IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER J. DEVOSE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37332

FILED

DEC 04 2001

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 one count of possession of a stolen vehicle, a category C felony. Appellant Christopher J. Devose received a sentence of 12 to 48 months in prison (concurrent to his sentence in district court case number C158603) and was ordered to pay $302.00 in restitution.

Devose contends that the State failed to prove every element of the crime he was charged with and therefore that the district court erred in denying his motion to set aside the jury verdict and enter a judgment of acquittal.

The State charged Devose by amended information with possession of a stolen vehicle having a value of $2,500.00 or more. If a prosecutor proves that the value of a stolen vehicle is $2,500.00 or more, the crime constitutes a category B felony.[1] Otherwise, possession of a stolen vehicle is a less severe, category C felony.[2] The State concedes that at trial it did not present evidence establishing the value of the stolen vehicle in question.

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[1]NRS 205.273(4).

[2]See NRS 205.273(1) and (3).

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Because the amended information charged Devose with possession of a stolen vehicle having a value of $2,500.00 or more and this charge was not amended,[3] Devose argues that the State did not prove its case and that his conviction must be overturned.[4] Devose's counsel, however, fails to inform this court that the verdict form returned by the jury stated simply that Devose was guilty of "POSSESSION OF STOLEN VEHICLE." And although the jurors were informed that Devose was charged with possessing a stolen vehicle worth $2,500.00 or more, they were instructed only that a person "who has in his possession any motor vehicle which he knows or has reason to believe has been stolen is guilty of Possession of Stolen Vehicle." Devose does not dispute that the State proved beyond a reasonable doubt that he possessed a stolen vehicle. Thus, the instruction given to the jury and the verdict returned by the jury were consistent with the proof of Devose's guilt.

Reversible error exists only where the variance between the charge and proof affects a defendant's substantial rights.[5] A defendant must be definitely informed as to the charges against him so that he can, first, prepare for trial and not be surprised by evidence produced and, second, be protected against double jeopardy.[6] Devose has failed to show that he was prejudiced in any way in presenting his defense or is in any way vulnerable to double jeopardy.

In fact, Devose did not object to either the instructions or the verdict form before they were provided to the jury. Nevertheless, after the

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[3]See NRS 173.095(1) ("The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.") (emphasis added).

[4]See, e.g., Slobodian v. State, 107 Nev. 145, 147-48, 808 P.2d 2, 3-4 (1991) ("[I]n order to obtain a conviction the prosecution must prove every element of the crime charged beyond a reasonable doubt.").

[5]State v. Jones, 96 Nev. 71, 74, 605 P.2d 202, 204 (1980); NRS 178.598.

[6]Jones, 96 Nev. at 74, 605 P.2d at 204.

guilty verdict was returned, Devose's trial counsel (who is also his appellate counsel) moved to set it aside, arguing as follows:

> The charges, as given to the jury, included an element of the value of the vehicle, and I know we had the argument before or at least the question before we did the jury instructions as to whether that was an element versus a sentencing issue. At that point, I actually believed it was a sentencing issue. Since that time, all the information I have been able to gather is that's an element of the crime and, as such, was charged in the information and given to the jury as an essential element of the crime. It's not something that can be taken judicial notice of, and if no evidence was given on that particular element, they can't find him guilty of that element because there was no evidence on it.

This challenge was not timely, nor was it meritorious.[7] The value of the stolen vehicle was not "given to the jury as an essential element of the crime." The district court therefore correctly denied the motion to set aside the verdict and entered a judgment of conviction for simple possession of a stolen vehicle, a category C felony.

The contentions made in this appeal are devoid of merit. Accordingly we

ORDER the judgment of the district court AFFIRMED.

Shearing, J.

Rose, J.

Becker, J.

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[7]See id. (concluding that a challenge to an indictment on the grounds that it varied from the proof, made after the close of evidence, was "eleventh hour" and "belie[d] any claim of prejudice").

cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Clark County Clerk