IN THE SUPREME COURT OF THE STATE OF NEVADA

CLINTON GREENE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43759

FILED

FEB 23 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary (count I), robbery with the use of a firearm (counts II, IV-V, IX), false imprisonment with the use of a firearm (counts III, VI-VII), and battery with the use of a deadly weapon causing substantial bodily harm (count VIII). Second Judicial District Court, Washoe County; James W. Hardesty, Judge. The district court sentenced appellant Clinton Greene to serve: a prison term of 32-84 months for count I, to run consecutively to the sentence imposed in district court case no. CR03-1084; two consecutive prison terms of 36-156 months for count II; a consecutive prison term of 18-60 months for count III; two consecutive prison terms of 36-156 months for count IV; two consecutive prison terms of 36-156 months for count V; a consecutive prison term of 18-60 months for count VI; a prison term of 18-60 months for count VII, to run concurrently with the sentence imposed for count V; a consecutive prison term of 72-180 months for count VIII; and two consecutive prison terms of 72-180 months for count IX. The district court also ordered Greene to pay $19,929.05 in restitution jointly and severally with his codefendants.

Greene's sole contention on appeal is that the jury should have been required to determine unanimously whether they believed Greene

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personally committed the crimes or whether he aided and abetted others during the commission of the crimes. In each of the nine counts in the amended information, Greene was charged as both the actual perpetrator and alternatively as an aider and abettor, and the jury was instructed that it was "not necessary [to] . . .unanimously agree upon the specific theory by which the crime was committed." The jury was further instructed:

> In other words, if six of you agree that the defendant personally committed the offense, and six of you agree that the defendant aided and abetted another person who committed the offense, then you may properly find the defendant guilty of the offense.

Citing to United States v. Garcia-Rivera for support, Greene objected to the instruction above.[1] Greene argues on appeal that the United States Constitution requires unanimity with regard to the theory of culpability. We disagree with Greene's contention.

NRS 175.161(2) provides that "[i]n charging the jury, the judge shall state to them all such matters of law he thinks necessary for their information in giving their verdict." The district court has broad discretion in giving a particular jury instruction, and its decision to give a particular instruction will not be reversed unless it is arbitrary or exceeds the bounds of law.[2]

Initially, we note that this court has stated that "the decisions of the federal district court and panels of the federal circuit court of appeal

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[1]353 F.3d 788, 792 (9th Cir. 2003) (holding that an accused has a constitutional right to a unanimous verdict under Article III, § 2 and the Sixth Amendment to the U.S. Constitution).

[2]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

are not binding upon this court. . . . Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court."[3] Further, we find Greene's reliance on Garcia-Rivera to be misplaced. In Garcia-Rivera, the jury was instructed as follows:

> In order for the defendant to be guilty of the offense charged you must find beyond a reasonable doubt that the possession occurred:
>
> (a) uninterrupted between May 19, 2001 and June 7, 2001; or
>
> (b) about a week after the purchase of the firearm [on May 19, 2001], or
>
> (c) on June 7, 2001
>
> and you must unanimously agree that the possession occurred during (a) above, or on (b) or (c) above.[4]

The United States Court of Appeals for the Ninth Circuit found the instruction at issue to be "fatally ambiguous" – the jury could have been misled into concluding that they were only required to unanimously decide that the crime occurred during any of three different time periods, and not that they were required to unanimously agree as to which specific time period.[5] Accordingly, Garcia-Rivera is distinguishable and not applicable to the instant case.

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[3]Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987), aff'd by Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (citations omitted).

[4]Garcia-Rivera, 353 F.3d at 790.

[5]Id. at 792. Garcia-Rivera was convicted of one count of possession of a firearm by a prohibited possessor. See 18 U.S.C. § 922(g)(1).

Additionally, we conclude that the district court did not err in overruling Greene's objection to the instruction. In Schad v. Arizona, the United States Supreme Court stated that an instruction requiring a unanimous theory of guilt is only required where theories involve important differences in mens rea such that they involve separate degrees of culpability.[6] This court later stated:

> We now conclude, in accord with the reasoning of the plurality opinion in Schad, that when conflicting or alternative theories of criminal agency are offered through the medium of competent evidence, the jury need only achieve unanimity that a criminal agency in evidence was the cause of death; the jury need not achieve unanimity on a single theory of criminal agency.[7]

In the instant case, "competent evidence" demonstrates that a criminal agency existed, resulting in the crimes of which Greene was found guilty. And whether Greene was the actual perpetrator or only an aider and abettor is of no import: "he that aids and abets in the commission of an offense, whether present or absent, is a principal and may be prosecuted, tried and punished as such."[8] Accordingly, we conclude that the district court did not abuse its discretion in giving the instruction in question.

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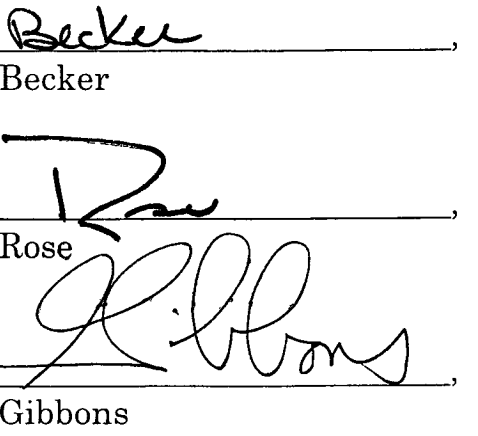
[6]501 U.S. 624, 633 (1995) (plurality opinion); see also Evans v. State, 113 Nev. 885, 895, 944 P.2d 253, 259 (1997) (citing approvingly to Schad).

[7]See Tabish v. State, 119 Nev. 293, 313, 72 P.3d 584, 597 (2003); see also Moore v. State, 116 Nev. 302, 997 P.2d 793 (2000).

[8]State v. Cushing, Et Al., 61 Nev. 132, 145, 120 P.2d 208, 214 (1941); see also NRS 195.020.

Therefore, having considered Greene's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.[9]



_____, C.J.
Becker

_____, J.
Rose

_____, J.
Gibbons

cc: Second Judicial District Court Dept. 9, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[9]Because Greene is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Greene unfiled all proper person documents he has submitted to this court in this matter.