IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY LYLE PEBLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59540

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, possession of a stolen vehicle, stop required on signal of police officer, and possession of burglary tools. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Sufficiency of the evidence

Appellant Jeffrey Pebley contends that insufficient evidence supports his convictions because the State did not prove that he possessed the stolen car or the shaved keys found therein, he entered the car with the intent to commit a crime, or the detective signaled him to stop the car in a manner consistent with the statutory requirements. Pebley also asserts that the State did not establish that the value of the stolen car was $2500 or more.[1] We disagree because the evidence, when viewed in the light most favorable to the State, is sufficient to support the convictions

[1]Because Pebley committed his offense on March 3, 2011, prior to the effective date of the current version of NRS 205.273, the prior version of the statute controls. See 1997 Nev. Stat., ch. 150, § 17, at 344.

beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Vega v. State, 126 Nev. ___, ___, 236 P.3d 632, 639 (2010).

Detective Buttars testified that he initiated a traffic stop of a green Honda by pulling behind the Honda, which was in a parking spot in a strip mall, and activating his lights and siren. Detective Buttars' unmarked vehicle was equipped with red and white flashing lights as well as strobe lights. The passenger in the Honda, Angela Lempke, testified at trial that she remembered emergency lights coming from behind the Honda. She later told police that the driver was looking in the rearview mirror and became nervous. The Honda then reversed, drove over a curb—causing pieces of cement to break off—and sped off across the parking lot. Detective Buttars turned "the siren all the way to full code" and pursued the Honda across the parking lot with his lights and siren on. Due to department policy, he turned off the lights and sirens once the vehicles reached the edge of the parking lot, but continued to pursue the Honda. A few minutes later, the Honda crashed into a fence in a residential neighborhood. The jury saw surveillance videos of the events in the parking lot.

After the crash, the driver got out and fled on foot, coming within a few feet of the detective's vehicle. The passenger in Detective Buttars' vehicle, Detective Swales, made eye contact with the driver and identified him in court as Pebley. Further, Ms. Lempke told a detective at the scene that "Jeff" was driving and described a nearby house where he might be found. Police later verified that Pebley resided in the house Lempke described. Lempke also testified at trial that Pebley picked her up that night.

The Honda's owner testified that it was stolen from her earlier that morning and that Pebley did not have permission to drive her car. The jury heard testimony that police found a lanyard with three shaved keys in the front driver's compartment and that shaved keys are used to steal vehicles. Finally, the Honda's owner testified that she paid $2500 for it approximately one month before it was stolen.

From this evidence, a rational juror could reasonably infer that Pebley committed the charged offenses. See NRS 205.060(1); NRS 205.080; NRS 205.273(1), (4), (6) (1997); NRS 484B.550; cf Stephans v. State, 127 Nev. ___, ___, 262 P.3d 727, 730 (2011) (the State must prove, "beyond a reasonable doubt[,] that the value of the property, by any reasonable standard, exceeds the statutory threshold amount" (internal quotation marks and brackets omitted)); State v. Ensz, 503 N.W.2d 236, 238-39 (N.D. 1993) (reasonableness of valuation is to be measured against any method that is fair considering the circumstances), cited with approval by Stephans, 127 Nev. at ___, 262 P.3d at 730. 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, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Pebley's statement

Pebley challenges the admission of his statement to police that he "runs from the cops all the time." Specifically, he contends that the investigating detectives failed to provide him with a proper Miranda warning before interrogating him and that the district court therefore erred by denying his motion to suppress. See Miranda v. Arizona, 384 U.S. 436 (1966). We agree. Pebley was not sufficiently warned pursuant

to Miranda because he was not specifically advised that he had the right to consult with an attorney prior to questioning, see Duckworth v. Eagan, 492 U.S. 195, 204 (1989) (Miranda requires that a suspect be informed "that he has the right to an attorney before and during questioning"), and the State failed to demonstrate that the detectives' warnings otherwise apprised Pebley of that right, see California v. Prysock, 453 U.S. 355, 359 (1981) (no "talismanic incantation" necessary to satisfy Miranda's strictures); Miranda, 384 U.S. at 444 (placing burden to show that procedural safeguards were employed on State); U.S. v. Williams, 435 F.3d 1148, 1151 (9th Cir. 2006) (district court's finding that a Miranda warning was adequate subject to de novo review). We conclude, however, that this error was harmless in light of the substantial evidence of guilt. See Holyfield v. State, 101 Nev. 793, 805, 711 P.2d 834, 841-42 (1985) (reviewing claim that statement was admitted in violation of Miranda for harmless error), abrogated on other grounds by Illinois v. Perkins, 496 U.S. 292, 300 (1990), as stated in Boehm v. State, 113 Nev. 910, 913 n.1, 944 P.2d 269, 271 n.1 (1997).[2]

Tattoo testimony

Pebley contends that the district court erred by allowing the victim to identify his tattoo because that identification was the result of an impermissibly suggestive show-up. This contention is belied by the record—although the victim testified that the person near her car had a tattoo on his neck, she did not identify Pebley or his tattoo in court.

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[2]In light of this conclusion, we need not reach Pebley's contentions that the district court erred by admitting his statement because it was evidence of a prior bad act, was involuntary, and was not preceded by a voluntary, intelligent, and knowing waiver of his Miranda rights.

Accordingly, we conclude that this contention lacks merit. To the extent Pebley contends that the district court erred by allowing the victim to testify that the man she saw near her car had a tattoo on his neck, and assuming arguendo that the show-up was impermissibly suggestive, we conclude that the victim's testimony was sufficiently reliable and the district court did not err by allowing this testimony. See, e.g., Bias v. State, 105 Nev. 869, 871-72, 784 P.2d 963, 964-65 (1989).

Phone calls

Pebley challenges the admission of portions of three phone conversations admitted as Exhibits 27, 28, and 29. He asserts that they were irrelevant, their probative value was substantially outweighed by the danger of unfair prejudice, and they undermined the presumption of innocence. We agree that the district court abused its discretion by admitting Exhibit 27, see Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (district court's decision to exclude or admit evidence reviewed for abuse of discretion), because its probative value was substantially outweighed by the danger of unfair prejudice, see NRS 48.035(1). The error, however, was harmless. See Chavez v. State, 125 Nev. 328, 344-45, 213 P.3d 476, 487 (2009). Regarding the remaining two calls, we conclude that the district court did not abuse its discretion by admitting Exhibit 28, and Pebley fails to demonstrate plain error in the admission of Exhibit 29. See Mclellan, 124 Nev. at 269, 182 P.3d at 110 (discussing plain error review regarding evidentiary decisions); Pantano v. State, 122 Nev. 782, 795, 138 P.3d 477, 485 (2006) (plain error review applies where no objection based on the grounds raised on appeal).

DMV records

Pebley alleges that the district court erred by declining to admit a bill of sale contained within official DMV records. The district court held that the document was inadmissible hearsay. Pebley asserts only that the document was properly authenticated and fails to challenge the district court's hearsay determination. Accordingly, we conclude that Pebley has failed to demonstrate any error.

Double jeopardy and redundancy

Pebley contends that his convictions for burglary and possession of a stolen vehicle violate the Double Jeopardy Clauses of the United States and Nevada Constitutions and are redundant. We conclude that these contentions lack merit. The elements of possession of a stolen vehicle are not entirely included in the elements of burglary and each conviction "requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932); see NRS 205.060(1); NRS 205.273(1)(b); Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (recognizing that Nevada utilizes the Blockburger test); Barton v. State, 117 Nev. 686, 692-93, 30 P.3d 1103, 1107 (2001) (the Blockburger test is based on examination of the elements of the offenses rather than on the conduct of the offender), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Further, burglary and possession of a stolen vehicle punish two separate acts and are therefore not redundant. See NRS 205.070; Stowe v. State, 109 Nev. 743, 745-47, 857 P.2d 15, 16-17 (1993).

Cumulative error

Finally, Pebley contends that cumulative error warrants the reversal of his convictions. Considering all the relevant factors, we

conclude that the cumulative effect of the errors identified in this order do not warrant relief. See Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). Accordingly, we

ORDER the judgment of conviction AFFIRMED.[3]

Saitta, J.

Pickering, J.

Hardesty, J.

cc: Hon. Elissa F. Cadish, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[3]Although we filed the fast track statement submitted by Pebley, it fails to comply with the Nevada Rules of Appellate Procedure because it does not have 1-inch margins on all four sides. See NRAP 3C(h)(1); NRAP 32(a)(4). Pebley's counsel is cautioned that future failure to comply with the fast track formatting requirements may result in the document being returned to be correctly prepared and in the imposition of sanctions. NRAP 3C(n).