IN THE SUPREME COURT OF THE STATE OF NEVADA

JORGE MIRANDA-RIVAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64687

FILED

OCT 15 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a firearm, discharging a firearm within or from a structure, grand larceny of a motor vehicle, and assault with a deadly weapon. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

First, appellant claims that there was insufficient evidence for his convictions because they were based solely on the testimony of his accomplices. *See* NRS 175.291. As second appellate counsel conceded in his supplemental fast track statement, there is ample independent evidence to corroborate the accomplices' testimony with regards to robbery with the use of a firearm, discharging a firearm within or from a structure, and assault with a deadly weapon. Therefore, we conclude these claims lack merit. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (the proper inquiry for a claim of insufficient evidence is whether the evidence, when viewed in the light most favorable to the prosecution, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008); *Ramirez-Garza v. State*, 108 Nev. 376, 379, 832 P.2d 392, 393 (1991) ("The evidence required to corroborate accomplice testimony need

not, in itself, be sufficient to establish guilt. If the evidence, independent of the accomplice testimony, tends to connect the accused with the commission of the offense, then the corroboration requirement contained in NRS 175.291 is satisfied.").

We also disagree with appellant's claim that insufficient corroborating evidence was presented on the charge of grand larceny of a motor vehicle. 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*, 443 U.S. at 319; *Mitchell*, 124 Nev. at 816, 192 P.3d at 727. At trial, the State presented testimony from the accomplices that, while looking for unlocked cars to enter and steal from, appellant found a Subaru that was unlocked and had the keys inside of it. The accomplices testified that after appellant robbed the gas station, they returned to the Subaru and, when one accomplice failed to start it, appellant got into the Subaru, started it, and drove away. The gas station employee testified that the robber wore a blue, puffy ski-jacket with striping on the sleeve and sideways stitching. A blue, puffy down jacket was discovered on a snow bank, fifteen to twenty feet from where the Subaru was last parked. The gas station employee identified the jacket from the snow bank as looking like the same jacket the robber wore. Furthermore, while speaking with his brother on a recorded jail call, appellant claimed that there was no proof, except that somebody snitched and "that they found the jacket." When his brother said that he heard appellant dropped the jacket in the Subaru and that the owner of the car had the jacket, appellant asked him, "[h]ow you know about it?" We conclude that the jury could have reasonably inferred from the evidence presented that appellant committed grand larceny of a motor

vehicle. *See* NRS 205.228(1); *Ramirez-Garza*, 108 Nev. at 379, 832 P.2d at 393. A jury's verdict will not be disturbed on appeal where, as here, it is supported by sufficient evidence. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Next, appellant argues that the district court erred by failing to sua sponte sever the grand larceny of a motor vehicle charge because it was not a connected part of a common scheme or plan with the other charges. *See* NRS 173.115. We review this claim for plain error because appellant did not move to sever the counts. *See* NRS 178.602. "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Appellant claims that severance was warranted because the theft of the Subaru and the accomplices' subsequent trip to San Francisco in the vehicle occurred after the robbery, the story of the robbery could easily be told without reference to the stolen vehicle, and the robbery and the theft of the Subaru were motivated by different concerns. He argues that he was prejudiced by the failure to sever because, as argued above, there was insufficient evidence of the grand larceny of a motor vehicle charge absent the accomplices' testimonies.[1] The record demonstrates that joinder was appropriate under NRS 173.115(2), which allows joinder

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[1]Although we could treat the State's failure to respond to this claim as a confession of error, *see Polk v. State*, 126 Nev. ___, ___, 233 P.3d 357, 359-60 (2010); *Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984), we decline to do so where, as here, the claim clearly lacks merit.

if the charged offenses are based on "acts or transactions connected together or constituting parts of a common scheme or plan." *See Weber v. State*, 121 Nev. 554, 572-73, 119 P.3d 107, 120 (2005) (defining "scheme or plan" and "connected together"). It was the jacket that was worn in the robbery, later located next to where the Subaru had been stolen, that connected the robbery to the theft of the Subaru and the people in the Subaru to the robbery. Further, appellant fails to demonstrate that his substantial rights were affected as we concluded above that there was sufficient independent evidence to corroborate the accomplices' testimony and to convict him of grand larceny of a motor vehicle. Therefore, we conclude that the district court did not err by failing to sever the charge.

Lastly, appellant contends that his convictions for assault with a deadly weapon or for discharging a firearm within or from a structure are lesser-included offenses of robbery with the use of a firearm and therefore violate double jeopardy. To determine whether two statutes punish the same offense, this court looks to the *Blockburger* test. *See Blockburger v. United States*, 284 U.S. 299 (1932). "The *Blockburger* test 'inquires whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution.'" *Jackson v. State*, 128 Nev. ___, ___, 291 P.3d 1274, 1278 (2012) (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)); *see also Barton v. State*, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001) ("under *Blockburger*, if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses"), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

Here, appellant concedes that assault with a deadly weapon is not a lesser-included offense of simple robbery but argues that it is a lesser-included of the crime charged, robbery with the use of a firearm. He further claims that discharging a firearm within or from a structure is a lesser-included crime to robbery with the use of a firearm when the armed robbery occurred within a store. He contends that the robbery, as charged, could not be committed without first committing assault with a deadly weapon and discharging a firearm within or from a structure.[2] Each of appellant's convictions requires proof of an element that the others do not, *compare* NRS 200.380(1) *and* NRS 193.165(1) *with* NRS 200.471(1)(a), (2)(b) *and with* NRS 202.287(1)(b), therefore, his convictions do not violate the Double Jeopardy Clause, *see Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) ("If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes").

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

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[2]Again, we could exercise our discretion to treat the State's failure to respond to this claim as a confession of error, *see Polk*, 126 Nev. at ___, 233 P.3d at 359-60; *Bates*, 100 Nev. at 681-82, 691 P.2d at 870, but we decline to do so.

cc: Hon. David A. Hardy, District Judge
Law Office of David R. Houston
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk