IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN JAMES MORGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55192

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 John Morgan contends that insufficient evidence was adduced at trial to support "the 'explosives' convictions."[1] We

[1]Morgan does not further specify which convictions he challenges. In light of the argument accompanying this issue statement we construe it as challenging only the convictions for use of explosives to damage or destroy property and manufacture and/or possession of explosive or incendiary devices. Cf. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and

continued on next page . . .

disagree because when viewed in the light most favorable to the State, the evidence is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

The evidence adduced at trial established that 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. His codefendant, Roger 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

---

. . . *continued*

cogent argument; issues not so presented need not be addressed by this court.").

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.

From this evidence a rational juror could have inferred that Morgan used explosives to damage or destroy property, see NRS 202.830(1), and manufactured and/or possessed explosive or incendiary devices, see NRS 202.260(1). See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); McNair, 108 Nev. at 56, 825 P.2d at 573; Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) ("[C]ircumstantial evidence alone may support a conviction."). Thus, we conclude that this contention lacks merit.

Morgan also contends that insufficient evidence supports his convictions for possession of a firearm by an ex-felon, possession of credit or debit cards without cardholder's consent, and possession of burglary tools. We agree.

Morgan entered Jenkins' SUV in the BCF parking lot and exited a few minutes later. Morgan was seen talking to a man and a woman in a black SUV earlier in the day of the bombings, however, no evidence was presented that Morgan was ever previously inside Jenkins' SUV. Detective Edward Ericson testified on direct examination that he found Morgan's backpack on the rear bench seat of Jenkins' SUV, on top of where the gun was hidden, but admitted on cross-examination that he actually found the backpack on the front passenger seat. Ericson testified at the preliminary hearing that the backpack was found on the floor of the

front passenger side. Ericson's photograph of the backpack on the rear seat was admitted at trial, but Ericson testified that he did not begin to take pictures of the inside of the SUV until the search was well underway and objects had been moved.

Eriscon also testified that the gun, a 9mm, was wedged between the seat cushions and not clearly visible from the passenger seat. Morgan had a 9mm bullet in his pocket at the time of his arrest, however, the headstamp on that bullet differed from the headstamps on the bullets in the gun. The results of DNA testing were inconclusive as to whether the DNA on the gun belonged to Morgan.

Morgan was inside the SUV along with the credit/debit cards and the burglary tools, but neither the credit/debit cards, which were hidden underneath the rear seat, nor the burglary tools, which were inside a duffel bag in the rear of the SUV, were clearly visible. Ericson testified that a black shirt was found on the floorboard of the front passenger side of the SUV while another officer testified that he observed a black dress shirt in the rear of the SUV.

We conclude that this evidence is insufficient to support Morgan's convictions for possession of a firearm by an ex-felon, NRS 202.360(1), possession of credit or debit cards without cardholder's consent, NRS 205.690(2), and possession of burglary tools, NRS 205.080(1), because it does not indicate that Morgan had control over those items. See Sheriff v. Shade, 109 Nev. 826, 829-30, 858 P.2d 840, 842 (1993) ("A person has constructive possession of [contraband] only if the person maintains control or a right to control the contraband."); Lathrop v. State, 110 Nev. 1135, 1136, 881 P.2d 666, 667 (1994) ("[M]ere presence in the area where contraband is discovered or mere association with the person who does control the contraband is insufficient to support a finding

of possession."); Marshall v. State, 110 Nev. 1328, 1333, 885 P.2d 603, 606 (1994). Accordingly, we reverse Morgan's convictions for counts 6, 7, 8, 9, 10, 12, and 13.

Motion to sever

Morgan contends that the district court erred by failing to sever his trial from Jenkins' trial because the two had inconsistent defenses. We conclude that Morgan has not met his "heavy burden" to demonstrate that the district court abused its discretion by denying his motion to sever on this basis because Jenkins' and Morgan's defenses were not mutually exclusive. See Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990) (inconsistent defenses warrant severance when they are "antagonistic to the point that they are mutually exclusive"); see also 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."); Chartier v. State, 124 Nev. 760, 765, 191 P.3d 1182, 1185 (2008).

Hearsay

Morgan next claims that the district court erred by allowing the introduction of an eyewitness' hearsay statement identifying Morgan as the bomber. The district court's decision to admit testimony under the excited utterance exception to the hearsay rule is reviewed for manifest error. Medina v. State, 122 Nev. 346, 351, 143 P.3d 471, 474 (2006). Here, the witness' statement was made just after a bomb went off, smoke was in the store and the witness was crying. Under these circumstances, we conclude that Morgan has failed to demonstrate that the district court manifestly erred by holding that the statement was an excited utterance. See id.

Morgan also asserts that admission of the statement violated the Confrontation Clause because it was testimonial in nature. See Crawford v. Washington, 541 U.S. 36 (2004). Whether a defendant's Confrontation Clause rights were violated is a question of law subject to de novo review. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 484 (2009). As mentioned above, the witness' statement was made during an ongoing emergency; the witness was describing current circumstances rather than merely describing a past event. Further, the statement was spontaneous and made to a store manager. See Harkins v. State, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006) (identifying the relevant factors to be used in determining whether a hearsay statement is testimonial); see also Davis v. Washington, 547 U.S. 813, 827 (2006). Under these circumstances we conclude that the witness' statement was not testimonial in nature and the district court did not err.

Irrelevant testimony

Morgan asserts that the district court erred by admitting irrelevant testimony regarding chemicals found in Jenkins' car. However, the district court never ruled on the admissibility of this evidence. Instead, it appears that Morgan's counsel and the State agreed that the chemicals would not be discussed at trial. When the testimony was given, Morgan's counsel did not object but asked to approach and explained the situation to the district court. The parties agreed to clarify the testimony and Morgan's counsel did not ask to strike the testimony. Under these circumstances we conclude that the district court did not plainly err. See Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008) (failure to object to the admission of evidence precludes appellate review unless it constitutes plain error).

Morgan also contends that the district court erred by admitting testimony regarding DNA analysis because it was irrelevant, confusing, and misleading. "We review a district court's decision to admit or exclude evidence for an abuse of discretion," Ramet v. State, 125 Nev. ___, ___, 209 P.3d 268, 269 (2009), and conclude that Morgan has failed to demonstrate an abuse of discretion. See NRS 48.015.

Cumulative error

Finally, Morgan contends that cumulative error denied him a fair trial. Because we conclude that the district court did not err, this contention lacks merit. See Valdez v. State, 124 Nev. 1172, ___, 196 P.3d 465, 481 (2008).

Having concluded that reversal of counts 6, 7, 8, 9, 10, 12, and 13 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.

Hardesty, J.

Douglas, J.

Pickering, J.

cc: Hon. Elissa F. Cadish, District Judge
Law Offices of Martin Hart, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk