IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT GONZALEZ SUYAT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42205

FILED

AUG 25 2004

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of nine counts of burglary. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court sentenced appellant Gilbert Suyat to serve consecutive terms of 16 to 72 months in prison for each count. Suyat asks this court to reverse and remand for a new trial in regard to counts one through four, and to reverse counts five through nine.

Over Suyat's objection, the district court gave the following instruction:

> Recent, exclusive and unexplained possession of stolen property by an accused person can give rise to an inference of guilt which may be sufficient to convict in the absence of other facts and circumstances which leave a reasonable doubt in the minds of the jury.

Suyat claims that the instruction misstated the law and violated his due process rights by impermissibly shifting the burden of proof from the State to the defendant.[1] We agree.

The instruction at issue repeats almost verbatim language from this court's opinion in Staab v. State;[2] however, we have since expressed disapproval of Staab.[3] The instruction is erroneous because proving simply that a person possessed stolen property is not sufficient to convict that person of the offense of possession of stolen property or theft, let alone burglary, all of which also require proof of an element of knowledge or intent, if not additional elements.[4] This proposition is a long-standing one which we have expressed in a number of cases.[5]

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[1]Given our disposition of this case, we need not address Suyat's claim that the instruction also violated his right against self-incrimination by requiring him to explain his possession of stolen property.

[2]90 Nev. 347, 350, 526 P.2d 338, 340 (1974).

[3]Gray v. State, 100 Nev. 556, 558 n.1, 688 P.2d 313, 314 n.1 (1984).

[4]See NRS 205.275(1); NRS 205.0832(1); NRS 205.060(1) (providing that burglary consists of entry into a building, tent, or vehicle "with the intent to commit grand or petit larceny, assault or battery on any person or any felony").

[5]See, e.g., State v. Gray, 23 Nev. 301, 303, 46 P. 801, 801 (1896) ("It is a well-settled rule of law that the possession of stolen property alone is not sufficient to justify a conviction for the larceny of that property."); State v. Mandich, 24 Nev. 336, 340, 54 P. 516, 517 (1898) ("The strength of the presumption which [possession of stolen property] raises against the accused depends upon all the circumstances surrounding the case, and is for the jury to determine."); Carter v. State, 82 Nev. 246, 249, 415 P.2d 325, 327 (1966) ("Though possession is relevant and admissible evidence, it does not necessarily point to guilt.").

In Barnett v. State, we addressed an instruction that

> impermissibly declared unexplained possession of recently stolen property to be . . . sufficient to convict [the possessor] of the crime charged. The instruction does not merely instruct the jury that possession of recently stolen property is a circumstance tending to justify an inference of knowledge, nor does it direct the jury to weigh the circumstance of possession of recently stolen property with other evidence in reaching a verdict.[6]

Likewise, in this case, the district court should have instructed the jury that possession of recently stolen property was merely a circumstance tending to justify an inference that the possessor had stolen the property. Possession of the stolen property alone was not sufficient to establish guilt of burglary, as the State clearly understood: in presenting its case, it did not rely solely on that fact as proof of Suyat's guilt. But as in Barnett, the instruction in this case "effectively relieved the prosecution of its burden of proof" on essential elements of the crimes charged.[7]

The instruction in this case also failed to satisfy NRS 47.230, which governs "presumptions against an accused recognized at common law or created by statute."[8] In properly charging a jury regarding a presumed fact, that statute requires, among other things, that the district court instruct that

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[6]96 Nev. 753, 755, 616 P.2d 1107, 1108 (1980).

[7]Id.

[8]NRS 47.230(1).

> the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.[9]

We review "improper instructions omitting, misdescribing, or presuming an element of an offense" for harmless error as long as the error is not "structural" in magnitude.[10] Harmless-error inquiry requires us to determine whether it is clear beyond a reasonable doubt that absent the error a rational jury would have found the defendant guilty.[11]

Harmless-error analysis is clearly appropriate in regard to the first four counts of burglary because Suyat admitted that he committed each of the crimes in those counts.[12] Moreover, police detectives observed him when he committed those four burglaries. We have no reasonable doubt that based on this evidence a reasonable jury would have found Suyat guilty on these counts even absent the improper instruction. Therefore, the error was harmless, and we affirm the judgment as to counts one through four.

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[9]NRS 47.230(3).

[10]Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 449 (2000).

[11]Id. at 722-23, 7 P.3d at 449.

[12]See id. at 720, 7 P.3d at 447.

Regarding counts five through nine, even assuming harmless-error analysis is appropriate, we are not convinced beyond a reasonable doubt that absent the error a rational jury would have found Suyat guilty. The evidence for those counts was limited to Suyat's possession of stolen property, evidence showing he had burglarized other vehicles under somewhat similar circumstances, and his own testimony regarding the alleged burglaries that the jury could have found false or evasive. Although we conclude that this evidence would be sufficient for reasonable jurors, if instructed properly, to convict,[13] it was not "'so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption.'"[14] Because we conclude that giving the improper instruction was not harmless error as to counts five through nine, we reverse the judgment on those counts.

Our review of the judgment of conviction also reveals a clerical error. The judgment of conviction incorrectly states that Suyat was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. We therefore direct the district court on remand to correct this error as well. Accordingly, we

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[13]We therefore reject Suyat's contention that the evidence was insufficient to support his conviction on these counts. See id. at 711, 7 P.3d at 441 (describing the standard for this court's review of the sufficiency of the evidence to support a criminal conviction).

[14]Id. at 722, 7 P.3d at 448-49 (quoting Yates v. Evatt, 500 U.S. 391, 405 (1991), overruled on other grounds by Estelle v. McGuire, 502 U.S. 62 (1991)).

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

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk