IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMIE LYN HELLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42174

FILED

APR 2 0 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of three counts of failure to stop on the signal of a police officer and three counts of possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

This case is based on three separate incidents where the police located appellant Jaime Lyn Heller in possession of a stolen vehicle after she committed various traffic violations. On October 10, 2002; January 9, 2003; and February 4, 2003, the police witnessed Heller driving a stolen vehicle. On each of these occasions, the police attempted to stop Heller; however, she fled from the scene. Notwithstanding Heller's attempts to get away, the police subsequently caught and arrested her after every offense.

During trial, the prosecutor simply pointed out that the chances of Heller inadvertently possessing three different stolen vehicles on three separate occasions within a five-block radius were extremely small. After the two-day trial, the jury convicted Heller as charged. The district court sentenced Heller to three concurrent sentences of seventy-two months in prison with parole eligibility after twelve months for failure to stop on signal of a police officer and three concurrent sentences of sixty months in prison with parole eligibility after twelve months for possession

of a stolen vehicle. The three concurrent sentences for failure to stop on signal of a police officer were to run consecutively with the three concurrent sentences for possession of a stolen vehicle. The district court also ordered Heller to pay $2,080 in restitution. Finally, the district court suspended Heller's sentence of imprisonment and placed her on three years of probation with five conditions.

On appeal, Heller argues that (1) the prosecutor committed several acts of misconduct, (2) the district court gave improper jury instructions, (3) the district court erred in restricting some of her arguments, (4) the district court erred in permitting victims to testify that their cars were stolen, (5) the district court erred in denying her motion to sever, and (6) the district court erred in admitting certain hearsay statements.

Prosecutorial misconduct

We have stated that it is improper for a prosecutor to comment on the defense's failure to produce evidence or call a witness because such comments shift the burden of proof to the defense.[1] However, in Evans v. State, we cited with approval the United States Court of Appeals for the Ninth Circuit, which held "that as long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented."[2]

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[1]Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996).

[2]117 Nev. 609, 631, 28 P.3d 498, 513 (2001) (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992)).

When the prosecutor's statement is taken in context, there is no prejudice to the appellant. The prosecutor's comment was made during the prosecutor's rebuttal argument. Specifically, the prosecutor responded to defense counsel's closing argument. Defense counsel argued that the jury did not know what really happened. The prosecutor responded by stating that the jury did not have to speculate about finding reasonable doubt. The prosecutor's statement was true; the jury does not have a duty to find reasonable doubt. Therefore, the prosecutor's comment was not prejudicial and does not constitute prosecutorial misconduct. We also find appellant's other claims of prosecutorial misconduct to be without merit.

Jury instructions

We have stated that "'[t]he matter of the prosecution of any criminal case is within the entire control of the district attorney.'"[3] The district attorney had the discretion to charge Heller with either unlawful taking of a motor vehicle and reckless driving or possession of a stolen vehicle. Therefore, whether Heller thinks she should have been charged with different crimes is irrelevant. The fact that the district attorney charged one crime as opposed to another crime is not grounds for reversal.

We have also recognized that "Nevada law requires jury instructions on defendant's theory of the case when the theory involves a defense or a lesser included offense."[4] However, "[t]o be entitled to an instruction as to a lesser included offense, the defendant's theory of

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[3]Henry v. Sheriff, 94 Nev. 66, 68, 574 P.2d 1011, 1012 (1978) (quoting Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973)).

[4]Moore v. State, 105 Nev. 378, 382, 776 P.2d 1235, 1238 (1989), overruled on other grounds by Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000).

defense must be consistent with a conviction for the lesser offense."[5] An offense is a lesser included offense if "'the offense charged cannot be committed without committing the lesser offense.'"[6]

Whether unlawful taking of a motor vehicle and reckless driving are lesser included offenses of possession of a stolen vehicle can be determined by examining the elements of each crime.[7] In order for the unlawful taking of a motor vehicle and reckless driving to be lesser included offenses of possession of a stolen vehicle, their elements must be included in the offense of possession of a stolen vehicle.

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. Instead, possession of a stolen vehicle only requires that she was in possession of a vehicle that she knew or had reason to believe had been stolen.[8]

Similarly, the crime of reckless driving does not contain any elements of possession of a stolen vehicle. Reckless driving is when a person drives a vehicle disregarding the safety of persons or property.[9] Therefore, the district court did not err by refusing to give a jury

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[5]Walker v. State, 110 Nev. 571, 575, 876 P.2d 646, 649 (1994).

[6]Peck, 116 Nev. at 844, 7 P.3d at 472 (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)).

[7]See Blockburger v. United States, 284 U.S. 299, 304 (1932), accord Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003).

[8]See NRS 205.273(1)(b).

[9]See NRS 484.377(1).

instruction on reckless driving because it is not a lesser included offense. Despite Heller's argument to the contrary, the unlawful taking of a motor vehicle and reckless driving are not lesser included offenses of possession of a stolen vehicle. We further find that Heller's other claims that the district court gave improper jury instructions to be without merit.

The district court's restriction of some of Heller's arguments

During the trial, in Officer Carlson's cross-examination, defense counsel asked him whether Heller had obtained a Department of Motor Vehicles identification card from Tim Waley, the son of the vehicle owner. Officer Carlson answered that he did not know whether Waley gave Heller the card. Defense counsel then asked if Heller told Officer Carlson that Waley gave her the card. The prosecutor promptly objected based on hearsay, and the district court sustained the objection. Neither party mentioned the identification card until closing arguments.

At closing, defense counsel argued to the jury that "you've heard the officer testify that [Heller] gave an explanation of where she got the vehicle." The prosecutor objected, and the district court sustained the objection and admonished the jury because the argued facts were not admitted into evidence. Heller now claims on appeal that the district court erred in restricting the closing argument.

"During closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence."[10] Trial counsel cannot, however, argue facts that are not in evidence.[11]

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[10]Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993).

[11]See Greene v. State, 113 Nev. 157, 177, 931 P.2d 54, 66 (1997), overruled in part on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

We conclude that the district court did not err because Heller's statement to the police officer was never admitted into evidence. Heller could have taken the stand to testify about what she said to the police officer during that incident; however, she chose not to do so. The district court was correct to sustain the prosecutor's objection for hearsay. Therefore, the district court did not err in restricting defense counsel's closing argument as to this issue and other issues.

Testimony that the victims' cars were stolen

"This court will not overturn a district court's decision to admit or exclude evidence absent an abuse of discretion."[12] NRS 50.265 addresses the admissibility of a lay witness' opinion. Under NRS 50.265, a lay opinion or inference must satisfy two conditions to be admissible. Lay opinions are admissible if they are "(1) [r]ationally based on the perception of the witness; and (2) [h]elpful to a clear understanding of his testimony or the determination of a fact in issue."[13]

In the instant case, two vehicle owners testified that they left their homes one morning to discover that their vehicles were not where they parked them the night before. The two vehicle owners stated that their cars were stolen because they did not give Heller permission to take them. We conclude that the district court properly overruled defense counsel's objections to the testimony because witnesses can testify about what they rationally perceive if it is helpful to the trier of fact.

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[12]Collman v. State, 116 Nev. 687, 704, 7 P.3d 426, 437 (2000).

[13]NRS 50.265.

Denial of Heller's motion to sever

We will not reverse a district court's joinder decision unless the district court abused its discretion.[14] NRS 173.115 provides that

> [t]wo or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are: 1. Based on the same act or transaction; or 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

"To establish that joinder was prejudicial 'requires more than a mere showing that severance might have made acquittal more likely.' Misjoinder requires reversal only if the error has a substantial and injurious effect on the jury's verdict."[15] This court will reverse only if the joinder is so prejudicial "'that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever.'"[16] Additionally, collateral evidence is cross-admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[17]

In this case, the State lists several characteristics which indicate that Heller had a common plan in the three incidents. Evidence at trial indicated that all three incidents (1) occurred in the same

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[14]Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 367 (2002).

[15]Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998) (quoting United States v. Wilson, 715 F.2d 1164, 1171 (7th Cir. 1983)).

[16]Honeycutt, 118 Nev. at 667, 56 P.3d at 367 (quoting United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976)).

[17]NRS 48.045(2).

neighborhood, (2) occurred at similar times of day, (3) occurred on the same streets, (4) involved Heller driving a stolen vehicle, (5) involved Heller initially stopping for the police officer, (6) involved Heller fleeing after the officer exited his vehicle, (7) involved Heller driving recklessly, (8) involved Heller speeding, and (9) involved Heller attempting to evade the officer. Additionally, in two of the three incidents, Heller hid under another vehicle after she was pursued by the police. Based on the similarities among the three incidents, the district court did not abuse its discretion in denying Heller's motion to sever.

Admission of certain hearsay statements

Hearsay is an out of court statement offered to prove the truth of the matter asserted.[18] Generally, hearsay statements are inadmissible.[19] A hearsay statement is admissible as an excited utterance if the statement is "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[20] A hearsay statement is also admissible as a present sense impression if the statement was "describing or explaining an event or condition made while the declarant was perceiving the event or condition."[21]

In the instant case, Melva Ramirez testified that her fifteen-year-old daughter was outside when her car was stolen. Ramirez testified that when she went outside, her daughter was hysterical and yelled that

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[18]NRS 51.035.

[19]NRS 51.065.

[20]NRS 51.095.

[21]NRS 51.085.

someone was stealing their car. She further testified that her daughter described the thief as a white female with short brown hair. Defense counsel objected to the testimony. The State responded that Ramirez' statement was admissible as either (1) an excited utterance pursuant to NRS 51.095 or (2) a present sense impression pursuant to NRS 51.085. The district court overruled the objection.

We conclude that the statement by Ramirez' daughter was a present sense impression because she told Ramirez about the car being stolen while she perceived it happening. Alternatively, the statement could also fit within the excited utterance exception. The record plainly demonstrates that Ramirez' daughter was hysterical and yelling the statement to her mother. Further, although Ramirez' daughter did not testify at trial, her statement is not precluded by Crawford v. Washington in that her statement was not solicited or made in contemplation of future testimony.[22]

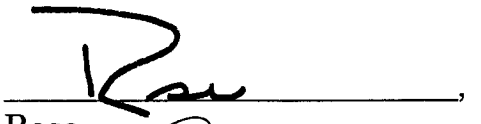
CONCLUSION

We conclude that the prosecutor did not commit any misconduct. The district court gave proper jury instructions and did not err in restricting some of Heller's arguments. Additionally, the district court did not err in permitting victims to testify that their cars were stolen. Further, the district court did not err in denying Heller's motion to

[22]Crawford v. Washington, 541 U.S. 36, 51-52 (2004) (stating that out of court statements which constitute formal or testimonial statements are inadmissible since they violate the confrontation clause).

sever. Finally, the district court did not err in admitting certain hearsay statements. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk