

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3947

UNITED STATES OF AMERICA

v.

THEODORE GREENAWAY,
Appellant

Appeal from the District Court
of the Virgin Islands
Division of St. Thomas and St. John
(D.C. Cr. No. 98-cr-00227-2)
District Judge: Honorable Thomas K. Moore

Submitted Under Third Circuit LAR 34.1(a)
December 4, 2000
Before: MANSMANN, ALITO and GREENBERG, Circuit Judges.

(Filed: December 20, 2000)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

Theodore Greenaway was convicted of offenses arising from the armed robbery of a Brink's armored van. On appeal, Greenaway argues that the evidence was insufficient to sustain a conviction for either a substantive violation of 18 U.S.C. §

924(c)(1),¹ using or carrying a firearm in relation to a crime of violence, or a conviction of this offense under an aiding and abetting theory.

We have the authority to review this matter under 28 U.S.C. § 1291. On a sufficiency of the evidence challenge, we view the evidence favorably to the prosecution and ask whether the trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. United States v. Yeaman, 194 F.3d 442, 452 (3d Cir. 1999). In this analysis, we are guided by “strict principles of deference to the jury’s findings.” United States v. Anderskow, 88 F.3d 245, 251 (3d Cir. 1996). Given this circumscribed review, we will affirm.

¹When the robbery occurred, section 924(c) provided in relevant part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years. . . .

18 U.S.C.A. § 924(c)(1) (1992).

In 1998, Congress amended § 924(c) to criminalize the act of “possessing a firearm” “in furtherance of” any crime of violence or drug trafficking crime, in addition to proscribing the offenses of “using” or “carrying” a firearm during and in relation to such crimes. See 18 U.S.C § 924(c)(1)(1999).

I.

Greenaway confessed to participating in the robbery of the Brink's van. He asserts, however, that evidence was lacking that he either used or carried a firearm during the robbery.

As part of this argument, Greenaway contests the language of the indictment charging the section 924(c)(1) offense. The version of the statute in effect on the date of the crime imposed a penalty on anyone who "uses or carries a firearm" during commission of a crime of violence. Count III of the indictment, however, charged Greenaway with "the use and carry of a firearm while interfering with commerce by robbery, and aiding and abetting in so doing." (emphasis added). Greenaway asserts that the use of the erroneous "and" language was compounded by the District Court's charge to the jury, which repeated the conjunctive phrase "use and carry."

We can readily dispose of this portion of Greenaway's argument. First, it is settled law that where a statute denounces an offense disjunctively, the offense may be charged conjunctively in the indictment. United States v. Niederberger, 580 F.2d 63, 67 (3d Cir. 1978). "The general rule is that when a jury returns a guilty verdict on an . . . indictment charging several acts in the conjunctive . . . the verdicts stand if the evidence is sufficient with respect to any of the acts charged." United States v. Cusumano, 943 F.3d 305, 310 (3d Cir. 1991) (quoting Turner v. United States, 398 U.S. 420 (1970)). Second, Greenaway did not challenge either the indictment or the jury instruction. Third, during the charge, the District Court recited the "use and carry" language when it

read the indictment to the jury; however, the body of the charge accurately instructed the jury as to the elements of the crime using the proper disjunctive phrase, “use or carry.”

The District Court then separately delineated the “use” and the “carry” elements.

Therefore, we cannot accept Greenaway’s argument.

Greenaway’s primary challenge to the evidence -- that it did not place a firearm in his hands -- also fails. The record instead confirms that Greenaway both used and carried a gun while robbing the Brink’s van.

The relevant testimony at trial concerning Greenaway’s connection to a firearm was elicited from the two Brink’s employees and from Greenaway himself. Mark Kuffy, the Brink’s messenger, testified that two men approached the van. The first robber put a gun to his head and hit him in the back of the head. Kuffy then related that he saw a second man coming from the back of the van. The second robber, who wore a mask, also had a gun in his hand which he pointed at Kuffy. Kuffy could not identify the second robber.

Ignatius Stevens, the Brink’s employee who drove the van and who was the inside man on the robbery, also testified that the first robber pointed a gun at Kuffy’s head. Stevens identified this robber as Greenaway’s co-defendant, Don Richards. Stevens did not see a second robber with a gun, however, he recalled Richards confiscated Kuffy’s gun and passed it to a second man who put it in a bag. Stevens informed the jury that Richards told him that Greenaway was the second robber involved in the Brink’s heist.

Damaging testimony to Greenaway came via his own confession which was read into the trial record. Greenaway admitted his participation in the crime, but denied that he used a gun during the robbery. His statement described his role as the robber outside the van to whom Richards threw the money, i.e., the second robber as described by Kuffy. Therefore, Greenaway's own testimony, read inferentially with Kuffy's testimony, confirms that he was the second person who approached Kuffy with a gun in his hand.

Thus, the record supports a reading of the evidence that two men approached the Brink's van, both of whom carried and displayed a gun. The only contradictory evidence is Greenaway's self-serving statement that he did not have a gun during the robbery. Based on this evidence, a reasonable jury, crediting the government's evidence, could find beyond a reasonable doubt that Greenaway carried or used a firearm during the robbery.²

II.

²Although we have already concluded that the District Court correctly instructed on the use or carry elements of a 924(c)(1) offense, Greenaway's actions as described by the witnesses and by himself show that he both used and carried a firearm. Therefore, even if the jury was confused as to the requisites of proof, the evidence supports the section 924(c)(1) conviction on both the use and carry elements.

We next discuss the now academic argument – whether Greenaway could be found guilty under the alternate theory of aiding or abetting the section 924(c)(1) offense.

To denigrate the verdict on the aiding and abetting theory, Greenaway asserts that he had no knowledge of Richards’ gun or that Richards attempted to facilitate the robbery via use of the gun.

To establish aiding and abetting liability, “the government must prove (1) that the substantive crime has been committed and (2) the defendant knew of the crime and attempted to facilitate it.” United States v. Garth, 188 F.3d 99, 113 (3d Cir. 1999). We require that evidence also shows that the defendant specifically intended to facilitate the commission of the principal’s crimes -- mere presence at the scene of the crime and knowledge that the crime is being committed is not enough. United States v. Bey, 736 F.2d 891, 895 (3d Cir. 1984).

In United States v. Price, 76 F.3d 526 (3d Cir. 1996), we upheld an aiding and abetting conviction for a violation of 924(c)(1) for a defendant who never possessed or controlled a firearm. Stubbs and Price participated in a bank robbery. Stubbs brandished a gun while Price jumped over a counter and scooped up money. Even though Price never touched a firearm, based upon the extent to which the gun related activity of Stubbs was intertwined with the actions of Price, we concluded that a reasonable juror could deduce that Price knew Stubbs was planning to use or carry the gun during the robbery and that the concerted action of Stubbs and Price accounted for

the success of the crime. We observed that “[e]ven if Mr. Price did not know in advance that Mr. Stubbs was going to use the gun during the robbery, it seems perfectly clear that Mr. Price was aware that the gun was being used while he continued to participate in the robbery.” Id. at 530.

In a later case, United States v. Garth, 188 F.3d 99 (3d Cir. 1999), a habeas petitioner challenged the validity of his guilty plea on aiding and abetting the unlawful use and carry of a firearm during a drug trafficking violation. The evidence, as it stood, indicated that although Garth knew his companion had a gun while they were in a train station, it also demonstrated that Garth first learned about the gun as he and others entered the station, that Garth never handled the firearm or the bag containing the firearm, and that none of his companions used the firearm while in the station. On this set of facts, we decided that a remand was required to determine whether Garth could establish actual innocence of the aiding and abetting offense.

The matter before us is closer to Price than Garth. The uncontroverted evidence proved that Richards used the firearm during the robbery of the Brink’s van. He wielded the firearm, put it to Kuffy’s head and struck him with it. Even if Greenaway did not know in advance that Richards was going to use the gun, Greenaway, like Price, continued to participate in the robbery after the firearm’s presence was apparent. While Richards held the gun to Kuffy’s head, Greenaway took the money. Thus, the actions of Greenaway were intertwined with a criminal objective of robbing the van by gunpoint. As in Price, the robbery succeeded because of the combined actions of both.

Accordingly, there was sufficient evidence for a reasonable jury to believe beyond a reasonable doubt that Greenaway aided and abetted the carrying or use of a firearm during a crime of violence.

For these reasons, we will affirm the judgment of sentence.

TO THE CLERK:

Please file the foregoing opinion.

/s/Carol Los Mansmann
Circuit Judge

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JUDGMENT

This cause came to be considered on the record from the District Court of the Virgin Islands and was submitted under Third Circuit LAR 34.1(a) on December 4, 2000.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the District Court entered on November 4, 1999, be and the same is hereby affirmed.

ATTEST:

Acting Clerk

Dated: December 20, 2000