temporarily incapable of self-propulsion," Parnell v. State, 261 S.E.2d 481, 482 (Ga. Ct. App. 1979) (internal quotations omitted). There was no evidence presented to the grand jury that the van located on Pena's property could not be returned to Nevada's public highways after it was restored to a safe mechanical condition. See NRS 487.795; NRS 487.860. Therefore, we conclude that the district court did not err by denying Pena's petition.

Second, Pena contends that the district court erred by denying his pretrial petition for a writ of habeas corpus based on inadequate Marcum notice. See NRS 172.241(2); see also Sheriff v. Marcum, 105 Nev. 824, 827, 783 P.2d 1389, 1391 (1989). Because Pena failed to pursue a pretrial remedy through a writ of mandamus, Pena's claim is governed by our opinion in Lisle v. State. See 113 Nev. 540, 551, 937 P.2d 473, 480 (1997) ("A writ of mandamus is an appropriate remedy for inadequate notice of a grand jury hearing."), decision clarified on denial of reh'g, 114 Nev. 221, 954 P.2d 744 (1998). In Lisle, we held that an appellant who fails to seek a writ of mandamus must demonstrate on appeal that

inadequate Marcum notice resulted in prejudice. Id. at 551–52, 937 P.2d at 480. Pena has failed to satisfy this requirement because he was convicted after trial beyond a reasonable doubt and therefore his claim lacks merit. Lisle v. State, 114 Nev. 221, 224–25, 954 P.2d 744, 746–47 (1998).

Third, Pena contends that there was insufficient evidence to support his conviction for operating premises to alter, destroy, or disassemble illegally obtained motor vehicles because the State did not prove that he knew the motor vehicles or parts of motor vehicles on his property were stolen. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). At trial, a detective testified that Pena had the complete paperwork with the required signatures for approximately 20 to 30 vehicles. However, he was unable to produce any paperwork for parts from two stolen vehicles and had incomplete paperwork for a third stolen vehicle. We conclude that a rational juror could infer from these circumstances that Pena had knowledge that these vehicles had been stolen. See NRS 205.2745(1); see also Moore v. State, 122 Nev. 27, 36, 126 P.3d 508, 513 (2006) (explaining that intent "may be inferred from the conduct of the parties and the other facts and circumstances"); McNair, 108 Nev. at 56, 825 P.2d at 573 ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."). The jury's verdict

will not be disturbed on appeal where, as here, sufficient evidence supports Pena's conviction. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Fourth, Pena contends that the State improperly shifted the burden of proof during rebuttal closing argument by insinuating that he had the duty to produce evidence to prove his innocence. A prosecutor improperly shifts the burden of proof to the defendant where the prosecutor comments on the defense's failure to call witnesses or produce evidence. Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996). Although the State's comments were improper, the district court immediately instructed the jury to disregard them, and we conclude that the comments were not so prejudicial that they could not be cured by the district court's admonishment. See Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974); see also Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) ("[W]e presume that the jury followed the district court's orders and instructions."); cf. Allen v. State, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975) (explaining that an admonishment may cure an error).

Fifth, Pena contends that the district court erred when it failed to adequately explore whether a conflict of interest existed that would deny him effective assistance of counsel. We concluded that the district court failed to make the inquiry mandated by Cuyler v. Sullivan, 446 U.S. 335 (1980). See Mickens v. Taylor, 535 U.S. 162, 167-170 (2002) (discussing Sullivan). Because the district court's failure to inquire into counsel's potential conflict does not entitle a defendant to automatic

reversal of his conviction, see id. at 172-74, we remanded Pena's case to the district court for the limited purpose of conducting an evidentiary hearing to determine whether counsel had a conflict of interest and, if so, whether this conflict actually affected the adequacy of her representation, see id. at n.5. After the evidentiary hearing, the district court concluded that trial counsel made a strategic decision not to call two exculpatory witnesses because they believed the State had failed to satisfy its burden of proof during its case in chief. Because it is not clear that any "conflict caused the attorney's choice," McFarland v. Yukins, 356 F.3d 688, 705 (6th Cir. 2004), we conclude that Pena has not "demonstrate[d] that a conflict of interest actually affected the adequacy of his representation,"[2] see Mickens, 535 U.S. at 168 (internal quotations omitted). Therefore, he is not entitled to relief.

Having considered Pena's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Gibbons, J.
Gibbons

Parraguirre, J.
Parraguirre

[2]We express no opinion as to counsel's effectiveness in deciding not to call the exculpatory witnesses.

cc: Hon. Abbi Silver, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk