IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH RUBEN SANCHEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36051

ORDER OF AFFIRMANCE

Joseph Ruben Sanchez appeals his judgment of conviction of several crimes related to his participation with a co-defendant in a plan to kidnap, rob, and murder a teenage boy in order to obtain the custom rims from the boy's car. Sanchez challenges his conviction on various grounds. We conclude that all his arguments lack merit, and we affirm his conviction.

Sanchez first contends that the district court abused its discretion by refusing to instruct the jury to disregard co-defendant Michael Cu's statements, as testified to by the Huffman brothers, because Cu's statements were inadmissible hearsay. The district court refused the proposed instructions, concluding that the evidence was admissible as an adoptive admission. On this issue, Sanchez first challenges Cu's statements as testified to by Jason Huffman. Sanchez cites Harrison v. State[1] for the proposition that his response to Cu was susceptible of two

[1]96 Nev. 347, 349, 608 P.2d 1107, 1109 (1980).

interpretations, and therefore Jason Huffman's statement inculpating him was not admissible against him because he did "not unambiguously assent." But Harrison, an opinion addressing situations in which the "accused ha[d] a constitutional right to remain silent and to avoid self-incrimination,"[2] does not apply here, where "the statements were made in a private conversation."[3] We conclude that the evidence of Sanchez's assent was sufficient to permit the district court to allow the jury to interpret the meaning of Sanchez's response, and therefore we conclude that the district court did not abuse its discretion by refusing to instruct the jury to disregard the evidence.[4]

Sanchez next challenges Thomas Huffman's testimony regarding Cu's statements insofar as they inculpated Sanchez because Thomas Huffman could not testify with certainty as to whether Sanchez was present while Cu told Thomas about the crimes. But we need not consider whether the testimony was admissible under the adoptive-admission exception because there was sufficient evidence to support the conclusion that Thomas Huffman participated in disposing of the victim's car and of the murder weapon as a coconspirator. Thus, we conclude that Thomas Huffman's testimony regarding Cu's statements was admissible as a "statement by a coconspirator of a party during the course and in furtherance of the conspiracy" under NRS 51.035(3)(e).

---

[2]Id. at 349, 608 P.2d at 1108.

[3]Maginnis v. State, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977).

[4]Harrison, 96 Nev. at 349, 608 P.2d at 1108 ("If an incriminating statement is heard and understood by an accused, and his response justifies an inference that he agreed or adopted the admission, then evidence of the statement is admissible at trial.").

Sanchez next contends that Thomas Huffman was an accomplice in the act of burning the victim's car, and therefore, according to NRS 175.291, the district court should have instructed the jury that it could not use Thomas Huffman's testimony without finding corroborating evidence connecting Sanchez to the crimes. We disagree. Thomas Huffman was not an accomplice under the statute because he was never charged for his role in burning the car.[5] Sanchez argues further that the accomplice-testimony rule should apply despite the fact that Thomas Huffman was not charged with the same crimes as Sanchez. His argument, however, does not persuade us to retreat from our stance in Globensky v. State.[6] In any event, we conclude that there was sufficient evidence independent of Thomas Huffman's testimony tending to connect Sanchez to the crimes charged, and therefore the instruction was unnecessary. Thus, the district court did not abuse its discretion by refusing Sanchez's instruction on this point.[7]

In a similar argument, Sanchez asserts that Cu's statements, as testified to by the Huffman brothers, should have been excluded for lack of independent evidence tending to connect Sanchez to the crimes. We conclude that although Cu clearly fits the accomplice definition of NRS 175.291(2) as Sanchez asserts, there was sufficient independent evidence

---

[5]See Globensky v. State, 96 Nev. 113, 117, 605 P.2d 215, 218 (1980) (holding that NRS 175.291 "has no application" where the witness in question has not been charged with the same offense as the defendant).

[6]See id.

[7]Jackson v. State, 117 Nev. ___, ___, 17 P.3d 998, 1001 (2001) (noting that "[t]he district court has broad discretion to settle jury instructions").

tending to connect Sanchez with the crimes charged. Thus, the district court did not abuse its discretion by refusing to instruct the jury to apply the accomplice-testimony rule to Cu's statements.

Sanchez next challenges the sufficiency of the evidence that supports his conviction and in the same vein argues that the district court should have given the jury an advisory instruction addressing this point. His specific concern is that "the only evidence which connected [Sanchez] with commission of the alleged crimes was contained in the statements of co-defendant Michael Cu to the Huffman brothers," and he asserts further that the Huffmans' testimony was inadmissible against Sanchez and "was so weak as to constitute no evidence at all." As discussed above, however, the testimony was properly allowed against Sanchez. Further, we have long held that the testimony of "but one witness" is sufficient to convict,[8] and that a witness's credibility is for the jury to weigh.[9] Accordingly, we conclude that the evidence was sufficient to sustain the convictions, and the district court properly rejected the proposed advisory instruction.

Sanchez next contends that the district court erred by refusing to grant his motion to sever his trial from the trial of co-defendant Cu. Specifically, Sanchez argues that the admission of Cu's inculpatory statements through the Huffmans violated his Sixth Amendment right to confrontation according to Bruton v. United States.[10] In Bruton, the Supreme Court held that a nontestifying defendant's admission that expressly incriminates another defendant cannot be used at a joint trial.

---

[8]Tellis v. State, 84 Nev. 587, 590, 445 P.2d 938, 940 (1968).

[9]Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972).

[10]391 U.S. 123 (1968).

Bruton, however, is concerned with post-arrest confessions, not statements made during the course of a crime.[11] As we discussed above, the statements that Cu made to the Huffman brothers that inculpated both him and Sanchez were made during the course of the conspiracy, long before Cu's arrest, and thus the statements were admissible against Sanchez. We conclude that the district court did not violate the rule announced in Bruton. We also reject Sanchez's other severance argument, namely, that there was a great disparity in the quantity and quality of evidence admissible against Cu as contrasted to that against Sanchez. Thus, we conclude that the district court did not abuse its discretion by refusing to sever Sanchez's trial from Cu's trial.[12]

Sanchez finally contends that the district court erred by giving a Kazalyn instruction for first-degree murder, an instruction that in Byford v. State we held does not adequately distinguish between the elements of premeditation and deliberation.[13] But we do not apply Byford retroactively.[14] Additionally, the factors that caused us concern in Byford are not present in this case. Thus, we conclude that the district court did not abuse its discretion by giving the Kazalyn instruction.

---

[11]Kay v. United States, 421 F.2d 1007, 1009-10 (9th Cir. 1970) (holding that the admission of a co-defendant's "pre-arrest statement made in the course of a joint arrangement or plan" did not violate Bruton).

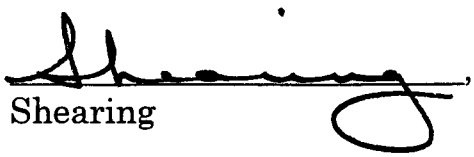
[12]See Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990) (stating that the "decision to sever is left to the discretion of the trial court").

[13]116 Nev. 215, 994 P.2d 700 (2000).

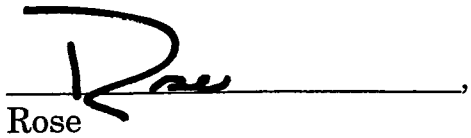
[14]Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000).

Having concluded that all of Sanchez's contentions on appeal lack merit, we

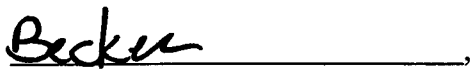
ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Lee A. Gates, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Clark County Clerk