

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARGARET JOYCE MODELFINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49288

FILED

JUL 24 2008

TRICIA A. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder of a victim 65 years of age or older with the use of a deadly weapon.¹ Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Margaret Modelfino has admitted to killing her estranged husband, Gino. She argues, however, that she killed the victim in self-defense. At trial, a jury rejected Modelfino's self-defense argument and found her guilty of second-degree murder. This appeal followed.

On appeal, Modelfino raises three contentions: First, she challenges the district court's decision to condition the admission of certain evidence on the admission of other evidence proffered by the prosecution. Second, Modelfino asserts that the district court improperly instructed the jury on her theory of self-defense. Third, Modelfino argues that the jury's verdict is not supported by the evidence.

For the reasons set forth below, we conclude that Modelfino's contentions fail and, therefore, affirm the judgment of conviction. The

¹Pursuant to NRAP 34(f), we have determined that oral argument is not warranted in this appeal.

parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Evidentiary challenge

Modelfino challenges the district court's evidentiary ruling regarding certain recorded evidence. However, this evidence—which consists of an audio tape and a diary entry—was not included as part of the record on appeal.² As a result, we cannot determine whether the district court abused its discretion and, thus, we decline to consider Modelfino's argument on this issue.³

Jury instructions

Modelfino also contends that the district court improperly instructed the jury on her theory of self-defense. Because Modelfino's counsel stipulated to the instructions in open court before they were read to the jury, a plain error analysis applies on appeal.⁴ An error is plain if it "is so unmistakable that it reveals itself by casual inspection of the

²The trial transcript does contain some descriptions of the evidence, but the evidence has not been presented to this court.

³See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

⁴Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005); Bonacci v. State, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980) (recognizing "plain error" as the only exception to the rule precluding appellate review where "a defendant's counsel has not only failed at trial to object to jury instructions, but has agreed to them").

record.”⁵ At a minimum, the error must be “clear under current law,”⁶ and “[n]ormally a defendant must show that an error was prejudicial in order to establish that it affected his substantial rights.”⁷

Here, Modelfino argues that a new trial is warranted pursuant to Runion v. State⁸ because the district court did not separately instruct the jury that the State had the burden to prove the lack of self-defense beyond a reasonable doubt. In Runion, we set forth “sample instructions for consideration by the district courts in . . . cases where a criminal defendant asserts self-defense.”⁹ We also noted that “[w]hether these or other similar instructions are appropriate in any given case depends upon the testimony and evidence of that case. The district courts should tailor instructions to the facts and circumstances of a case, rather than simply relying on ‘stock’ instructions.”¹⁰

In this case, the district court’s self-defense instructions tracked the sample instructions set forth in Runion, except that the

⁵Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks omitted).

⁶Gaxiola, 121 Nev. at 648, 119 P.3d at 1232 (quoting U.S. v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001)).

⁷Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1131 (2001).

⁸116 Nev. 1041, 13 P.3d 52 (2000).

⁹Id. at 1051, 13 P.3d at 58.

¹⁰Id. at 1051, 13 P.3d at 58-59.

district court did not include the final clause of the Runion instructions, which concerns the State's burden of proof:

If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.¹¹

Nevertheless, the district court's jury instructions plainly explained the presumption of innocence and the State's "burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense." Furthermore, in defining the elements of murder, the district court's instructions stated that "[m]urder is the unlawful killing of a human being, with malice aforethought, either express or implied." The district court's Runion instructions then explained that "[t]he killing of another person in self-defense is justified and not unlawful when" the elements of self-defense are met. Thus, the district court's instructions explained to the jury that murder is an "unlawful" killing and that self-defense renders a killing "justified and not unlawful."

Based on the above, we conclude that the district court's failure to include the final clause of the Runion instructions did not constitute plain error, especially given that Modelfino's attorney stipulated to the instructions before they were read to the jury. Moreover, based on the evidence presented at trial regarding the weapon used to cause the victim's injuries and Modelfino's conduct following the victim's

¹¹Id. at 1052, 13 P.3d at 59.

death, we conclude that Modelfino has failed to demonstrate that the error was prejudicial. Accordingly, we reject Modelfino's challenge to the district court's self-defense jury instructions.

Jury verdict

Modelfino lastly contends that the evidence produced at trial does not support the jury's finding that she did not act in self-defense beyond a reasonable doubt. In reviewing the sufficiency of the evidence in support of the jury's verdict, we must decide ""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 crime beyond a reasonable doubt.""¹²

Here, the jury heard testimony that Modelfino did not report the victim's alleged attack on her to the authorities, denied knowing that the victim was dead, and staged the victim's hand over his genitals because she was angry at him. We conclude from this evidence that a rational juror could reasonably infer that Modelfino was not acting in self-defense when she killed the victim. Thus, Modelfino's argument on this point is without merit.

¹²Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1381 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))).

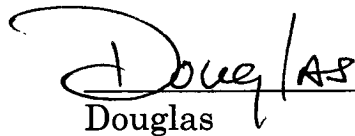
Conclusion

For the reasons set forth above, we conclude that Modelfino's arguments on appeal fail. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Robert E. Glennen III
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk