

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

FEB 01 1988

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY LEE GRIST,

Defendant-Appellant.

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ROBERT L. HOECKER
Clerk

No. 86-2880
(D.C. No. 86-91-CR)
(Eastern District of
Oklahoma)

ORDER AND JUDGMENT

Before HOLLOWAY, Chief Judge, BARRETT, Circuit Judge, and CONWAY,
District Judge*

Defendant Jerry Lee Grist was indicted on twenty-seven counts arising out of his purported participation in -- and masterminding of -- a ring of car thieves. After a jury trial, Grist was convicted on three counts of transporting stolen vehicles in interstate commerce, in violation of 18 U.S.C. §§2312 and 2 (1982); three counts of receiving or concealing stolen vehicles, in violation of 18 U.S.C. §§2313 and 2 (1982); and one count of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. §371 (1982).

On appeal, Grist argues that his convictions should be reversed because the prosecution was fatally tainted by the improper introduction of evidence of other crimes committed by

* The Honorable John E. Conway, United States District Judge for the District of New Mexico, sitting by designation.

Grist that were unrelated to the offenses charged. In addition, Grist contends that the evidence was insufficient to support the convictions for the three counts of transporting stolen vehicles in interstate commerce and the three counts of receiving or concealing stolen vehicles. Finally, Grist asserts that the convictions under both 18 U.S.C. §2312 (1982) and 18 U.S.C. §2313 (1982) cannot stand because they are duplicative. We affirm.

I. Facts

Considered in the light most favorable to the government, as we must at this juncture, the evidence tends to show the following. On April 1, 1986, Ronnie Sullivan, a manager at Southwestern Electric Cooperative ("Southwestern") notified B.J. Moore, a District Attorney Investigator in Durant, Oklahoma, that two Southwestern employees, while inspecting telephone poles, "had run across a kind of a shop or barn type building back down off the road . . . and had seen some fairly late model cars and pickups and so forth in the building. . . ." IV R. 126. In response to Sullivan's information, Moore ran the tag number of one of the vehicles seen by the Southwestern employees -- a 1985 Ford Mustang -- through the National Crime Information Center ("NCIC"). The NCIC reported that the vehicle had been stolen.

Based on the information supplied by Sullivan and the NCIC report, Moore obtained a search warrant for the property. The same day, Moore, an officer with the Oklahoma State Bureau of Investigation, and two officers from the Atoka County Sheriff's Office executed the warrant. The search of the property uncovered the following vehicles:

- (1) A 1986 Blue Chevrolet Pickup;
- (2) a 1983 Tan Ford Pickup;

- (3) a 1981 Blue Lincoln;
- (4) a 1986 Chevrolet Crew Cab; and
- (5) a 1985 Red Ford Mustang.

In addition, the search also disclosed twenty-five automobile engines; several motor vehicle frames; a wide variety of interior and exterior motor vehicle parts; and equipment for cutting up automobile bodies.

Following the search and subsequent investigation an indictment was returned against Grist. It charged Grist with twenty-seven counts, including four counts of transporting a stolen motor vehicle in interstate commerce, in violation of 18 U.S.C. §2312 (1982); four counts of possessing a stolen motor vehicle, in violation of 18 U.S.C. §2313 (1982); eighteen counts of altering a motor vehicle identification number, in violation of 18 U.S.C. §511 (1982); and one count of conspiracy in violation of 18 U.S.C. §371 (1982). Two alleged coconspirators -- C.J. Anderson and Loyd Calliccoat -- were indicted for conspiracy; and three others -- Charles Edward Brigman, Ralph William Crowe, and Stephen Charles Seabourn -- were named as unindicted coconspirators.

At trial, evidence of a wide-ranging auto theft ring was presented. Testimony by Anderson, Brigman, and Crowe linked Grist to the theft of twenty vehicles. V R. 181; V R. 281. In addition, evidence was introduced that at least three of the vehicles seized in the April 1, 1986 search were stolen, IV R. 146-54; V. R. 360; see also Ex. 89-90, and that the vehicle identification numbers on many of the engines and frames seized in the raid had been removed. Finally, the prosecution presented

testimony that Grist was the lessee of the property searched on April 1, 1986. IV R. 99-101; V R. 273-74.

In defense, Grist asserted that the testimony by Anderson, Brigman, and Crowe was motivated by personal animus, VI R. 516; VI R. 520-21, and that he had never rented the property on which the stolen vehicles were found. VI R. 522-24. His testimony was that he was forced to work since he was a young boy because of his father's disability; he explained his legitimate business was the buying, rebuilding and selling of cars, and he denied the charges completely.

The trial court directed a verdict of acquittal on one count of transporting a stolen vehicle in interstate commerce, and on one count of receiving or concealing a stolen vehicle. VI R. 432. All other counts were submitted to the jury. The jury returned verdicts of guilty on three counts of transporting a stolen vehicle in interstate commerce, on three counts of receiving or concealing a stolen vehicle; and on the one count of conspiracy. However, the jury found Grist not guilty on all 18 counts of altering or removing a motor vehicle identification number. After judgment and sentence,¹ this timely appeal followed.

II. Evidence of other crimes

A.

Grist first argues that the prosecution was fatally infected by the improper introduction of evidence of other crimes,

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Grist was sentenced to consecutive five year terms for counts one and two, and for concurrent five year terms for counts three, four, five, eight and nine. He was also ordered to make restitution and to pay special assessments.

purportedly committed by Grist, that were unrelated to the offenses charged. At trial, C.J. Anderson, an alleged coconspirator of Grist's, testified about an incident -- recounted to him by Grist -- in which Grist allegedly hired someone to kill Crowe:

[Grist] was telling me that there had been a shooting or something and that this guy went to the hospital screaming that Jerry had paid a black guy to kill him. And Jerry acted pretty upset about it, you know, he had mentioned that the colored guy had been out to Jerry's home and they had went to Rocky Ridge. I never did get the whole story on this. It was like a comic book. I think they fired twenty shots at each other, and had a rock fight and wound up in a fist fight. That's all.

IV R. 49-50. When the prosecution asked Anderson whether Grist had ever told him any more about the incident, however, Anderson responded: "No, sir, . . . [b]ut he did tell me . . . that one time they had been smoking whack, or something, and you know, that is when the black guy had went out there to Rocky Ridge. . . ."

IV R. 50.

Grist immediately objected, and, at a bench conference moved for a mistrial on the ground that the prosecution had improperly elicited evidence of another offense.² Although the trial court sternly admonished the prosecutor, IV R. 54, it denied the motion

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The incident in which Grist allegedly hired someone to kill Crowe formed the basis for one of the overt acts listed in the indictment for conspiracy. See I R. 10 (overt act no. 8). Consequently, although there was considerable testimony about the incident, see, e.g., V R. 289 (testimony by Crowe); V R. 349-51 (testimony by Sherry Jannell Anderson); VI R. 588 (testimony by Derrick Kirby Wilson), its admission was proper. Grist's objection, therefore, relates only to the testimony by Anderson that Grist was "smoking whack" and not to the alleged conspiracy to kill Crowe.

for mistrial.³ Instead, the court offered to instruct the jury to disregard Anderson's testimony about the use of drugs by Grist. However, Grist declined the court's offer to admonish the jury.

B.

A motion for mistrial should be granted only "where evidence is so prejudicial that the jury will unlikely be able to erase it from their minds. . . ." United States v. Escamilla, 666 F.2d 126, 128 (5th Cir. 1982); United States v. Alley, 661 F.2d 718, 721 (8th Cir. 1981); United States v. Klein, 546 F.2d 1259, 1263 (5th Cir. 1977). A mistrial "is most likely to become necessary when the evidence is admitted, [it] indicates on its face that

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The trial judge was clearly disturbed by what he perceived to be a pervasive pattern of conduct by prosecutors in introducing inadmissible evidence of other crimes. At the bench conference, for instance, the judge stated:

You know if this just happened occasionally, . . . I wouldn't think so much about it. Here we have two cases in a row where you have these guys doing this. I don't know whether . . . you're not preparing them or just because -- when you start dealing with thugs . . . you end up with this kind of problem. Here we have two cases in a row [and] my recollect[ion] is, we have . . . a lot more cases where this has happened.

IV R. 53. See also VIII R. 22 ("I find there is the issue that is a very vexatious problem with me and that is whether or not the jury was prejudiced by [the introduction of evidence of other crimes] and it's of great concern to me that these kinds of things have happened. We've had . . . two trials . . . and we have in each case with the same prosecutor . . . somebody saying something about something that isn't admissible, that's just a blurted pronouncement that the man . . . who is on trial is guilty of some other even more heinous crime than he is being charged with."). We agree with the trial court that the testimony by Anderson concerning other offenses did not require granting Grist's motion for mistrial in this case. At the same time, however, we fully share the trial court's concern over the pervasiveness of the problem, and warn that "[w]e may not be as receptive to similar claims of inadvertence in the future." United States v. Krevsky, 741 F.2d 1090, 1094 (8th Cir. 1984).

defendant has been guilty of a prior crime, and the evidence plays a prominent part in the conduct of the trial." United States v. Taylor, 605 F.2d 1177, 1179 (10th Cir. 1979). "Conversely, prejudicial error is least likely to occur when the evidence is excluded, the jury is instructed to disregard it, and the reference is both vague and passing in nature." Id. Because the trial court is in the best position to evaluate the prejudicial effect of improperly introduced evidence, the decision to grant or deny a motion for mistrial is within the trial court's sound discretion, and will not be overturned, absent an abuse of discretion. United States v. Day, 830 F.2d 1099, 1106.

We believe the trial court did not abuse its discretion in denying Grist's motion for a mistrial. Anderson's testimony that "they had been smoking whack, or something," IV R. 50, while clearly inadmissible, was "both vague and passing in nature." Taylor, 605 F.2d 1179. Furthermore, the trial court offered to cure any prejudice by admonishing the jury to disregard Anderson's statement, an offer Grist declined when the mistrial motion was denied. IV R. 55-56. Moreover, Anderson's testimony appears to have been the result of an unresponsive answer rather than to have been elicited deliberately. See United States v. Morales-Quinones, 812 F.2d 604, 613 (10th Cir. 1987). Indeed, at the sidebar conference, the prosecutor stated that Anderson had been instructed "not to mention about Jerry Grist's drug use unless it was specifically asked." IV R. 51. In our consideration of this claim of prejudicial error, we note too the fact that the jury found Grist not guilty on Counts X to XXVII, the counts charging alteration of the vehicle identification numbers. We do not feel

the argument that the jury's deliberations were prejudicially influenced is persuasive in view of these numerous not guilty verdicts.

The claim of error is troublesome because, as requested by the defendant when the mistrial was denied, any further comment on the objection to the "whack" remark, and any admonition to disregard it, is absent from the record. Nevertheless, for the reasons stated, we hold that the denial of the mistrial motion was not an abuse of discretion.

III. Sufficiency of the evidence

Grist's second argument is that the evidence presented by the prosecution on the three counts of transporting a stolen vehicle in interstate commerce, and on the three counts of receiving, concealing, storing, bartering, selling or disposing of a motor vehicle, was insufficient to support a guilty verdict. Again, we must disagree.

In assessing whether evidence is sufficient to support a conviction, a court must consider both the direct and circumstantial evidence, including reasonable inferences that can be drawn, in the light most favorable to the verdict. United States v. Taylor, 832 F.2d 1187, 1192 (10th Cir. 1987); United States v. Washita Constr. Co., 789 F.2d 809, 815 (10th Cir. 1986); United States v. Gamble, 541 F.2d 873, 877 (10th Cir. 1976). A court of appeals "will not sift the record in order to make an independent determination of the sufficiency of the evidence." United States v. Downen, 496 F.2d 314 (10th Cir.), cert. denied, 419 U.S. 897 (1974). "Jurors are charged with the duty of assessing the credibility of witnesses and determining the weight

to be given any testimony, taking into consideration the appearance and general demeanor of each and every witness." Id. "As long as substantial evidence supports the jury verdict, it cannot be set aside." Taylor, 832 F.2d at 1192; United States v. Shelton, 736 F.2d 1397, 1402 (10th Cir.), cert. denied, 469 U.S. 857 (1984).

A.

To sustain a conviction under 18 U.S.C. §2312 (1982), the prosecution must prove (1) that the vehicle was stolen; (2) that it was transported in interstate commerce; and (3) that such transportation was with knowledge the vehicle was stolen. United States v. Brazeal, 464 F.2d 1, 2 (10th Cir. 1972). Accord United States v. Spooone, 741 F.2d 680, 686 (4th Cir. 1984), cert. denied sub nom. Bates v. United States, 469 U.S. 1162 (1985); United States v. Mansaw, 714 F.2d 785, 792 (8th Cir.), cert. denied, 464 U.S. 986 (1983); United States v. Martinez, 694 F.2d 71, 72 (5th Cir. 1982).

Testimony and business records established that the two vehicles underlying counts two through five had been stolen from a Chevrolet dealership in Dallas, Texas. See V R. 356-61 and Exs. 89-90. Similarly, the owner of the vehicle involved in counts eight and nine testified that the car had been stolen from his apartment complex in Sherman, Texas. See IV R. 145-57 and Exs. 16-22. Grist argues that there is no evidence either that he knew the vehicles had been stolen or that he transported the vehicles in interstate commerce.

Proof that a defendant was in possession in one state of vehicles recently stolen in another state, unless satisfactorily

explained, will permit the inferences that the defendant knew the vehicles were stolen and that he transported them in interstate commerce. Rogers v. United States, 416 F.2d 926, 927 (10th Cir. 1969), cert. denied, 397 U.S. 952 (1970). Accord United States v. Wiesner, 789 F.2d 1264, 1267-68 (7th Cir. 1986); Mansaw, 714 F.2d at 792; United States v. Sroka, 621 F.2d 1012, 1014 (1st Cir. 1980). However, Grist argues that the government failed to prove that he was ever "in possession" of the vehicles. At most, Grist claims, the government proved that three stolen vehicles were located on property that might have been leased by him. This, Grist asserts, could have created only a suspicion of possession. "[T]he mere suspicion of possession will not support the inferences of transportation and guilty knowledge." Mansaw, 714 F.2d at 792. See also Paige v. United States, 394 F.2d 105, 107 (5th Cir. 1968).

Viewing the evidence in the light most favorable to the verdict, we believe that a jury could have rationally concluded that Grist was "in possession" of the three stolen vehicles. See United States v. Wolfenbarger, 426 F.2d 992, 994-95 (6th Cir. 1970) ("A person who, although not in actual possession, knowingly has both the power and intention at any given time to exercise dominion and control over a thing is then in constructive possession of such property."); United States v. Nitti, 444 F.2d 1056, 1057 (7th Cir. 1971) ("Generally, it is held that possession is dependant upon the extent of the defendant's dominion and control over the stolen property."); Rogers, 416 F.2d at 927-28 ("Possession means actual control, dominion, or authority."). In order to prove possession, the prosecution need only establish

"such a nexus between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession." United States v. Bonnetts, 747 F.2d 1159, 1164 (7th Cir. 1984), cert. denied, 470 U.S. 1058 (1985), quoting United States v. Parent, 484 F.2d 726, 732 (7th Cir. 1973), cert. denied, 415 U.S. 923 (1974). Accord United States v. Casalnuovo, 350 F.2d 207, 209 (2d Cir. 1965). Thus, in Casalnuovo, a superintendent of an apartment building was held to be in possession of goods stored in the building's locked basement to which he had a key. And in United States v. Cordo, 186 F.2d 144 (2d Cir.), cert. denied, 340 U.S. 952 (1951), the court found that a defendant, who had non-exclusive control of a garage in which stolen goods were to be stored, and who provided and helped move the goods to a substitute storage place for the goods after another person refused to allow storage in the garage, had sufficient "custody and control" of the goods to possess them.

A rational jury could have concluded that the three stolen vehicles were located on property leased to Grist.⁴ This, we

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Grist argues that the evidence was insufficient to show that he ever leased the property from which the vehicles were seized. Grist was linked to the property by the testimony of Wayne Baughman, the owner of the property; by an application for electrical services from Southeastern Electric Co-op; and by the fact that Grist's principal employee drove up to the property while it was being searched. Baughman's testimony, however, was somewhat equivocal:

Q Okay. Did you have occasion, sir, to rent any of this property to Jerry Grist during the month of March, 1986?

A I rented it. It was back in January, I think it was in January. It was after the first of the year.

Q Who did you rent it to, sir?

(Footnote continued on next page)

believe, is sufficient "actual control, dominion or authority," Rogers, 416 F.2d at 927-28, to constitute possession under 28 U.S.C. §2312 (1982). And from that possession, the jury could have inferred both that Grist knew the vehicles were stolen and that he transported or aided, procured or caused the transportation of the vehicles in interstate commerce. Moreover the inferences could be weighed in light of the testimony about Grist's involvement in the car theft scheme by his coconspirators.

(Footnote continued):

A Well, Jerry and some other man come up there one day in a black van, and come in and talked to me, I was in bed, and rented it, yeah.

Q How much did you get in exchange for renting it to Grist?

A A thousand dollars.

Q How long did you rent it to him for?

A Well, it had been rented for pasture for years for a thousand dollars for a year. It was a hundred and thirty acres, and the barns and what have you.

Q All right. Is that the property that you rented to Jerry Grist?

A It's the day -- the one I rented that day, yes. But now, this other fellow that was there, one of the two, I don't know -- I was in bed, in the hospital bed flat of my back, and they stood at the foot of the bed and the money was left. I don't remember if it was on the bed, or in my dresser, or beside of the bed or what. But in other words, when they left, I had the thousand dollars, yes.

V R. 273-74. Likewise, the defense demonstrated that it would have been possible for someone other than Grist to have applied for electrical service for the property in Grist's name. See IV R. 98-107. Nonetheless, we believe the evidence was sufficient to allow a jury to find that Grist was, in fact, the lessee of the property. "[T]he law does not require the jury to credit [a defendant's] explanation or to accept it as satisfactory." United States v. Bonnetts, 747 F.2d 1159, 1163 (7th Cir. 1984).

In sum, we hold that the evidence was sufficient to support Grist's convictions under 18 U.S.C. §2312 (1982).

B.

Similarly, we believe the evidence was sufficient to support Grist's convictions for receiving, concealing, storing, bartering, selling, or disposing of the three vehicles, in violation of 18 U.S.C. §2313 (1982).

In order to prove a violation of 18 U.S.C. §2313, the prosecution must demonstrate that (1) the vehicle was stolen; (2) the vehicle was transported in interstate commerce; and (3) the defendant had knowledge that the vehicle was stolen when he received, concealed, stored, bartered, sold or disposed of it. United States v. Hines, 564 F.2d 925, 927 (10th Cir. 1977), cert. denied, 434 U.S. 1022 (1978). Accord United States v. Dennett, 551 F.2d 261, 262 (10th Cir. 1977); Seefeldt v. United States, 183 F.2d 713, 714 (10th Cir. 1950). Grist insists that the evidence is insufficient to prove that he received or concealed the stolen vehicles; that he had knowledge they were stolen; or, indeed, that he had any connection with them. Brief of Defendant-Appellant at 16.

From the record, it is clear that a reasonable jury could have concluded that the vehicles were found in a rural location between a quarter and a half mile from the county line road. In addition, the dirt road leading to the sheds on the property was blocked off by a gate. At least two of the three vehicles were contained in the sheds. This, we believe, constitutes sufficient "concealment" to satisfy the requirements of 18 U.S.C. §2313 (1982). At the same time, as to any argument that he had no

knowledge that the vehicles were stolen, our disposition of Grist's identical argument challenging his convictions under 18 U.S.C. §2312 (1982) disposes of his attack on his convictions under 18 U.S.C. §2313 (1982) as well.

IV. Duplication of offenses

Grist lastly argues that his convictions for transporting stolen vehicles in interstate commerce, in violation of 18 U.S.C. §2312 (1982), unconstitutionally duplicates his convictions for receiving or concealing stolen vehicles, in violation of 18 U.S.C. §2313 (1982). We disagree.

In determining whether separate convictions are duplicative, the test to be applied is "[w]hether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Accord Lindsay v. United States, 134 F.2d 960, 961-62 (10th Cir.), cert. denied, 319 U.S. 763 (1943); Ward v. United States, 694 F.2d 654, 661 (11th Cir. 1983); United States v. Caston, 615 F.2d 1111, 1117 (5th Cir.), cert. denied, 449 U.S. 831 (1980). While §2312 and §2313 may be connected, "each require[s] proof of a fact not required to establish [the other offense]." Lindsay, 134 F.2d 960. Section 2312 requires, inter alia, that the defendant transport the stolen vehicle in interstate commerce. Section 2313 requires, inter alia, that the vehicle be one that has been transported in interstate commerce but also that the defendant receive, conceal, possess, etc. the stolen vehicle; §2312 does not require the latter element. - Consequently, we conclude that - §2312 and §2313 (1982) are not duplicative. Lindsay, 134 F.2d at 961-62; Record

v. Hudspeth, 126 F.2d 215, 216 (10th Cir.), cert. denied, 316 U.S. 703 (1942); Jackson v. Hudspeth, 111 F.2d 128, 129 (10th Cir. 1940); Chrysler v. Zerbst, 81 F.2d 975, 976 (10th Cir. 1936). Accord, Caston, 615 F.2d at 1117; United States v. Marvel, 493 F.2d 15, 16 (5th Cir. 1974); United States v. Ploof, 464 F.2d 116, 120 (2d Cir.), cert. denied sub nom., Godin v. United States, 409 U.S. 952 (1972); United States v. Stone, 411 F.2d 597, 599 (5th Cir. 1969); Strother v. United States, 387 F.2d 385, 386 (5th Cir. 1967), cert. denied, 391 U.S. 971 (1968); United States v. Linkenauger, 357 F.2d 925, 925-26 (6th Cir. 1966); United States v. Lankford, 296 F.2d 34, 36 (4th Cir. 1961); United States v. Pearce, 275 F.2d 318, 325 (7th Cir. 1960); Woody v. United States, 258 F.2d 535, 536 (6th Cir. 1957), aff'd by an equally divided court, 359 U.S. 118 (1959); Doll v. Johnston, 95 F.2d 838, 838-39 (9th Cir.), cert. denied, 304 U.S. 574 (1938).

Noting that the Supreme Court was evenly divided on the question whether §2312 and §2313 are duplicative, see, Woody v. United States, 258 F.2d 535 (6th Cir. 1957), aff'd by an equally divided court, 359 U.S. 118 (1959), Grist "requests an opportunity to allow a majority of the Supreme Court to hold that 18 U.S.C. Section 2312 and 18 U.S.C. Section 2313 are duplicitous." Brief of Appellant at 18. While we recognize that a decision by an equally divided Supreme Court settles no issue of law and is not entitled to precedential weight, see, e.g., Neil v. Biggers, 409 U.S. 188, 192 (1972), we remain convinced that our view, and that of the other circuits cited, is correct. Any review of this issue by the Supreme Court, of course, would be at its discretion.

V

Grist argues that the witnesses testifying on the conspiracy charge were admitted to be convicted felons, some convicted three times; that there was no physical evidence connecting Grist with any count; and that the testimony about Grist's being a drug abuser contributed to his convictions because of the public's revulsion against drug abusers. Therefore a new trial on the conspiracy count is sought.

We have previously rejected the claim of prejudicial effect of the "whack" statement. It was for the jurors to determine the credibility of the witnesses and the weight to be given to their testimony. Downen, 496 F.2d at 319.

VI

No reversible error has been demonstrated and the convictions are accordingly

A F F I R M E D.

Entered for the Court
William J. Holloway, Jr.
Chief Judge