IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER THEODORE JENKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55136

FILED

SEP 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of use of explosives to damage or destroy property, two counts of manufacture and/or possession of an explosive or incendiary device, five counts of possession of a credit or debit card without cardholder's consent, and one count each of burglary, conspiracy to manufacture and/or possess an explosive or incendiary device, possession of burglary tools, and possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Sufficiency of the evidence

Appellant Roger Jenkins contends that insufficient evidence was adduced at trial to support his convictions for burglary, use of explosives to damage or destroy property, manufacture and/or possession of explosive or incendiary devices, and conspiracy to manufacture and/or possess an explosive or incendiary device. We agree.

The evidence adduced at trial established that Jenkins' codefendant, John Morgan, was shopping in the Burlington Coat Factory (BCF) around 5:30 p.m. on the night of the bombing. A few minutes later, Morgan was seen talking to a man and a woman in a black SUV in the

parking lot of the BCF. Jenkins was the registered owner of a black SUV. Around 8:30 p.m. that night Morgan again entered the store. He was wearing a hat, a black dress shirt, and socks pulled all the way up. About seven minutes after Morgan entered the store, witnesses heard a bang and a store employee saw smoke and Morgan near the site of the explosion. Approximately one minute later, in another department of the store, a second explosion occurred. Morgan was again seen near the site of the explosion. He walked away from the smoke and did not look back, but turned and walked back towards the smoke as a store employee approached him. A shopper in the store pointed to Morgan and informed the manager that she saw Morgan throw something, "and then there was smoke."

As Morgan left the store, he was met by Jenkins in Jenkins' black SUV in the middle of the parking lot. The SUV was moving as Morgan left the store, stopped to let Morgan in, and then began to move again. The SUV proceeded down the street but completed a U-turn as police began to arrive. The SUV parked and both Morgan and Jenkins got out. Morgan was no longer wearing the hat or the dress shirt and his socks were pulled down. When questioned by police, Jenkins denied knowing Morgan and claimed that a person had tried to get in his car while he was parked. Both Jenkins and Morgan admitted that they had been in the BCF earlier in the day.

We conclude that this evidence is insufficient to demonstrate, beyond a reasonable doubt, that Jenkins aided and abetted in burglary, NRS 205.060(1), use of explosives to damage or destroy property, NRS 202.830(1), manufacture and/or possession of an explosive or incendiary device, NRS 202.260(1), and conspiracy to manufacture and/or possess an explosive or incendiary device, NRS 199.480(3); NRS 202.260(1), as

charged in the second amended information because no evidence established that Jenkins knew that Morgan possessed or used explosive or incendiary devices or that Jenkins possessed the requisite intent. See NRS 195.020; NRS 193.190 (in every crime there must exist a union of act and criminal intent); Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) ("[I]n order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime."); see also e.g., U.S. v. Friedman, 300 F.3d 111, 124 (2d Cir. 2002) ("Charges of . . . 'aiding and abetting' require the Government to prove, beyond a reasonable doubt, that the defendant knew the specific nature of the . . . underlying crime. . . . Proof that the defendant knew that *some* crime would be committed is not enough." (internal citations omitted)). Accordingly, we reverse Jenkins' convictions for counts 1, 2, 3, 4, 5, and 11.

Jenkins also asserts that insufficient evidence supports his conviction for being an ex-felon in possession of a firearm because no evidence was adduced showing that he possessed the gun or knew of its existence. We conclude that the evidence supporting this conviction, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. NRS 202.360(1)(a); Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

The firearm was found in Jenkins' SUV, which he had been driving, wedged between the cushions of the rear bench seat. Hidden approximately 20 inches away, under one of the seat cushions, were stolen credit cards linked to Jenkins. From this evidence a rational juror could have inferred that Jenkins had dominion and control over the gun and

thus constructively possessed it. See Glispey v. Sheriff, 89 Nev. 221, 223-24, 510 P.2d 623, 624 (1973) (a person has constructive possession of contraband if he maintains control or a right to control the contraband); Woerner v. State, 85 Nev. 281, 284, 453 P.2d 1004, 1006 (1969) (dominion and control may be demonstrated through circumstantial evidence and reasonably drawn inferences); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) ("[C]ircumstantial evidence alone may support a conviction."). Accordingly, we conclude that this contention is without merit.

Motion to sever

Jenkins contends that the district court erred by denying his motion to sever his trial from Morgan's trial because (1) Morgan's statement regarding a motive for the bombing was inadmissible against and prejudicial to Jenkins, (2) joinder precluded Jenkins from calling Morgan to testify that the items found in Jenkins' car were Morgan's, and (3) the jury was unable to compartmentalize the evidence as it related to each defendant.[1] We disagree.

Assuming that Morgan's statement regarding his motive would have been inadmissible in a separate trial against Jenkins, we conclude that Jenkins has not met his "heavy burden" to demonstrate that the district court abused its discretion by denying his motion to sever.

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[1]Jenkins also asserts that severance should have been granted because he and Morgan had irreconcilable defenses. See Rodriguez v. State, 117 Nev. 800, 809-810, 32 P.3d 779-80 (2001); Chartier v. State, 124 Nev. 760, 765, 191 P.3d 1182, 1185 (2008). However, Jenkins does not make any cogent argument in support of this assertion and we therefore decline to address it. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Rodriguez v. State, 117 Nev. at 809, 32 P.3d at 779; see Amen v. State, 106 Nev. 749, 755, 801 P.2d 1354, 1358 (1990) (a defendant is entitled to a separate trial if he presents sufficient showing of facts demonstrating that substantial prejudice would result from a joint trial); Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995) ("[I]t is well settled that where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary."); Lisle v. State, 113 Nev. 679, 689, 941 P.2d 459, 466 (1997) ("The jury is expected to follow the instructions in limiting evidence for each defendant;" even if a risk of prejudice arises from a joint trial, a limiting instruction may cure that risk), modified on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998); Zafiro v. United States, 506 U.S. 534, 539 (1993). Further, we conclude that Jenkins has failed to demonstrate that the district court abused its discretion by denying the motion to sever on the basis that Jenkins was precluded from calling Morgan as an exculpatory witness at a joint trial because Jenkins made no showing that Morgan would give exculpatory testimony at a separate trial. See United States v. Noah, 475 F.2d 688, 696 (9th Cir. 1973) (where defendant made no showing that the codefendant would be willing to testify for him in a separate trial, the court did not abuse its discretion by refusing to grant a motion to sever); accord U.S. v. Hernandez, 952 F.2d 1110, 1115 (9th Cir. 1991); U.S. v. Catalan-Roman, 585 F.3d 453, 461 (1st Cir. 2009), cert. denied sub nom. Medina-Villegas v. U.S., ___ U.S. ___, 130 S. Ct. 3377 (2010); U.S. v. Crumley, 528 F.3d 1053, 1063 (8th Cir. 2008); U.S. v. Nguyen, 493 F.3d 613, 625 (5th Cir. 2007).

Regarding his claim that the jury was unable to compartmentalize the evidence, Jenkins did not raise this ground in his motion below, and we conclude that he has failed to demonstrate plain

error. See Moore v. State, 122 Nev. 27, 36-37, 126 P.3d 508, 514 (2006) (the failure to object generally precludes appellate review unless plain error is demonstrated). Throughout the trial, the jury could have been "reasonably . . . expected to compartmentalize the evidence as it" related to each defendant, see Chartier, 124 Nev. at 765, 191 P.3d at 1185-86; Jones, 111 Nev. at 854, 899 P.2d at 547, and the jury was instructed to consider the evidence only as it related to each defendant, see Lisle, 113 Nev. at 689, 941 P.2d at 466.

Having concluded that reversal of counts 1, 2, 3, 4, 5, and 11, is warranted, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_______________, J.
Hardesty

_______________, J.
Douglas

_______________, J.
Pickering

cc: Hon. Elissa F. Cadish, District Judge
Robert E. Glennen III
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk
Roger Theodore Jenkins