IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA MAE GARRETT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35693

FILED

OCT 02 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a stolen vehicle. The district court sentenced appellant to serve 12 to 36 months in the Nevada State Prison, suspended the sentence and placed appellant on probation for an indeterminate period not to exceed 3 years.

Appellant contends that: (1) the State adduced insufficient evidence to support the jury's verdict of guilt; (2) the district court erred by failing to give an instruction on unlawful taking of a vehicle as a lesser included offense of possession of a stolen vehicle; and (3) the district court erred by failing to give an instruction on unlawful taking of a vehicle as a lesser related offense of possession of a stolen vehicle. We conclude that these contentions lack merit.

Appellant first contends that the State adduced insufficient evidence to support the jury's verdict. In particular, appellant argues that her friend, Edward Gray, fit the definition of an "owner" set forth in NRS 205.271[1] and

[1]NRS 205.271 provides that, as used in the possession of a stolen vehicle statute, "the word 'owner' means a person having the lawful use or control or the right to the use and control of a vehicle under a lease or otherwise for a period of 10 or more successive days."

that Gray gave appellant permission to use the vehicle. Appellant therefore concludes that the evidence was insufficient to support a conviction for possession of a stolen vehicle. We disagree.

When reviewing a claim of insufficient evidence, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted). Furthermore, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. In particular, we note that the owner of the vehicle, Larry Southard, testified that he and Gray were at a bar together in California in late October or early November 1997 when Southard began to feel sick. Southard testified that he arranged for transportation to a physician's office and Gray agreed to drive Southard's vehicle back to Southard's home later in the evening or the next day. According to Southard, appellant was at the bar with Gray and overheard the discussion about the vehicle. Southard heard from Gray later in the evening and Gray promised to bring the vehicle to Southard. Gray failed to do so. Southard filed a stolen vehicle report in San Diego, California. Subsequently, Southard received a message that his vehicle was in Las Vegas.

Southard went to Las Vegas to find the vehicle and eventually filed a stolen vehicle report with police in Las Vegas.

On November 28, 1997, appellant was stopped for traffic violations while driving Southard's vehicle in Las Vegas. Appellant was the only person in the vehicle. She lied about having any identification, gave the officer a false name and told the officer that the individual listed on the vehicle registration (Southard) was her boyfriend.[2] The officer noticed that the right side of the steering column had been stripped away and the ignition had been tampered with. During the traffic stop, the officer learned that the vehicle had been reported as stolen and arrested appellant. Appellant then told the officer that she got the vehicle from her boyfriend, that he drove it from California, and that she did not know it was stolen. Based on this evidence, the jury could reasonably infer that appellant was guilty of possession of a stolen vehicle. See NRS 205.273(1)(b).

Appellant next argues that the district court erred by failing to give an instruction on unlawful taking of a vehicle as a lesser included offense of possession of a stolen vehicle. We disagree.

It is the defendant's responsibility to request a desired instruction. See Gebert v. State, 85 Nev. 331, 333, 454 P.2d 897, 899 (1969). Appellant failed to request an instruction on unlawful taking of a vehicle as a lesser included offense. Generally, the failure to request a lesser included offense instruction waives any right to complain about the trial court's failure to give such an instruction. See Hollis v. State, 95 Nev. 664, 667, 601 P.2d 62, 64 (1979), reh'g granted on other grounds, 96 Nev. 207, 606 P.2d 534

[2]Southard testified that appellant was not his girlfriend and that he did not know her very well.

(1980); Larsen v. State, 93 Nev. 397, 400, 566 P.2d 413, 414 (1977). However, a lesser included offense instruction is "mandatory, without request" where "there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree." Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966).

To determine whether a lesser included offense instruction was mandatory in this case, we must first determine whether unlawful taking of a motor vehicle is a lesser included offense of possession of a stolen vehicle. "We adhere to the rule that to determine whether an offense is necessarily included in the offense charged, the test is whether the offense charged cannot be committed without committing the lesser offense." Id. at 187, 414 P.2d at 594. We conclude that possession of a stolen vehicle may be committed without committing the offense of unlawful taking of a motor vehicle because the former does not require proof that the defendant unlawfully took the vehicle, just that she was in possession of a vehicle that she knew or had reason to believe had been stolen. See NRS 205.273(1)(b). Thus, the district court was not required to give a lesser included offense instruction.

Finally, appellant contends that the district court erred by failing to give an instruction on unlawful taking of a motor vehicle as a lesser related offense of possession of a stolen vehicle. Again, we disagree.

Appellant failed to request a lesser related offense instruction. Her failure to do so constitutes a waiver of her right to complain on appeal "unless the instruction was so necessary to [her] case that the court sua sponte was required to give." Gebert, 85 Nev. at 333, 454 P.2d at 899. We

conclude that appellant was not entitled to a lesser related offense instruction and, therefore, the district court did not err in failing to give the instruction sua sponte. See Peck v. State, 116 Nev. ___, ___ P.3d ___ (Adv. Op. No. 90, August 24, 2000) (overruling Moore v. State, 105 Nev. 378, 776 P.2d 1235 (1989), and holding that trial court is not required to instruct jury on lesser related offenses).

Having considered appellant's contentions and concluded that they lack merit, we affirm the judgment of conviction.

It is so ORDERED.

Young, J.

Maupin, J.

Becker, J.

cc: Hon. James A. Brennan, Senior District Judge
Attorney General
Clark County District Attorney
Wolfson & Glass
Clark County Clerk