

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARTHUR JOSEPH BREWER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73337

FILED

SEP 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING*

Arthur Joseph Brewer appeals from a judgment of conviction, pursuant to a jury verdict, of stop required on signal of a police officer, grand larceny auto, and theft. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Brewer first contends the district court erred in sentencing him for both grand larceny auto and theft because the charges were pleaded in the alternative. Brewer did not object at sentencing and is thus not entitled to relief absent a demonstration of plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unpreserved claims for plain error). “In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant’s substantial rights.” *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted).

At the preliminary hearing, the justice court indicated it would dismiss count three, theft, when the prosecutor stated, “Grand larceny auto and theft are alternatives.” On that representation, the justice court held Brewer to answer on the theft charge. It is thus plain from a casual inspection of the record that Brewer should not have been sentenced for

both counts. The State, on appeal, acknowledges the alternative nature of the two counts. And the error affects Brewer's substantial rights because it inaccurately reflects an additional felony conviction. We therefore conclude the conviction for count three, theft, must be vacated and the matter remanded for entry of an amended judgment of conviction that reflects count 3 was dismissed.¹

Brewer next contends insufficient evidence supported his conviction for grand larceny auto. When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). And circumstantial evidence is enough to support a conviction. *Washington v. State*, 132 Nev. ___, ___, 376 P.3d 802, 807 (2016).

The instant offenses involve a pickup truck that Ronald Caplin had purchased through a wholesale auction for \$18,000. Caplin had arranged for a company to transport the truck to his Utah dealership. Brewer admitted to driving the truck for his personal use after Caplin purchased it but before it was transported to Utah. Caplin did not give Brewer permission to drive the truck for his personal use. When officers attempted to stop Brewer for a broken tail light and suspicious license plate, Brewer fled. Brewer initially told police he got the truck from an


¹In light of this holding, we need not reach Brewer's challenges to the sufficiency of the evidence and redundancy of count three.

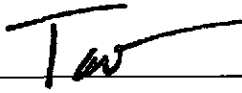
irreputable friend and he ought to have known better, but he later confessed to "peeling" the truck's key from its storage location. Brewer testified the transport driver had given him permission to take the vehicle.


The jury could reasonably infer from the evidence presented that Brewer drove away a motor vehicle owned by another. See NRS 205.228(1). 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); see also *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Having concluded Brewer should not have been sentenced for count three, theft, and sufficient evidence supported his conviction for grand larceny auto, we

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Sandra L. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk