IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER WAYNE JEFFRIES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47176

FILED

FEB 26 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, upon a jury verdict, of one count each of home invasion, sexual assault, attempted sexual assault and open or gross lewdness. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Christopher Wayne Jeffries was arrested in September of 2005 and charged with burglary, invasion of the home, kidnapping, sexual assault, attempted sexual assault, and two counts of open or gross lewdness arising out of an incident at the house of his ex-girlfriend, a woman twelve years his senior. A jury acquitted Jeffries of burglary, kidnapping, and one count of open and gross lewdness, and convicted him of invasion of the home, sexual assault, attempted sexual assault, and one count of open or gross lewdness.

Jeffries appeals, alleging in part that the district court erred in excluding a jury instruction regarding consent of the victim as a defense to sexual assault.[1] Jeffries argues that the district court erred in not

[1]Jeffries also alleges the following errors by the district court: (1) constitutional error in barring all voir dire inquiry into potential juror partiality regarding the multi-generational relationship between the alleged victim and the defendant; (2) improper inclusion of a jury

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applying Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005), to allow a defense instruction on consent. We agree.

We review jury instructions for harmless error beyond a reasonable doubt. Neder v. United States, 527 U.S. 1, 13-15 (1999). Because the district court has broad discretion in settling jury instructions, we will not reverse a jury instruction unless we conclude that the district court abused its discretion or committed judicial error in settling the jury instructions. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). When an error in a trial infringes on a defendant's constitutional rights, the error may be deemed harmless only if the appellate court is "able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). We may find some errors in instructions harmless where it is clear beyond a reasonable doubt that the guilty verdict rendered was "surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (citing Chapman, 386 U.S. at 24).

Jeffries offered the following two consent jury instructions:

. . . continued

instruction as to flight; (3) improper inclusion of a jury instruction as to change of appearance without the element of consciousness of guilt; (4) reversible error in failing to sua sponte strike the prosecutor's improper expression of personal opinion during closing argument; (5) improper allowance of testimony of a high media profile probation and parole officer; and (6) error in not declaring a mistrial when the prosecutor improperly questioned the alleged victim concerning the discomfort she suffered in pursuing prosecution of the present criminal charges. Because we conclude that these allegations are without merit, we decline to address them in this order.

> To find the Defendant guilty of sexual assault, you must find that he had sexual intercourse with the prosecuting witness without her consent.
>
> Consent may be explicit, or consent may be implied from a consideration of the totality of the circumstances.

And,

> In determining whether or not the Defendant believed that he had the consent of the prosecuting witness, you are to determine if, under the totality of the circumstances a reasonable person would believe that the prosecuting witness consented.

Jeffries argues that because the district court refused to give either of the above-quoted instructions, the jury was not adequately instructed on consent. Instead, the district court ruled that the state's instruction fully covered consent, and admitted the state's instruction to the jury, which read:

> Physical force is not a necessary element in the commission of sexual assault. The crucial question is not whether a person was physically forced to engage in a sexual assault, but whether the act was committed without her consent.
>
> A person is not required to do more than her age, strength, surrounding facts and attending circumstances make it reasonable for her to do to manifest opposition to a sexual assault.
>
> Submission is not the equivalent of consent. While consent inevitably involves submission, submission does not inevitably involve consent.

Jeffries contends that this instruction did not fully cover the defense's theory of consent, which there was evidence to support. Furthermore, Jeffries contends that this instruction did not fulfill the requirements of an accurate and complete consent instruction as decreed by Carter.

In Carter, the district court rejected Carter's proffered instruction, instead instructing the jury that:

> [p]hysical force is not necessary in the commission of sexual assault. The crucial question is not whether a person was physically forced to engage in a sexual assault but whether the act was committed without her consent or under conditions in which the defendant knew or should have known, the person was incapable of giving her consent or understanding the nature of the act. There is no consent where a person is induced to submit to the sexual act through fear of death or serious bodily injury.

Carter, 121 Nev. at 763, 121 P.3d at 595. We reversed Carter's conviction and remanded for a new trial because the above instruction "failed to address the significance of any finding by the jury concerning consent, to wit: that a reasonable doubt as to whether the victim consented, or whether the defendant harbored a reasonably mistaken belief of consent, would require an acquittal." Id.

As such, we rejected Honeycutt v. State's strict mandate that the defendant must include language that undermines his defense in order to have a reasonable-belief-of-consent instruction given. Id. at 764, 121 P.3d at 595-96. Instead, we held that when an incomplete instruction regarding consent is proffered, the district court must give the instruction proffered by the defendant, and include the following language that:

> a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief.

Id. at 763, 121 P.3d at 595 (citing Honeycutt, 118 Nev. at 671, 56 P.3d at 369). That is, the district court cannot per se reject as incomplete a

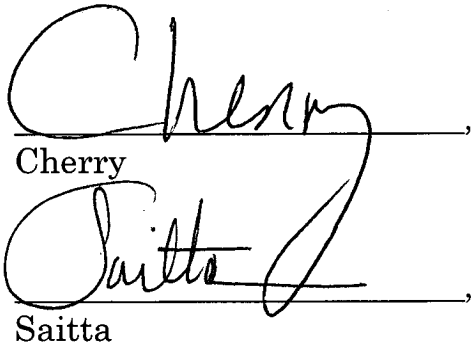
proposed instruction on consent, or reasonable mistaken belief of consent, when requested, as long as some evidence supports its consideration. Id. at 764, 121 P.3d at 596. Rather, the "district court has an affirmative obligation to cooperate with the defendant to correct the proposed instruction or to incorporate the substance of such an instruction [regarding consent or reasonable mistaken belief of consent] in one drafted by the court." Id. at 765, 121 P.3d at 596, citing Honeycutt, 118 Nev. at 677-78, 56 P.3d at 373-74 (Rose, J., dissenting).

We conclude that the district court did not follow Carter when it denied Jeffries' proposed instructions on consent. The state's instruction did not fully cover Jeffries' theory of consent, which was supported by evidence at trial, including conflicting statements regarding consent by the alleged victim and a lack of physical evidence. Further, such a consent instruction is mandated by our holding in Carter that "[c]laims of consent in a sexual assault prosecution raise specific questions that must be addressed as part of the trial court's instruction to the jury." Id. at 762, 121 P.3d at 594. The proffered instructions by Jeffries followed Carter and the district court erred in refusing to allow an instruction on Jeffries' theory of consent. Our inquiry then becomes whether the error was harmless.

We also conclude that, like in Carter, the error is not harmless when the instructions given fail to address the significance of any finding by the jury concerning consent, *e.g,* that a reasonable doubt as to whether the victim consented, or whether the defendant harbored a reasonably mistaken belief of consent, would require an acquittal. Id. at 763, 121 P.3d at 595. Such error requires reversal and remand for a new trial. Id. The error was not harmless here because the jury was unable to even

consider a consent or reasonable-mistaken-belief-of-consent instruction, which may have led to Jeffries' acquittal because consent was not adequately defined by the State's instructions. Consequently, we

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



_____, J.
Cherry

_____, J.
Saitta

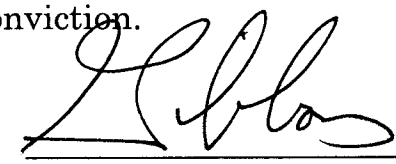
cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

GIBBONS, J., dissenting:

I respectfully disagree with the majority that the district court was required to give the Carter instruction. The appellant never presented any evidence that Andrews consented to sexual conduct with the appellant. In fact, the counsel for the appellant argued throughout the trial that the incident in question never took place.

In Graham vs. State, 116 Nev. 23, 992 P.2d 253 (2000), the Nevada Supreme Court affirmed the district court's refusal to give a second degree murder instruction to the jury in a case alleging murder by child abuse. The Court stated that "the only evidence supporting [his] defense [were] his statements, through others, that the death of [the infant] was accidental. Id. at 258.

In my opinion, the district court should not be required to give jury instructions as to potential defenses absent some evidence that the defendant is asserting the defense as a theory of the case. For this reason, I would affirm the judgment of conviction.



_____, J.
Gibbons