

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRADLEY JAY HAYHURST,

No. 35956

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**AUG 10 2001**

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

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit robbery with a firearm, and one count of robbery with a firearm. The district court sentenced appellant for conspiracy to a prison term of 12 to 60 months with an equal and consecutive term for the firearm enhancement, and for robbery to a consecutive prison term of 24 to 84 months with an equal and consecutive term for the firearm enhancement.

Appellant contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>1</sup>

In particular, we note that evidence at trial showed that appellant planned with others to rob the victim, and that while they were waiting for the victim to pass by, one of appellant's accomplices produced a gun. When appellant and his accomplices approached the victim, appellant's co-defendant pointed the gun at the victim and forced the victim to the ground while appellant beat and kicked the victim.

<sup>1</sup>See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

Evidence was also adduced showing that appellant and his accomplices took the victim's money.

The jury could reasonably infer from the evidence presented that appellant conspired to commit robbery with a firearm, and actually did commit robbery with a firearm.<sup>2</sup> It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.<sup>3</sup>

Appellant next contends that the jury should have been instructed on the lesser included offenses of conspiracy to commit robbery, and robbery without the use of a firearm. Appellant failed to request the instructions on the lesser included offenses. Moreover, the State met its burden of proof on the greater offenses. We therefore conclude that appellant's contention is without merit.<sup>4</sup>

Finally, appellant contends that the district court erred by applying the deadly weapon enhancement provided for in NRS 193.165(1) to his conspiracy conviction. This court recently held it "improper to enhance a sentence for conspiracy using the deadly weapon enhancement."<sup>5</sup> Accordingly, the consecutive enhancement term of appellant's conspiracy sentence must be vacated. We therefore

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<sup>2</sup>See Anderson v. State, 95 Nev. 625, 630, 600 P.2d 241, 244 (1979) (unarmed assailant has constructive possession where "unarmed assailant has knowledge of the use of the gun and by his actual presence participates in the robbery . . . [benefiting] from the use of the other robber's weapon, [and] adopting derivatively its lethal potential").

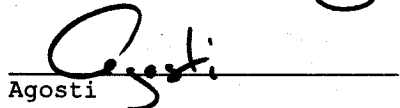
<sup>3</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

<sup>4</sup>See Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966) (where greater offense could not have been committed without committing the lesser offense, instruction on lesser offense not required unless requested by defendant).

<sup>5</sup>Moore v. State, 117 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 52, at 6, July 25, 2001).

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to vacate the second, consecutive term of appellant's sentence for conspiracy.<sup>6</sup>

  
Shearing J.

  
Agosti J.

  
Rose J.

cc: Hon. David A. Huff, District Judge  
Attorney General  
Churchill County District Attorney  
Jeffrey D. Morrison  
Churchill County Clerk

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<sup>6</sup>Although this court has elected to file the fast track statement submitted, it is noted that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2). Specifically, NRAP 3C(e)(2) requires that "[e]very assertion in the fast track statement regarding matters in a rough draft transcript . . . shall cite to the page of the rough draft transcript . . . that supports that assertion." (Emphasis added). Throughout the fast track statement, instead of a cite to a specific page, appellant's counsel merely cites, "See generally Transcript." Counsel is cautioned that failure to comply with the requirements for fast track statements in the future may result in the fast track statement being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).