

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY BAILEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52444

**FILED**

**DEC 04 2009**

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 conspiracy to commit robbery (Count 1), two counts of attempted robbery with the use of a deadly weapon (Counts 2 and 3), conspiracy to commit murder (Count 4), first-degree murder with the use of a deadly weapon (Count 5), and attempted murder with the use of a deadly weapon (Count 6). Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The district court sentenced appellant Larry Bailey to serve a prison term of one to four years on Count 1, two consecutive terms of two to five years on Count 2, two consecutive terms of two to five years on Count 3, 36 to 90 months on Count 4, two consecutive terms of 20 years to life on Count 5, and two consecutive terms of four to ten years on Count 6. The district court ordered Counts 1 through 5 to run concurrently and ordered Count 6 to run consecutive to Count 5.

On appeal, Bailey acknowledges that he conspired to commit robbery but asserts that there was insufficient evidence to convict him of the remaining counts. The standard of review for a challenge to the sufficiency of the evidence is "whether, after viewing the evidence in the

light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.” McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

In a voluntary statement to the police, Bailey admitted that while outside a house party on January 28, 2006, he, Gregory Boyd, and Debaron Sanders formulated a plan to rob two men of a necklace and a gun.<sup>1</sup> The men borrowed a friend’s white Kia Rio to effectuate the plan; Bailey served as the driver while Boyd and Sanders rode in the back seat. Bailey parked the car on the street near the victims, who were walking home from the party, and Boyd and Sanders exited the vehicle, made a brief comment,<sup>2</sup> and began firing their handguns at the victims, who fled on foot. Bailey told Boyd and Sanders to get back in the car, and then the three men met up with some friends before traveling to a Denny’s restaurant where they were apprehended by the police a few minutes later.

One of the victims, Darrell Ford, eventually died as the result of two gunshot wounds: one bullet went through his right leg and the other entered his lower back and exited his abdomen. The other victim, Mariano Lomeli, was treated for a gunshot wound that entered the back of

---

<sup>1</sup>Evidence at trial showed that despite the conspirators’ belief otherwise, the victims were not armed.

<sup>2</sup>In his statement to the police, Bailey stated that one of his codefendants said “give me what you got.” However, victim Mariano Lomeli testified at trial that the only thing he heard was one of the attackers ask “where’s the party at?”

his thigh and exited near his hip. Lomeli was taken from the hospital to Denny's and identified Boyd and Sanders in a lineup as two persons who looked familiar.

A search of the white Kia revealed three firearms, but forensic analysis of the recovered shell casings and bullets showed that only two of them had been used in the crime. Although no evidence tied Bailey directly to the firearms that were used, Bailey's fingerprints were found inside the vehicle and he had gunshot residue on both of his hands, indicating that he had been in close proximity to the weapons when they were fired.

Bailey argues that this evidence was insufficient to support his convictions for conspiracy to commit murder, first-degree murder, and the deadly weapon enhancements because—although he conspired to commit robbery—he had no knowledge that Boyd and Sanders intended to use guns during the robbery or shoot the victims. We disagree.

Initially, we address Bailey's claim that there was no evidence that he conspired to commit murder. "Conspiracy is seldom demonstrated by direct proof and is usually established by inference from the parties' conduct." Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). "Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction." Id.

Bailey admitted that he conspired to rob the victims of a necklace and a gun but claims that the use of firearms was not a part of the plan. However, a rational juror could have rejected Bailey's assertions of ignorance and been skeptical that Bailey and his companions conspired

to rob two men, who they believed to be armed, by mere demand. Lomeli testified at trial that no demand for property was made before the shooting started. Rather, he immediately saw guns being drawn and was shot in the back as he fled. Viewing this evidence in the light most favorable to the State, we conclude that a rational juror could have found beyond a reasonable doubt that the conspiracy between Bailey, Boyd, and Sanders contemplated the death of the victims.

Accordingly, we likewise conclude that there was sufficient evidence for a rational juror to conclude that the State had proved the intent elements of both attempted murder and first-degree murder (under the theories of aiding and abetting, see Sharma v. State, 118 Nev. 648, 656, 56 P.3d 868, 872-73 (2002), and vicarious coconspirator liability, see Bolden v. State, 121 Nev. 908, 922-23, 124 P.3d 191, 201 (2005), receded from on other grounds by Cortinas v. State, 124 Nev. \_\_\_, 195 P.3d 315 (2008), cert. denied, \_\_\_ U.S. \_\_\_, No. 09-6028, 2009 WL 2566986 (U.S. Oct. 13, 2009).<sup>3</sup>

Finally, we conclude that Bailey's challenges to the deadly weapon enhancements—based on claims that (1) he never personally

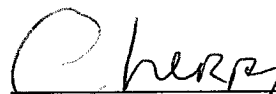
---

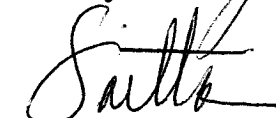
<sup>3</sup>Bailey also argues that there was insufficient evidence to support his convictions for attempted robbery because the evidence shows that nobody tried to take property from the victims or chase them when they fled. Bailey's contention is without merit. An attempt to commit a crime is complete when a person acts with the intent to commit a crime but fails to accomplish it. NRS 193.330. There was more than enough evidence for a rational juror to conclude beyond a reasonable doubt that Bailey acted with the intent to commit robbery but failed to accomplish the crime. And because the attempted robbery resulted in the death of one of the victims, there was also sufficient evidence to find Bailey guilty of first-degree murder based on the felony-murder rule. See NRS 200.030(1)(b).

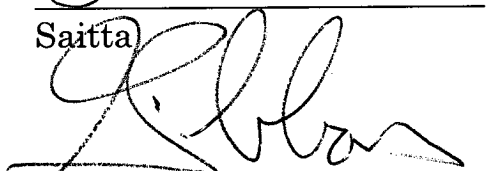
handled the guns and (2) the district court erred in failing to instruct the jury on constructive possession—are without merit. Not only is Bailey’s instructional claim not entitled to review because he never requested an instruction on constructive possession, see McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998), but this court recently rejected the constructive possession test of Anderson v. State, 95 Nev. 625, 600 P.2d 241 (1979), and its progeny. Brooks v. State, 124 Nev. \_\_\_, \_\_\_, 180 P.3d 657, 661 (2008). As set forth in Brooks, an unarmed offender “uses” a deadly weapon whenever a “principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.” Id. Applying that standard to the facts of this case, we conclude that there was sufficient evidence to support the deadly weapon enhancements.

Because we conclude that there was sufficient evidence for a rational juror to find beyond a reasonable doubt that Bailey was guilty of the charged crimes, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Michael Villani, District Judge  
Joel M. Mann, Chtd.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk