

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY NOE ESCALANTE,

No. 35920

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 08 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of battery with the use of a deadly weapon (count III). The district court sentenced appellant, Danny Escalante, to a term of six years in prison with parole eligibility after two years. The district court suspended Escalante's sentence and placed him on probation for a maximum period of four years.

Escalante first contends that the district court's refusal to give his proposed jury instruction on the elements of aiding and abetting was reversible error. We disagree. Although a criminal defendant is entitled to have the jury instructed as to his theory of the case, a proffered instruction need not be given if it misstates the law or is adequately covered by other instructions.¹ The instructions given in this case properly instructed the jury on the elements of battery with the use of a deadly weapon based on a theory of aiding and abetting. Accordingly, we conclude that Escalante's contention lacks merit.

Escalante also contends that the evidence adduced at trial was insufficient to support his conviction based on a theory of aiding and abetting.

"[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, [t]he relevant inquiry for this court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

¹Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

crime[s] beyond a reasonable doubt.”² Moreover, it is for the jury to determine what weight, credibility and credence to give to witness testimony and other trial evidence.³ Finally, circumstantial evidence alone may sustain a conviction.⁴

Our review of the record reveals sufficient evidence from which the jury, acting reasonably and rationally, could have found the elements of battery with the use of a deadly weapon beyond a reasonable doubt based on a theory of aiding and abetting. NRS 200.481 defines a battery as “any willful and unlawful use of force or violence upon the person of another.”⁵ Further, a person who aids or abets in the commission of a crime shall be charged and punished as a principal.⁶ Additionally, this court has held that presence, companionship, and conduct before, during, and after the offense are circumstances from which a defendant’s participation in a crime may be inferred.⁷

In this case, Escalante explained to the jury the circumstances surrounding his presence at the scene and his actions at the time his brother stabbed the victim. However, the jury also heard testimony which suggested that Escalante held the victim down while his brother stabbed him. The jury is the sole judge of the credibility of witnesses and the weight to be given the evidence.⁸ Evidently, the jury did not believe Escalante. Accordingly, we conclude that, given the conflicting evidence presented at trial in this case, the jury reasonably could conclude that Escalante aided and assisted in the perpetration of a battery with the use

²Hutchins v. State, 110 Nev. 103, 107-108, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)) quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979).

³Id. at 107, 867 P.2d at 1139.

⁴McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 576 (1992).

⁵NRS 200.481.

⁶NRS 195.020.

⁷Merryman v. State, 95 Nev. 648, 650, 601 P.2d 53, 54 (1979) (citations omitted).

⁸See Hutchins, 110 Nev. at 109, 867 P.2d at 1140.

of a deadly weapon. Having considered appellant's contentions and concluded that they lack merit, we therefore

ORDER the judgment of conviction AFFIRMED.

Young J.
Young

Leavitt J.
Leavitt

Becker J.
Becker

cc: Hon. Mark W. Gibbons, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk