STATE V. UPCHURCH

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SHANE UPCHURCH,
Defendant-Appellant.

No. 33,240

COURT OF APPEALS OF NEW MEXICO

December 15, 2014

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, William C. Birdsall, District Judge

COUNSEL

Gary K. King, Attorney General, Paula E. Ganz, Assistant Attorney General, Santa Fe, NM, for Appellee

Law Works LLC, John McCall, Albuquerque, NM, for Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, CYNTHIA A. FRY, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} Defendant Shane Upchurch appeals his convictions for larceny, burglary, receiving stolen property, conspiracy to commit larceny, conspiracy to commit burglary, and conspiracy to commit receiving stolen property. He challenges his convictions on

double jeopardy grounds, and he argues that there was insufficient evidence to support his convictions. We affirm in part and reverse in part.

BACKGROUND

{2} At the end of October 2010, a building in San Juan County was burglarized at least twice within a few days. The building was owned by Jerry Dalla and included a jewelry-making workshop and a lapidary room, which was used for polishing stones, silver, and jewelry. Dalla rented space in the workshop to two other jewelry-makers, Roy Kinney and Raymond Rhodes. On October 27, 2010, Kinney noticed that some items seemed out of place or missing, but because it was a shared space, he was uncertain whether items had been moved or if they were actually missing. The next morning, Kinney noticed that more items were missing, so he called the police to report the burglaries.

{3} Prior to Defendant's jury trial, Defendant's identical twin brother, Aaron Upchurch, was convicted of larceny, burglary, conspiracy to commit larceny, and conspiracy to commit burglary for his involvement with the aforementioned burglaries. *See State v. Upchurch*, No. 31,671, mem. op. (N.M. Ct. App. July 18, 2012) (non-precedential). During Defendant's trial, Aaron testified that he acted alone when he committed the burglaries. Therefore, there is no dispute that the burglaries occurred. The critical issue that was tried to the jury was whether Defendant was involved in committing the burglaries and related crimes with Aaron.

{4} The jury found Defendant guilty of larceny (over $20,000), a second degree felony; burglary, a fourth degree felony; receiving stolen property (retain) (over $500), a fourth degree felony; conspiracy to commit larceny, a third degree felony; conspiracy to commit burglary, a fourth degree felony; and conspiracy to commit receiving stolen property, a fourth degree felony. Defendant now appeals each of his convictions.

DOUBLE JEOPARDY

{5} Defendant raises two double jeopardy issues. First, Defendant argues that his convictions for larceny and receiving stolen property violate double jeopardy. Second, Defendant argues that his multiple conspiracy convictions violate double jeopardy. In both instances, Defendant asserts that he is subject to multiple punishments for the same conduct contrary to the Fifth Amendment of the United States Constitution and Article II, Section 15 of the New Mexico Constitution.

{6} Double jeopardy claims are not subject to waiver and can be raised at any time before or after entry of a judgment. NMSA 1978, § 30-1-10 (1963). However, to preserve a claim under the state constitution, Defendant would have had to raise this claim in the district court and provide a basis to interpret the state constitution differently. *See State v. Vaughn*, 2005-NMCA-076, ¶¶ 6-7, 137 N.M. 674, 114 P.3d 354. Defendant did not preserve his claim under the New Mexico Constitution. Therefore, we will limit our review of Defendant's double jeopardy claims to federal double jeopardy

principles. Double jeopardy is a question of law, and we apply a de novo standard of review. *State v. Montoya*, 2013-NMSC-020, ¶ 22, 306 P.3d 426.

{7} The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, which was made applicable to the states by the Fourteenth Amendment of the United States Constitution, "protects against multiple punishments for the same offense." *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d 1223 (internal quotation marks and citation omitted). There are two general categories of multiple punishment cases: (1) those in which a defendant is charged with violations of multiple statutes for the same conduct, referred to as "double description" cases; and (2) those in which a defendant is charged with multiple violations of the same statute based on a single course of conduct, referred to as "unit of prosecution" cases. *State v. DeGraff*, 2006-NMSC-011, ¶ 25, 139 N.M. 211, 131 P.3d 61. In this case, Defendant has raised both types of claims.

Larceny and Receiving Stolen Property

{8} Defendant argues that his convictions for larceny and receiving stolen property arise from the same conduct, but under different statutes. *See* NMSA 1978, § 30-16-1(A) (2006) (defining larceny as "the stealing of anything of value that belongs to another"); NMSA 1978, § 30-16-11(A) (2006) (stating that "[r]eceiving stolen property means intentionally to receive, retain or dispose of stolen property knowing that it has been stolen or believing it has been stolen"). Therefore, this is a double description claim.

{9} Generally, we analyze double description claims under the two-part test set forth in *Swafford*, 1991-NMSC-043, ¶ 25. *See id.* (stating that the appellate courts must determine: (1) whether the conduct is unitary, and (2) if so, whether the Legislature intended to create separately punishable offenses based on the statutes). When the conduct in question is found to be unitary there is a double jeopardy violation unless the Legislature intended to create separate punishments for the conduct found to be unitary. *Id.* However, this analysis is not necessary because our case law has already addressed the issue in this case—whether a person can be convicted of both stealing and receiving the same stolen property.

{10} In *State v. Tapia*, 1976-NMCA-042, ¶ 1, 89 N.M. 221, 549 P.2d 636, this Court addressed whether a defendant who was convicted of larceny could also be convicted of receiving stolen property by disposing of the stolen property. We held that because stealing and disposing of stolen property are two separate actions, a defendant could be convicted of both crimes. *Id.* ¶¶ 1, 9-14. In reaching this conclusion, we discussed larceny and the three ways in which a defendant may be convicted of receiving stolen property: (1) receiving or acquiring possession of stolen property, (2) retaining or keeping the stolen property, or (3) disposing of stolen property. *Id.* ¶ 12; see § 30-16-11(A) (defining receiving stolen property); UJI 14-1650 NMRA (stating that one of the elements of receiving stolen property is that the defendant acquired possession of, kept, or disposed of stolen property).

{11} In *Tapia*, we stated that a defendant who is convicted of larceny may not be convicted of receiving stolen property if he receives or acquires possession of the same stolen property. 1976-NMCA-042, ¶ 12 ("A thief who holds on to the stolen property cannot violate the [receiving stolen property] statute by receiving the stolen property because he cannot receive it from himself."). Likewise, a defendant who is convicted of larceny may not be convicted of receiving stolen property if he retains or keeps the stolen property. *Id.* ("Nor can the thief violate the [receiving stolen property] statute by retaining the stolen property because larceny is a continuing offense."). However, a defendant who commits larceny and then disposes of the stolen property may be convicted of both larceny and receiving stolen property. *Id.* ("The thief's disposition, however, is action separate from the larceny.").

{12} Defendant contends that his convictions for larceny and receiving stolen property violate double jeopardy because he could not be both a thief of stolen property and a receiver of that same property. *See id.*; *State v. Gleason*, 1969-NMCA-054, ¶ 8, 80 N.M. 382, 456 P.2d 215 (recognizing that a defendant cannot be convicted of both larceny and receiving stolen property for stealing property and receiving the same stolen property); *Territory v. Graves*, 1912-NMSC-027, ¶ 9, 17 N.M. 241, 125 P. 604 ("[W]here the evidence shows that the defendant was himself guilty of the theft, there can be no conviction of feloniously receiving the property in question knowing it to have been stolen."). The State, on the other hand, argues that Defendant stole the property and then disposed of the stolen property, thereby committing separate and distinct acts. *See Tapia*, 1976-NMCA-042, ¶¶ 1, 9-14.

{13} We do not base our holding on the argument of either Defendant or the State. In this case, the jury was instructed that in order to find Defendant guilty of receiving stolen property, the State was required to prove that Defendant "kept" the stolen property. This instruction became the law of the case. *See State v. Quiñones*, 2011-NMCA-018, ¶ 38, 149 N.M. 294, 248 P.3d 336 (stating that the jury instructions become the law of the case). Thus, the jury was not asked to determine whether Defendant disposed of the property. Consistent with our reasoning in *Tapia*, 1976-NMCA-042, ¶ 12, we hold that a thief cannot be convicted of receiving stolen property by retaining or keeping the stolen property, because larceny is a continuing offense. *See also State v. Meeks*, 1919-NMSC-015, ¶ 2, 25 N.M. 231, 180 P. 295 (holding that larceny is a continuing offense). Because the jury did not make a determination that Defendant disposed of the property, and the conviction was based on the fact that Defendant "kept" the stolen property, Defendant's conviction for receiving stolen property was in violation of double jeopardy. Therefore, we reverse and remand with instructions to vacate Defendant's conviction for receiving stolen property.

Multiple Conspiracy Convictions

{14} Defendant argues that his convictions for conspiracy to commit larceny, conspiracy to commit burglary, and conspiracy to commit receiving stolen property violate double jeopardy, because he was convicted of multiple violations of the same statute based on a single course of conduct. This is a unit of prosecution claim.

{15} The State concedes Defendant's double jeopardy claim with respect to Defendant's three conspiracy convictions. While the appellate courts are not bound by the State's concession, *State v. Guerra*, 2012-NMSC-027, ¶ 9, 284 P.3d 1076, we agree.

{16} In *State v. Gallegos*, 2011-NMSC-027, ¶ 55, 149 N.M. 704, 254 P.3d 655, our Supreme Court held that New Mexico's conspiracy statute establishes "a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment set at the highest crime conspired to be committed." During the trial, the State may "overcome the Legislature's presumption of singularity, but doing so requires the [S]tate to carry a heavy burden." *Id.*

{17} On appeal, Defendant and the State agree that the evidence adduced at trial supports, at most, the existence of one conspiracy. Because the State has not provided a basis for rebutting the presumption that, at most, "only one, overarching, conspiratorial agreement" existed, we hold that Defendant's multiple convictions for conspiracy violate double jeopardy.

{18} Accordingly, we reverse and remand with instructions to vacate Defendant's convictions for conspiracy to commit burglary and conspiracy to commit receiving stolen property. *See id.* ¶ 64 (stating that "the appropriate remedy is to vacate [the d]efendant's redundant convictions with punishment imposed on the single remaining conspiracy at the level of the 'highest crime conspired to be committed'" (citation omitted)); *see also Upchurch*, No. 31,671, mem. op. (reversing Aaron Upchurch's conviction for conspiracy to commit burglary).

SUFFICIENCY OF THE EVIDENCE

{19} Defendant raises three sufficiency of the evidence arguments. First, Defendant argues that the circumstantial evidence in this case was insufficient to support his convictions. Second, Defendant asserts there was insufficient evidence to support his identity and involvement. Third, Defendant claims that there was insufficient evidence as to the value of the stolen property. Because we have already determined that Defendant's convictions for receiving stolen property, conspiracy to commit burglary, and conspiracy to commit receiving stolen property must be vacated on double jeopardy grounds, we will limit our review of sufficiency of the evidence to the three remaining claims—larceny, burglary, and conspiracy to commit larceny. In determining whether there was sufficient evidence to support Defendant's convictions for larceny, burglary, and conspiracy to commit larceny, we will address Defendant's contentions that there was insufficient evidence to support the jury's findings that he committed these crimes and that the value of the stolen property was over $20,000.

Standard of Review

{20} "In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and

resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (alteration in original) (emphasis, internal quotation marks, and citation omitted). We will not second-guess the jury's credibility determinations, reweigh the evidence, or substitute our judgment for that of the jury, as long as there is sufficient evidence to support the jury's verdict. *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057. Our standard of review is not whether the evidence is devoid of any reasonable inference of innocence. *See State v. Garcia*, 2005-NMSC-017, ¶¶ 18-20, 138 N.M. 1, 116 P.3d 72; *State v. Huber*, 2006-NMCA-087, ¶ 12, 140 N.M. 147, 140 P.3d 1096.

Larceny

{21} To convict Defendant of larceny, the State was required to prove the following three elements beyond a reasonable doubt: (1) Defendant "took and carried away personal property, belonging to Roy Kinney and Jerry Dalla, which had a market value over $20,000;" (2) "[a]t the time he took the property, [D]efendant intended to permanently deprive the owner[s] of it;" and (3) "[t]his happened in New Mexico on or about the 26th day of October, 2010." *See* UJI 14-1601 NMRA (setting forth the elements of larceny); Section 30-16-1(A) (defining larceny). Defendant argues that the State failed to prove that he stole any items and the stolen items had a market value over $20,000.

{22} Aaron testified at Defendant's trial that he, Aaron, acted alone and used an old red truck when he stole the items from Dalla's property. Two independent witnesses testified that they saw the red truck near Dalla's property in late October 2010, and each witness observed only one person in the truck.

{23} One of the witnesses, Joshua Swanson, worked for a gas station near Dalla's property and saw the red truck parked near a dumpster on October 25, 2010 for the duration of his shift, which was 1:00 p.m. to 9:00 p.m. After Swanson's shift, he pulled around to put gas in his truck, and he saw the red truck return at about 9:30 p.m. or 9:45 p.m. The man in the red truck went into the gas station, and a surveillance camera recorded an image of the man.

{24} On October 27, 2010, police officers went to the Upchurch residence, where both Defendant and Aaron lived, to serve a warrant on Aaron on an unrelated matter. The officers spoke with Defendant outside of the residence. At that time, the officers observed items on the Upchurch property that were consistent with some of the items that were reported missing by Kinney, including hundreds of feet of welding leads, which were on the ground near the red truck. Defendant told police that the leads belonged to his father. There was also copper tubing in the back of the truck.

{25} The police obtained a search warrant and returned to the Upchurch residence, along with Kinney, on October 28, 2010. Nobody was home at the Upchurch residence. Nevertheless, Kinney recognized various tools on the Upchurch property that were stolen from the workshop. The tools were identifiable because Kinney's tools had a distinctive engraving that was a certified livestock brand and Rhodes' tools were engraved with his initials. The police noticed that some of the items they had noted the previous day, such as buckets, fittings, and wire were gone. The ground had also been raked.

{26} On November 3, 2010, police returned to the Upchurch residence. While executing a search warrant, Detective Clugston observed a hat on the headboard of the bed where Defendant and his girlfriend were lying that looked like the hat in the surveillance video recorded at the gas station. The other clothes seen in the video were found in the laundry room of the Upchurch residence. Detective Clugston testified that he was able to identify Defendant by his tattoos, which are distinguishable from his brother's tattoos. Detective Clugston showed Defendant the photograph from the gas station surveillance video and asked Defendant whether he was the man in the photograph. Detective Clugston testified that, initially, Defendant admitted to being the man in the photograph, and later, Defendant said he was not sure if he was the person in the photograph. On cross-examination, Detective Clugston was impeached with previous testimony that Defendant denied being the person in the photograph. However, Detective Clugston further testified that he did not remember his previous testimony, but that regardless of his previous testimony, he remembered Defendant initially admitted being the person in the photograph, and later, Defendant denied being the person in the photograph.

{27} The State also presented evidence that there were two sets of shoe impressions at Dalla's property and two sets of shoe impressions at the Upchurch residence. The jury was shown photographs of the shoe impressions and asked to compare them.

{28} Viewing the evidence in the light most favorable to the jury's verdict, a reasonable jury could have concluded that more than one person committed the larceny and that Defendant was one of the people involved in committing the larceny. *See State v. Flores*, 2010-NMSC-002, ¶ 19, 147 N.M. 542, 226 P.3d 641 (emphasizing that "circumstantial evidence alone can amount to substantial evidence"); *State v. Rojo*, 1999-NMSC-001, ¶ 23, 126 N.M. 438, 971 P.2d 829 ("[J]ust because each component may be insufficient to support the conviction when viewed alone does not mean the evidence cannot combine to form substantial . . . support for the conviction when viewed as a whole.").

{29} We acknowledge Defendant's argument that the evidence in this case was weak and that there was conflicting evidence. However, "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *Rojo*, 1999-NMSC-001, ¶ 19.

{30} Defendant also argues that there was insufficient evidence to support the jury's verdict that the value of the stolen property was over $20,000, because the State failed to introduce documentation with respect to ownership and the value of the stolen property. Defendant claims that the testimony was speculative and a rational jury could not have found the aggregate market value to satisfy the threshold amount charged. The jury was instructed that "'[m]arket value' means the price at which the property could ordinarily be bought or sold at the time of the alleged larceny." *See* UJI 14-1602 NMRA.

{31} "It is clear that an owner of personal property may testify concerning the value of the property and that such testimony is sufficient to support a jury's determination of value." *State v. Hughes*, 1988-NMCA-108, ¶ 8, 108 N.M. 143, 767 P.2d 382. "The reason for this rule is that the owner necessarily knows something about the quality, cost, and condition of his or her property and consequently knows approximately what it is worth." *Id.*

{32} During the trial, Kinney testified that the items stolen from him included: (1) Snap-On hand tools for which a Snap-On dealer quoted a replacement value of $4,000; (2) a plasma cutter worth $1,000; (3) approximately 600 feet of welding leads valued at approximately $10 per foot, for a total value of $6,000; (4) a set of antique blue point wrenches and a socket set for which Kinney had recently received an offer of $2,500; (5) copper tubing and wire of an unspecified value; and (6) an expensive iron clamp of an unspecified value. Kinney had purchased the items in or around 2008, used them, and they were in good working condition.

{33} Dalla testified that the items stolen from the lapidary room included everything he needed to make jewelry, including rolls of sterling silver wire, silver findings for mounting stones to make jewelry, small tools, scales, a micrometer, and stones in different phases of being finished for jewelry. He estimated that fifty ounces of silver were stolen and the price of silver was approximately $35 an ounce. Dalla had purchased the finished silver from suppliers over time. He agreed that the stolen silver was valued at approximately $1,500. Dalla estimated that hundreds of pounds of raw stone were stolen from his lapidary room, which had a value of between $16,000 and $20,000. The stone was white quartz with gold and silver smeared on it. Dalla owned the mine from which the stone was obtained in Silverton. According to Dalla, the raw stone had a significant value because finished cabochons made from the raw stone are valued at $30 to $100 per gram, or $300 to $400 for a finished cabochon the size of a fifty-cent coin. Dalla further testified that he had acquired his lapidary tools over the previous five to six years and he valued them at "a couple thousand easy, maybe more."

{34} Kinney's and Dalla's testimony regarding the value of their stolen property was sufficient to allow the jury to draw reasonable inferences about the present market value of the stolen items. *See State v. Barr*, 1999-NMCA-081, ¶ 30, 127 N.M. 504, 984 P.2d 185 (holding that victim's testimony of the purchase price, age, and condition of consumer goods was sufficient to allow a jury to draw reasonable inferences about the market value); *State v. Phillips*, 1971-NMCA-114, ¶ 16, 83 N.M. 5, 487 P.2d 915

(same). The State presented sufficient evidence that the market value of the items stolen was over $20,000.

Burglary

{35} To convict Defendant of burglary, the State was required to prove the following three elements beyond a reasonable doubt: (1) Defendant "entered a structure without authorization;" (2) "with the intent to commit a theft when he got inside;" and (3) "[t]his happened in New Mexico on or about the 26th day of October, 2010." *See* UJI 14-1630 NMRA (setting forth the elements of burglary); NMSA 1978, § 30-16-3 (1971) (defining burglary). Defendant argues that the State failed to prove that he committed burglary because Aaron testified that Defendant was not involved and did not participate in the theft.

{36} As we discussed earlier, there was sufficient evidence to allow the jury to infer that Defendant was one of two people who entered Dalla's warehouse and lapidary room and stole Kinney's and Dalla's belongings. *See State v. Neal*, 2008-NMCA-008, ¶ 19, 143 N.M. 341, 176 P.3d 330 ("The test [on appeal] is not whether substantial evidence would support an acquittal, but whether substantial evidence supports the verdict actually rendered."); *see also State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (defining substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks and citation omitted)).

Conspiracy to Commit Larceny

{37} To convict Defendant of conspiracy to commit larceny, the State was required to prove the following three elements beyond a reasonable doubt: (1) Defendant "and another person by words or acts agreed together to commit larceny;" (2) "[D]efendant and the other person intended to commit larceny;" and (3) "[t]his happened in New Mexico on or about the 26th of October, 2010." *See* UJI 14-2810 NMRA (setting forth the elements of conspiracy); NMSA 1978, § 30-28-2(A) (1979) (defining conspiracy); § 30-16-1(A) (defining larceny). Defendant argues that there was insufficient evidence to show that he and Aaron agreed to commit larceny or that they intended to commit larceny, because Aaron testified that he was the sole perpetrator of the property crimes.

{38} The crime of conspiracy can be established by circumstantial evidence. *State v. Deaton*, 1964-NMSC-062, ¶ 5, 74 N.M. 87, 390 P.2d 966. "A mutually implied understanding is sufficient so far as combination or confederacy is concerned, and the agreement is generally a matter of inference deduced from the facts and circumstances, and from the acts of the person accused done in pursuance of an apparent criminal purpose." *Id.* ¶ 6.

{39} The evidence regarding the shoe impressions was sufficient to allow the jury to infer that two people committed the larceny. The evidence regarding the identity of the person in the surveillance video was sufficient to allow the jury to conclude that

Defendant was involved in committing the larceny. Also, Aaron admitted that he participated in the larceny, and the jury could disbelieve the portion of his testimony claiming he acted alone. A reasonable jury could have found that Defendant and Aaron conspired to commit the larceny.

CONCLUSION

{40} For the foregoing reasons, we affirm Defendant's convictions for larceny, burglary, and conspiracy to commit larceny. We reverse and remand with instructions to vacate Defendant's convictions for receiving stolen property, conspiracy to commit burglary, and conspiracy to commit receiving stolen property.

{41} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRY, Judge