

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN BATTISTA GIORDANO A/K/A
JOHN BATTISTA GIORDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59644

FILED

OCT 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER AFFIRMING AND REMANDING

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of grand larceny of a motor vehicle, possession of personal identifying information to establish a false status or identity, and felony escape. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.¹

Sentencing error

Appellant John Battista Giordano contends that the district court committed plain error by holding its adjudication and sentencing decision for the possession of a stolen vehicle count in abeyance pending this court's disposition of his direct appeal. We agree. Nevada law clearly establishes that a person cannot be convicted of both larceny and the possession of the fruits of that larceny. Lane v. State, 114 Nev. 299, 304, 956 P.2d 88, 91 (1998); Stowe v. State, 109 Nev. 743, 746, 857 P.2d 15, 17 (1993); Point v. State, 102 Nev. 143, 147, 717 P.2d 38, 41 (1986),

¹The Honorable Jerome T. Tao, District Judge, was the trial judge and the Honorable Charles Thompson, Senior Judge, was the sentencing judge.

disapproved of on other grounds by Stowe, 109 Nev. at 746-47, 857 P.2d at 17; see generally Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006). Accordingly, we conclude that the district court abused its discretion by placing the possession count in abeyance instead of ordering it dismissed, see Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000) (reviewing sentencing errors for abuse of discretion), and on remand the district court must dismiss the possession of a stolen vehicle count and enter an amended judgment of conviction.

Sufficiency of the evidence

Giordano contends that insufficient evidence supports his convictions. 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 crimes beyond a reasonable doubt. Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The jury heard testimony that the victim's 1987 Fleetwood Bounder recreational vehicle (RV) was stolen shortly after he put it up for sale and showed it to Giordano. Nearly a month later, the victim spotted his RV and called the police. The police made a felony vehicle stop, took Giordano into custody, advised him of his Miranda rights, and informed him that he was in custody because the vehicle he was driving was reported stolen.

Giordano falsely told the police that his name was John Peron and provided them with an Arizona identification card. When the police were unable to confirm that he was John Peron, Giordano suffered an apparent seizure and was taken to the hospital—handcuffed to the gurney. After his release from the hospital, Giordano was brought back to the traffic stop location and placed in the back of a police car—in

handcuffs. Thereafter, Giordano escaped from the police car and attempted to run away before tripping, falling, and being captured by witnesses and police officers.

The police determined that someone switched the RV's license plates, replaced the side-door lock, and "punched" the ignition system. Inside the RV, the police found a bag containing a passport, certificate of title, and other documents belonging to Harry Freeman—these items were returned to Freeman at the scene. The victim testified that he paid \$3,500 for the RV, made \$1,000 in improvements, expected to sell it for \$3,500, and it was worth \$6,000 or more.

We conclude that a rational juror could reasonably infer from this testimony that Giordano committed grand larceny of a motor vehicle, possessed personal information to establish a false status or identity, and perpetrated a felony escape. See NRS 205.228(1), (3); NRS 205.465(1); NRS 212.090. 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. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence alone may sustain a conviction).

Evidentiary rulings

Giordano contends that the district court made three erroneous evidentiary rulings. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." McLellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

First, Giordano asserts that the district court erred by allowing the State to admit irrelevant Kelley Blue Books, unnoticed expert

testimony regarding National Automobile Dealership Association (NADA) printouts, and the victim's testimony as to the value of his RV. Giordano did not object to the victim's testimony regarding the value of the RV and we conclude he has not demonstrated plain error as to the victim's testimony. See NRS 178.602; Dugan v. Gotsopoulos, 117 Nev. 285, 288, 22 P.3d 205, 207 (2001) (jury may consider property owner's testimony regarding the value of his property when the value is relevant to the case). We conclude, however, that the district court abused its discretion by admitting the 2005 and 2010 Kelley Blue Books because they were not relevant (one was out-of-date and the other did not contain a value for the 1987 RV), and the VIPER detective was not qualified to establish a foundation for admission of the NADA printout. But based on the victim's testimony and Giordano's admissions regarding what he would have paid for the RV, we conclude that the error was harmless. See Chavez v. State, 125 Nev. 328, 344-45, 213 P.3d 476, 487-88 (2009).

Second, Giordano asserts that the district court erred by admitting evidence of other bad acts without conducting an adequate hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.3d 503 (1985). The district court heard argument on whether the State could present testimony that the license plates found on the RV at the time of the traffic stop belonged on another RV. The district court determined that the custodian of records for the Nevada Department of Motor Vehicles could testify as to the ownership of the license plates but the documents showing that the license plates belonged to someone else could not be admitted because they tended to show that Giordano may be guilty of an uncharged bad act. We conclude that the factors for determining the admissibility of prior bad act evidence were met, see Tinch v. State, 113 Nev. 1170, 1176,

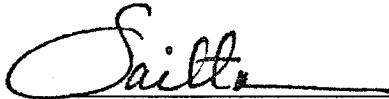
946 P.2d 1061, 1064-65 (1997), as modified by Big Pond v. State, 128 Nev. ___, ___, 270 P.3d 1244, 1245-46 (2012), and the district court did not abuse its discretion in admitting this evidence, see Chavez v. State, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009).


Third, Giordano asserts that the district court erred by admitting a title for the RV that listed someone other than victim as the vehicle owner. The record reveals that Giordano did not object to the title's admission, but rather requested that it be conditionally admitted because it did not show that the victim owned the RV. The district court inspected the title and admitted it into evidence, whereupon the victim testified that he received the title when he bought the RV from its previous owner. We conclude that the title was not evidence of other bad acts, was relevant to establishing the ownership of the RV, and therefore district court did not abuse its discretion by admitting it into evidence. See NRS 48.015.

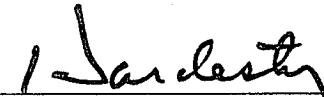
Prosecutorial misconduct

Giordano contends that the prosecutor committed misconduct by not disclosing evidence used in her case-in-chief until the fourth day of the trial. Giordano did not object to the late disclosure of this evidence on prosecutorial misconduct grounds and we conclude that he has failed to demonstrate plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); Pantano v. State, 122 Nev. 782, 795, 138 P.3d 477, 485 (2006).

For the reasons stated above, we
ORDER the judgment of conviction AFFIRMED AND
REMAND this matter to the district court for proceedings consistent with
this order.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Jerome T. Tao, District Judge
Hon. Charles Thompson, Senior Judge
Eichhorn & Hoo LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk