

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE FLORES,

No. 36377

Appellant,

vs.

FILED

NOV 13 2001

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

THE STATE OF NEVADA,

Respondent.

ORDER AFFIRMING IN PART.

REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of attempted murder, conspiracy to commit murder, and accessory to a felony. The district court sentenced appellant, Jose Flores, to serve consecutive prison terms of thirty-two to one hundred forty-four months for the attempted murder charge, twenty-four to seventy-two months for the conspiracy charge, and twelve to thirty-six months for the accessory to a felony charge. We affirm the attempted murder and conspiracy convictions, but reverse the conviction for accessory to a felony because the State presented insufficient evidence to support that charge.

When sufficiency of the evidence is challenged on appeal, this court inquires as to whether any rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, could find the essential elements of the crime to exist beyond a reasonable doubt.¹ Where there is substantial evidence in the record to support the verdict, this court will not disturb the verdict on appeal.² When determining whether a defendant possesses the requisite intent, the jury may resort to

¹Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000); Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994).

²Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992).

inferences from the surrounding circumstances in order to determine whether the prosecution has proved the intent element of the crime.³

Flores contends that the evidence presented at trial was insufficient to convict him of attempted murder. The State adduced evidence that Flores confronted Samuel Rodriguez in a casino parking lot and shortly thereafter appeared at Rodriguez's apartment with his nephew, Benito Flores, Jr. Rodriguez and his wife both testified that they heard Jose and Benito, Jr. arguing over a gun and each saying, "let me do it, I'm gonna do it." Rodriguez's wife further stated that she heard Jose Flores say that he wanted to kill Rodriguez. Then, Benito, Jr. pointed the gun at Rodriguez and fired it at him approximately eight times. One of the bullets hit Rodriguez in his right side. Flores denied knowing that Benito, Jr. had a gun or that he was going to shoot Rodriguez. The jury, however, was free to discount that testimony. Therefore, we conclude that, based on Samuel and Cricela Rodriguez's testimony, there was sufficient evidence to support the jury verdict of attempted murder.

Flores also contends that the evidence presented at trial was insufficient to convict him of conspiracy to commit murder. We disagree. There was no direct evidence of an actual agreement between Flores and Benito, Jr., however, a conspiracy agreement may be inferred from circumstances and actions and need not be supported by direct evidence.⁴ The circumstantial evidence the State adduced, which was sufficient to convict Flores of attempted murder, is also sufficient to convict him of conspiracy to commit murder. Therefore, we conclude that, based on Samuel and Cricela Rodriguez's testimony, there was sufficient evidence to support the jury verdict of conspiracy to commit murder.

Flores's conviction for accessory to a felony must be reversed. A defendant may not be both a principal and an accessory to the same felony. Both charges cover the same course of conduct.⁵

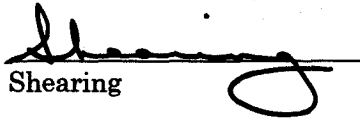
Accordingly, we


³Sheriff v. Hodes, 96 Nev. 184, 187, 606 P.2d 178, 180 (1980).

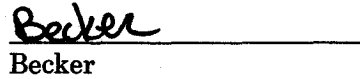
⁴Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996).

⁵Albitre v. State, 103 Nev. 281, 284, 738 P.2d 1307, 1309 (1987).

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

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. J. Michael Memeo, District Judge
Attorney General/Carson City
Elko County District Attorney
David A. Gottlieb
David D. Loreman
Elko County Clerk