STATE V. DUPREE

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KASEY DUPREE,
Defendant-Appellant.

No. A-1-CA-36448

COURT OF APPEALS OF NEW MEXICO

December 11, 2017

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY, Jennifer E. DeLaney, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Elizabeth Ann Ashton, Assistant Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, J. MILES HANISEE, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Defendant appeals from the district court's amended judgment and sentence, convicting him for unlawful taking of a vehicle and resisting, evading, or obstructing an

officer and sentencing him to serve eight years in the Department of Corrections, pursuant to habitual offender enhancements. Initially, we issued a notice proposing to reverse for insufficient evidence. The State filed a memorandum in opposition, in which the State supplied us with more information about the evidence presented. Persuaded that the evidence was sufficient, as it was represented by the State, we then issued a second notice, proposing to affirm. Defendant has filed memorandum in opposition to our second notice. We remain persuaded that the evidence was sufficient. However, Defendant's response points out an irrefutable clerical error in the judgment and sentence. [Defendant's MIO 3] The judgment and sentence correctly stated that Defendant was convicted for the offense of unlawful taking of a vehicle but it incorrectly cited to NMSA 1978, Section 30-16D-2 (2009) (embezzlement of a vehicle or motor vehicle). [RP 102] We remand for the district court to correct its judgment to reflect that Defendant was convicted under NMSA 1978, Section 30-16D-1 (2009) (unlawful taking of a vehicle or motor vehicle). We affirm Defendant's conviction on the merits.

{2} On appeal, Defendant has maintained that the evidence was insufficient to establish that he took his aunt's vehicle without her consent. [DS 4; Defendant's MIO 4-8] Our first notice proposed to agree with Defendant, based on Defendant's recitation of the evidence. [1st CN 3; DS 2-3] Defendant's docketing statement suggested that the only evidence the State presented relative to his aunt's consent at the time Defendant took the vehicle was his aunt's testimony that she could not recall whether she gave him permission to take the vehicle or not and that she indicated to him that he could borrow the vehicle that week to find a place to live and have the vehicle serviced. [1st CN 3-4; DS 2-3] The evidence, as represented by Defendant, suggested more of an embezzlement scenario than an unlawful taking. *Compare* § 30-16D-1(A) ("Unlawful taking of a . . . motor vehicle consists of a person taking any . . . motor vehicle . . . intentionally and without consent of the owner."), *with* § 30-16D-2(A) ("Embezzlement of a . . . motor vehicle consists of a person embezzling or converting to the person's own use a . . . motor vehicle . . . , with which the person has been entrusted, with the fraudulent intent to deprive the owner of the . . . motor vehicle."). *See Black's Law Dictionary* 1251 (9th ed. 2009) (defining "taking" as "[t]he act of seizing an article"); *Black's Law Dictionary* 1250 (defining to "take" as "[t]o obtain possession or control, whether legally or illegally").

{3} Our first notice also observed, however, that Defendant's recitation of the evidence was presented without clarity or a natural and logical flow, and we expressed our reservation that Defendant was not supplying us with a complete version of the State's evidence. [1st CN 5] We invited the State to inform this Court of any additional proof it may have presented. [1st CN 5]

{4} In response to our first notice, the State represented that Defendant's aunt also testified that she would sleep with her car keys in her bed to ensure that her vehicle would not be taken without her permission. [State's MIO 2, 5] The State further represented that Defendant's aunt testified that she did not give Defendant direct permission to borrow the car on the night in question and that she slept with her keys that night; and in the morning, the keys were missing from her bed and the car was

gone. [State's MIO 2, 5] There was no dispute that Defendant took the car, and we discovered there was evidence that Defendant had to take the car keys from his aunt's bed to drive it. [State's MIO 2, 5] Defendant does not directly contradict this version of the evidence.

{5} As we have stated, when assessing the sufficiency of the evidence, the appellate courts "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. Samora*, 2016-NMSC-031, ¶ 34, 387 P.3d 230 (internal quotation marks and citation omitted). The jury could infer from this additional evidence that, by keeping her car keys in the bed with her that night, Defendant's aunt actually denied him consent to take the vehicle on the night in question; and that by taking the keys from her bed Defendant also knew he lacked consent to take the car. Additionally, based on the evidence that (1) Defendant was living with his aunt, (2) Defendant's aunt called the police after Defendant told her he left the car at the dealership to be serviced, and (3) she took her car keys to bed with her, which is unusual, the jury could infer the following: his aunt had a fear that Defendant would take the vehicle without her consent; she did not believe Defendant about where he took the car; and she did not give him consent to take the vehicle to the dealership that night. We believe that all of these inferences are reasonable and appropriately based on direct and/or circumstantial proof and support the jury's conclusion that Defendant's aunt did not give him consent to take the vehicle on the night he took it. *See State v. Garcia*, 2016-NMSC-034, ¶ 15, 384 P.3d 1076 (stating that after viewing the evidence and indulging inferences that support the verdict, the appellate courts "then determine whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction" (internal quotation marks and citation omitted)).

{6} Defendant's response to our second notice emphasizes that his aunt testified that she did not recall denying him permission to take the vehicle and that she did not testify that she affirmatively denied him permission to take the vehicle when he did. [Defendant's MIO 7] This is not a direct contradiction of our recitation of the circumstantial evidence supplied by the State, and it is not what the jury instruction required the State to prove. [RP 83] The State was required to establish that Defendant took the vehicle without the owner's consent. [RP 83] We believe that the circumstantial evidence was sufficient to prove that Defendant took the vehicle without his aunt's consent as stated in our second notice. *See id.*

{7} We are not persuaded by Defendant's assertion that his testimony—that the vehicle was impounded after he intended to take it to dealer, as his aunt requested, but ran out of gas before accomplishing his aunt's request—was uncontradicted. [Defendant's MIO 7] As we set forth earlier, the jury could draw reasonable and rational inferences from the circumstantial evidence that contradicts Defendant's theory of events. *Cf. State v. Wynn*, 2001-NMCA-020, ¶ 6, 130 N.M. 381, 24 P.3d 816 (stating that while a jury is free to reject a defendant's version of events, the fact that the jury did not believe the defense cannot substitute for affirmative proof of the prosecution's case

that the opposite is true). Disregarding all evidence and inferences that support a different result, we hold that the evidence was sufficient. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

{8} Based on the foregoing, we affirm Defendant's conviction for unlawful taking of a motor vehicle and remand to the district court to correct its judgment and sentence to reflect that Defendant was convicted under Section 30-16D-1, rather than Section 30-16D-2.

{9} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

J. MILES HANISEE, Judge