IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD RAY LAMONT WANNER, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81589-COA

ORDER OF AFFIRMANCE

Donald Ray Lamont Wanner, Sr., appeals from a judgment of conviction, pursuant to a bench verdict, of two counts of possession of a stolen vehicle and conspiracy to possess a stolen vehicle. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

Curtis Loper owned a 1968 Fastback Mustang, which he initially stored on Debora Mock's and Manuel Jimenez's property.[1] After Mock and Jimenez divorced, they split their property, and at some point after that, they moved the Mustang to Manuel Jimenez's adjacent property. Loper apparently knew Mock, but was unfamiliar with Jimenez. The Mustang remained stored on the Mock-Jimenez properties for approximately fifteen years. Wanner and Jimenez also knew each other for a number of years, although the extent of their relationship is unclear. However, Wanner was familiar with the Mustang stored on Jimenez's property.

In 2017, Chase Peterson came across a Craigslist advertisement posted by Wanner for the sale of the Mustang and contacted him to purchase it. Wanner told Peterson that Jimenez could sell the

[1]We do not recount the facts except as necessary to our disposition.

Mustang pursuant to Jimenez and Mock's divorce. Jimenez and Peterson negotiated the price of the Mustang and the sale was finalized. During the negotiations, Wanner led Peterson to believe that Mock might attempt to interfere with the sale, so it was decided that for a higher price, they would remove the Mustang at night with extinguished streetlights so Mock would not be alerted to the transfer.

Thereafter, Mock learned about the sale of the Mustang and confronted Wanner, who, after denying any involvement, later admitted that he and Jimenez sold the Mustang to Peterson. Mock contacted law enforcement about the "theft" of the Mustang. Eventually, the police retrieved the Mustang and arrested Wanner. Although the police questioned Jimenez, he denied any knowledge of the sale; however, he remained under suspicion as having been involved in the transaction.

The State filed a second amended information charging Wanner with two counts of possession of a stolen vehicle (counts I-II),[2] profiting from a stolen vehicle (count III), and conspiracy to possess a stolen vehicle (count IV). After a two-day bench trial, the district court found Wanner guilty on all counts, except count III, and sentenced him to concurrent terms of incarceration from 24 to 72 months. This appeal followed.

Wanner raises four issues on appeal: (1) whether the district court failed to adequately perform its fact-finding duties during trial, (2)

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[2]Count II pertained to Wanner's illegal possession and transfer of a 2007 Yamaha Raptor belonging to a Jon Hughes. Wanner fails to offer argument regarding count II. As such, we necessarily affirm his conviction as to count II. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that we need not address issues raised by appellant if they are not cogently argued or supported with relevant authority).

whether the district court abused its discretion by imposing an exceedingly harsh sentence, (3) whether the district court's actions during trial constituted judicial bias, and (4) whether there was sufficient evidence to support the convictions. We decline to address Wanner's second and third arguments in great detail based on plain error review.[3]

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[3]We review Wanner's second and third arguments for plain error because he failed to object to them below. *Lamb v. State*, 127 Nev. 26, 40, 251 P.3d 700, 709 (2011) (holding that we review an appellant's "failure to specifically object on the grounds urged on appeal" for plain error). First, Wanner contends his sentence should reflect the punishment set out in Assembly Bill (AB) 236, section 68, *see* 2019 Nev. Stat., ch. 633, § 68, at 4432-33, which would have reduced his maximum sentence for violating NRS 205.273(1)(a) & (4) (i.e., count I) by one year, because the district court sentenced him after AB 236 became effective. Here, a casual inspection of the record does not show the district court erred when it imposed the punishment in effect at the time Wanner committed the crime of possession of a stolen vehicle. *See State v. Second Judicial Dist. Court*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008) (holding that we must apply the law in effect when a defendant commits a crime "unless the Legislature clearly expresses its intent to apply a law retroactively"); 2011 Nev. Stat., ch. 41, § 20, at 166. Additionally, there is no indication that the Legislature intended to apply the changes in NRS 205.273 (2019) retroactively. As such, we conclude Wanner fails to demonstrate plain error with respect to sentencing.

Second, Wanner argues that the district court judge showed bias by falling asleep, playing on his cell phone, and being disengaged. He avers the judge's disengagement is evidence of judicial bias, which caused prejudice in the form of an excessive sentence and because it was unable to determine the credibility of witnesses. We conclude Wanner fails to demonstrate plain error because a casual inspection of the record does not show the district court judge fell asleep, played on his phone, or was otherwise disengaged during the trial.

Thus, we turn to Wanner's remaining arguments, first addressing his Constitutional challenge based on the district court's failure to perform its fact-finding duties. Wanner argues that he did not receive a fair trial because the district court judge fell asleep during various parts of the trial, played on his cell phone, or was otherwise disengaged. Wanner did not object during trial to any of these alleged behaviors.

We review unpreserved constitutional errors for plain error. *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015). Plain error arises when "a casual inspection of the record" clearly shows an error exists and "the error affected the defendant's substantial rights" by causing "actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Jeremias v. State*, 134 Nev. 46, 50-51, 412 P.3d 43, 48-49 (2018). The United States and Nevada Constitutions guarantee a defendant the right to an impartial jury. U.S. Const. amend. VI; Nev. Const. art. I, § 8, cl. 2; *see also Daniel v. State*, 119 Nev. 498, 517, 78 P.3d 890, 903 (2003). Wanner argues by analogy that Nevada jurisprudence pertaining to a sleeping juror may also apply to a judge when the judge acts as a fact finder. *See generally Burnside*, 131 Nev. at 387, 352 P.3d at 638 (discussing how courts deal with allegations of potentially sleeping jurors). "A sleeping juror strikes at the heart of a defendant's constitutional right to a fair trial." *Id.* at 410, 352 P.3d at 654 (Cherry, J., dissenting) (citing *United States v. McKeighan*, 685 F.3d 956, 973 (10th Cir. 2012) ("A defendant could be deprived of the Fifth Amendment right to due process or the Sixth Amendment right to an impartial jury if jurors fall asleep and are unable to fairly consider the defendant's case.")).

Wanner asserts that a sleeping judge, acting as a trier of fact, violates a defendant's right to a fair trial. Wanner avers that the district

court judge failed his duty as a supervisor in preserving his rights when he fell asleep or was otherwise disengaged. Wanner contends the district court judge fell asleep during Emilio Jimenez's (Mock and Jimenez's son) and Deputy Shawn Thornhill's testimonies, which stifled its ability to perceive the nuances of the testimonies. Wanner also notes the district court judge engaged in strange behavior by making comments to Mock before testifying.[4] Wanner concedes he did not object to this issue at trial but now asserts he feared reprisal from the district court.

Although Wanner refers to the record for his support of a Constitutional violation, he fails to demonstrate specific instances where the court fell asleep or was otherwise disengaged during the testimonies of various witnesses. A casual inspection of the record fails to reveal such instances. Instead, the record supports that the district court was attentive and engaged during trial, evidenced by the numerous times it responded to the parties' questions and requests to admit evidence, its interactions with witnesses, and its detailed decision. We are also unpersuaded by Wanner's argument that he failed to make a record because of the fear of judicial retaliation. A record must be made where required. If a hearing or trial was not recorded (such as by audiovisual means, which was the case here), or if a transcript is unavailable, as part of his appeal Wanner could have prepared and served "a statement of the evidence or proceedings from the

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[4]We note that Wanner did not object to the comment about the microphone at the time. However, based on a casual inspection of the record, it does not appear that the district court's comment adversely interfered with or hindered the witness's ability to testify at trial. We take this opportunity, however, to remind the court that efforts at levity may be misinterpreted or inappropriate and to be mindful of engaging in unnecessary commentary even in a non-jury trial.

best available means, including the appellant's recollection." NRAP 9(d). Wanner did not do this and plain error review does not support reversal.

Last, we address Wanner's argument that the district court did not have sufficient evidence to find him guilty. He asserts he was acting as Jimenez's agent and had no reason to believe Jimenez could not sell the Mustang. As such, Wanner requests this court to reverse the judgment of conviction.[5]

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." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We will not disturb a verdict on appeal where substantial evidence supports it. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). "[I]t is the function of the [fact finder], 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).

Here, sufficient evidence supports the district court's verdict. Although Wanner argues he believed he had authority to sell the Mustang, evidence in the record, or lack thereof, shows Wanner knew or should have known he could not sell it. First, the certificate of title for the Mustang listed Loper as the owner, which means Wanner was at least on constructive

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[5]In addition, Wanner asserts that he suffered from cumulative error. Because there are no errors to cumulate, reversal on this basis is unwarranted. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (explaining that cumulative error warrants reversal where the effect of the errors, viewed collectively, violates the defendant's right to a fair trial, even if each individual error was harmless).

notice that the Mustang did not belong to him or Jimenez. Second, since the Mustang's title listed Loper as the owner, Wanner took possession of the Mustang knowing or at least having reason to believe it did not belong to him when he assisted Peterson in removing it from Jimenez's property. *See Lewis v. State*, 124 Nev. 1488, 238 P.3d 833 (2008) (holding "that NRS 205.273 'makes mere possession of a vehicle, with the requisite knowledge of its stolen character, a crime'"). Third, Wanner intended to pass the Mustang's title, which neither he nor Jimenez possessed, and transferred possession of the title to Peterson despite knowing he could not do so (discussed below). Fourth, Wanner's conduct in selling Peterson the Mustang for less if Peterson was willing to buy it under threat of Mock catching them, suggests he knew the Mustang was not his or Jimenez's to sell, or at least that the sale was not authorized. The same is true for subsequently selling the Mustang to Peterson at night when the streetlights were extinguished so Mock would not notice the removal of the Mustang from the property.

Fifth, testimony at trial supported that the Mustang was not abandoned, contradicting Wanner's argument that he could sell it because Jimenez owned it via abandonment. Sixth, Wanner made no effort to ensure the Mustang had a clear title before transferring it, which places substantial doubt to his position that he was authorized to sell it. Seventh, although some testimony suggests Jimenez thought he owned the Mustang through abandonment, testimony by Mock and Deputy Thornhill shows he knew it was not his to sell. Additionally, Wanner was exceedingly adamant about not involving the police after Mock confronted him about the sale. Therefore, substantial evidence demonstrates that any rational trier of fact could have found the essential elements of possession of a stolen vehicle

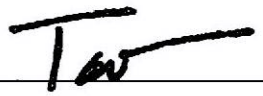
beyond a reasonable doubt, which includes possessing or transferring ownership of a vehicle that one has actual or constructive knowledge is not theirs to sell. NRS 205.273.

Further, sufficient evidence supports Wanner's conspiracy conviction as well, such as Peterson testifying that he understood Jimenez and Wanner were associates in selling the Mustang. In addition, Deputy Thornhill testified Peterson told him that he and Jimenez were in communication before the sale. Further, while in the process of selling the Mustang to Peterson, Wanner sent him a video of the Mustang showing its condition, position, and location, with the video containing the voices of Jimenez and Wanner, suggesting they were working together on the sale. Finally, after Mock confronted Wanner about the sale, he admitted "we" sold the Mustang to Peterson and that he set up the sale for Jimenez, implying he and Jimenez agreed to sell the Mustang. This evidence shows any rational trier of fact could have found the essential elements of conspiracy to possess a stolen vehicle beyond a reasonable doubt. NRS 199.480; NRS 205.273. As a result, we will not disturb the verdict.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Jim C. Shirley, District Judge
Miller Law, Inc.
Attorney General/Carson City
Pershing County District Attorney
Clerk of the Court/Court Administrator