IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN WARD A/K/A JOHN JEFF WARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57687

FILED

NOV 18 2011

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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of theft. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Sufficiency of the evidence

Appellant John Ward contends that insufficient evidence supports his conviction because the State failed to present any direct evidence linking him to the theft. We disagree and conclude that the evidence, 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. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The jury heard testimony that Manuel Zepeda and Walter Corpuz worked as collectors for ETT Gaming. They were assigned a particular collection route, stopped at businesses where ETT Gaming had slot machines, and collected the gaming company's winnings. A specific van was assigned to each collection route and the driver had to sign for the keys to that van. The van was equipped with an alarm system that automatically armed itself 30 to 40 seconds after the doors were locked.

While Zepeda and Corpuz were in a Smith's grocery store, someone took the van. Zepeda called ETT Gaming and the director of corporate security, James Hannah, began investigating the theft. Hannah contacted the police, interviewed Zepeda and Corpuz, and confirmed that Zepeda and Corpuz still had their van keys. Hannah also obtained a copy of the store's surveillance system video and determined that the theft occurred approximately 20 seconds after Zepeda and Corpuz left the van and entered the store. The van was found in an apartment complex across the street from the store. The van's doors, windows, and ignition system had not been damaged; the alarm system had not been tampered with; and over $300,000 in cash was missing. Hannah concluded that someone used an ignition key to steal the van and later learned that keys to the van were missing.

Ward had left his job with ETT Gaming a few months earlier. Ward had worked as a collector, driven the same van, and travelled the same collection route that Zepeda and Corpuz used on the day of the theft. Ward knew that the Smith's grocery store was one of the longer stops and that it took 30 to 40 seconds for the van's alarm system to arm. Ward had discussed taking the van and stealing the money several times with Zepeda, offered to make a key for a tavern manager so that he could access the lock box where the slot machine keys were kept, and talked about taking money from the van or stealing the van with his ex-wife.

Prior to the theft, Ward lived paycheck-to-paycheck, earned about $12 an hour, had a negative cash flow, and had to have a friend co-sign his car loan. After the theft, Ward gave his wife $500 in one dollar bills for child support, spent $1,000 in a brothel, started gambling, and was observed carrying a large wad of cash and making purchases at a

shopping mall, a restaurant, and an airport gift shop. Ward also rented a storage unit where a detective later found $39,150 in manila envelopes that had "John Ward" written on them.

We conclude that a rational juror could reasonably infer from this evidence that Ward committed theft. See NRS 205.0832(1). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence alone may sustain a conviction).

Jury instruction

Ward also contends that the district court erred by giving the State's proposed instruction on principals because it set forth alternative theories of principal liability that were not alleged in the information and he did not otherwise receive notice that he must be prepared to defend against these alternative theories. The State responds that Ward was simply charged with "controlling another's property with the intent to permanently deprive" and the instruction was based on the language found in NRS 195.020, it did not contain the term "aiding and abetting," and it did not indicate that the State was proceeding on a theory of aiding and abetting. The State alternatively argues that any error was harmless beyond a reasonable doubt.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the

bounds of law or reason." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks and footnote omitted).

Jury instruction number 8 states:

> Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether the person directly commits the act constituting the offense and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain criminal intent shall not be a defense to any person counseling, encouraging, hiring, commanding, inducing or procuring him or her.

This instruction contains words that are used to define the term "aiding and abetting," see Bolden v. State, 121 Nev. 908, 914, 124 P.3d 191, 195 (2005) (defining a person who aids and abets in the commission of a crime as someone who "aids, promotes, encourages or instigates, by act or advice, the commission of such crime with the intention that the crime be committed"), receded from on other grounds by Cortinas v. State, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008), and presents theories of principal liability that were not alleged in the information, see Batt v. State, 111 Nev. 1127, 1130 & n.2, 901 P.2d 664, 666 & n.2 (1995).

We conclude that the district court abused its discretion by giving instruction number 8 because it impermissibly expanded the scope of the information by allowing the jury to find Ward guilty under theories of principal liability that were not alleged and of which Ward had no prior notice. See Randolph v. State, 117 Nev. 970, 976-79, 36 P.3d 424, 428-30

(2001); State v. Dist. Ct., 116 Nev. 374, 377-79, 997 P.2d 126, 129 (2000); Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983). However, we further conclude beyond a reasonable doubt that the error did not contribute to the jury's verdict because the State did not present evidence, argue, or otherwise pursue a theory of indirect principal liability during the course of the trial. See Nay v. State, 123 Nev. 326, 333-34, 167 P.3d 430, 435 (2007) (applying Chapman v. California, 386 U.S. 18, 24 (1967), harmless error analysis to an instructional error of constitutional dimension).

Having considered Ward's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.

Douglas

Hardesty, J.

Hardesty

Parraguirre, J.

Parraguirre

cc: Hon. David B. Barker, District Judge
The Pariente Law Firm, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk