

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAJESH KUMAR VIG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36183

FILED

NOV 06 2002

ORDER OF REVERSAL AND REMAND

STATE FILED ROOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant Rajesh Kumar Vig to two consecutive terms of twenty-four to seventy-two months in the Nevada State Prison.

Vig asserts several claims of error on appeal. Most importantly, he argues that the district court failed to properly instruct the jury on the essential elements of attempted murder based upon an aiding and abetting theory of liability.

Jury Instruction No. 12 read as follows.

The elements of ATTEMPTED MURDER which the State must prove beyond a reasonable doubt in this case are that on or about the 18th day of November, 1998, the defendant did:

- 1) in Washoe County, State of Nevada;
- 2) willfully, unlawfully, with premeditation, deliberation, and malice aforethought;
- 3) directly attempt to kill AMIT RANADEY;
- 4) or aid, abet, counsel or encourage another person or persons to attempt to do so.

In Sharma v. State,¹ we determined that this instruction was defective because it failed to instruct the jury that to convict Vig of aiding or abetting attempted murder, Vig must have aided or abetted the attempt with the specific intent to kill.² The same reasoning applies here. Additionally, we cannot conclude that the error was harmless beyond a reasonable doubt.³ Accordingly, we reverse the judgment of conviction and remand this matter for further proceedings.

Our conclusion that reversal and remand is warranted makes it unnecessary to discuss in detail most of Vig's other claims of error. Only one of those claims, his contention that the State adduced insufficient evidence to support the deadly weapon enhancement, would preclude a retrial on that charge. Viewing the evidence in the light most favorable to the State, we conclude that the State presented sufficient evidence from which a properly instructed jury could have found that Vig had constructive possession of the gun.⁴ Therefore, Vig may properly be retried on the use of a deadly weapon allegation.

Accordingly, we

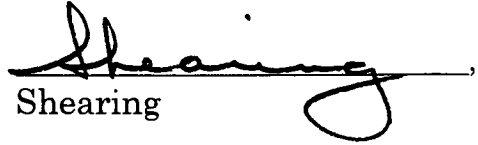
¹118 Nev. ___, ___ P.3d ___ (Adv. Op. No. 69, October 31, 2002).

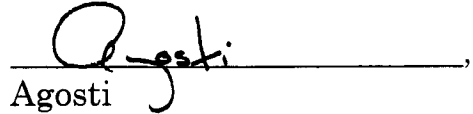
²Id.

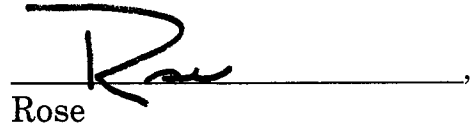
³See Wegner v. State, 116 Nev. 1149, 14 P.3d 25 (2000) ("Where a defendant has contested an omitted element and there is sufficient evidence to support a contrary finding, the error is not harmless."); see also Collman v. State, 116 Nev. 687, 722-23, 7 P.3d 426, 449 (2000).

⁴See Moore v. State, 105 Nev. 378, 776 P.2d 1235 (1989) overruled on other grounds by Peck v. State, 116 Nev. 840, 7 P.3d 470 (2000).

ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.

 _____, J.
Shearing

 _____, J.
Agosti

 _____, J.
Rose

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Richard F. Cornell
Washoe County Clerk