IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. NATHANIEL GRAVES, Respondent.	No. 43676
THE STATE OF NEVADA, Appellant, vs. MARK MCLEMORE, Respondent.	No. 44694

FILED

NOV 15 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from orders of the district court granting respondents' motion for a new trial. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

A jury found respondents Nathaniel Graves and Mark McLemore guilty of conspiracy to commit robbery, conspiracy to commit murder, robbery with the use of a deadly weapon, two counts of attempted murder with the use of a deadly weapon, and first degree kidnapping. The district court sentenced Graves and McLemore to prison terms of 13 to 60 months for the robbery conspiracy, 24 to 72 months for the murder conspiracy, two consecutive terms of 35 to 156 months for robbery with the use of a deadly weapon, two consecutive terms of 43 to 192 months for each count of attempted murder with the use of a deadly weapon, and a term of life with the possibility of parole for kidnapping. The district court

subsequently granted respondents' motion for a new trial. The State now appeals.

The State claims that (1) the district court used a flawed standard for granting Graves and McLemore a new trial based on conflicting evidence; (2) Graves and McLemore failed to present sufficient evidence to demonstrate that major conflicts of evidence existed which would have changed the outcome of the trial; and (3) even with the conflicts, there was sufficient evidence to convict.

NRS 176.515 provides in relevant part:

> 1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.
>
> . . .

Grounds for a new trial, other than newly discovered evidence, exist when "the trial judge finds that the evidence of guilt is conflicting, and after an independent evaluation of the evidence, disagrees with the jury's verdict of guilty."[1] We have held:

> [A] conflict of evidence occurs where there is sufficient evidence presented at trial which, if believed, would sustain a conviction, but this evidence is contested and the district judge, in resolving the conflicting evidence differently from the jury, believes the totality of evidence fails to

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[1]Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996); see also State v. Purcell, 110 Nev. 1389, 887 P.2d 276 (1994); Washington v. State, 98 Nev. 601, 655 P.2d 531 (1982).

prove the defendant guilty beyond a reasonable doubt.[2]

Our review of the record reveals that the district court identified and applied the correct standard. The district court found that the pleadings, argument, and trial record demonstrated that there was conflicting testimony among some of the witnesses. It independently evaluated this conflicting evidence and reached a conclusion that was at odds with the jury's verdict. In resolving the conflicting evidence differently from the jury, the district court further believed that the totality of the evidence failed to prove that Graves and McLemore were guilty beyond a reasonable doubt.

The State's arguments on appeal fail to distinguish between sufficient evidence and conflicting evidence. The issue before the district court was not whether there was sufficient evidence to support a conviction, but whether the district court should resolve conflicting evidence differently from the jury and conclude that the totality of the evidence failed to prove that Graves and McLemore were guilty beyond a reasonable doubt. The district court resolved the conflicting evidence differently than the jury and concluded that the totality of the evidence did not support a guilty verdict. We will not disturb the district court's evaluation of the evidence under these circumstances.[3]

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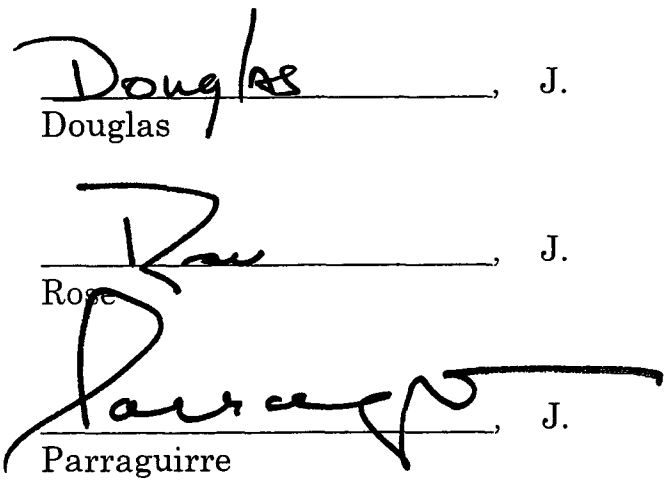
[2]State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2 (1993).

[3]See State v. Busscher, 81 Nev. 587, 588-89, 407 P.2d 715, 716 (1965).

Having concluded that the district court did not apply an incorrect standard or abuse its discretion, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Rose

_____, J.
Parraguirre

cc: Hon. Nancy M. Saitta, District Judge
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
J. Chip Siegel, Chtd.
Longabaugh Law Offices
Clark County Clerk