

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LEE SELMON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50773

FILED

JUN 01 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, burglary while in possession of a deadly weapon, and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David Wall, Judge.

In this appeal, appellant Gary Lee Selmon raises the following issues: (1) Batson challenge,¹ (2) Bruton violation,² (3) prosecutorial misconduct, (4) improper deadly weapon enhancement instruction, (5) improper conspiracy instruction, (6) Brady claim,³ (7) errors regarding the defense's theory of the case, (8) the State's amendment of the information on the last day of trial, (9) sufficiency of the evidence, (10) prior bad acts, and (11) cumulative error.

Having considered each of Selmon's arguments, we conclude that, with the exception of his assertion that the district court erred in instructing the jury that a knife is a deadly weapon for the purposes of the deadly weapon enhancement, Selmon's arguments are without merit.

¹Batson v. Kentucky, 476 U.S. 79 (1986).

²Bruton v. United States, 391 U.S. 123 (1968).

³Brady v. Maryland, 373 U.S. 83 (1963).

Accordingly, we turn to the issue of whether the district court usurped the jury's role as fact-finder by instructing the jury that a knife is a deadly weapon as a matter of law.

The court's deadly weapon instruction read as follows:

A deadly weapon is any instrumentality which is inherently dangerous. Inherently dangerous means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will, or is likely to, cause a life-threatening injury or death.

A firearm and/or a knife is a deadly weapon.

Selmon contends that this instruction usurped the jury's role as fact-finder by removing from the jury's consideration the factual issue of whether the knife is a deadly weapon.

This court has held that "[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). The failure to object to a jury instruction at trial, however, generally precludes appellate review. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). Nevertheless, this court may address an erroneous instruction if the error was plain and affected the defendant's substantial rights. Id. An error is plain if it "is so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks and citations omitted). At a minimum, the error must be "clear under current law," Gaxiola, 121 Nev. at 648, 119 P.3d at 1232 (quoting U.S. v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001)) and "[n]ormally, a defendant must show that an error was prejudicial in order to establish that it affected his substantial rights."

Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1131 (2001). Selmon failed to object to the court's deadly weapon instruction at trial. Thus, he failed to preserve this matter for appeal and must demonstrate plain error.

The district court's deadly weapon instruction is based on the definitions provided in NRS 193.165(6), Nevada's deadly weapon enhancement statute. Under NRS 193.165(6), deadly weapon means:

(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or

(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

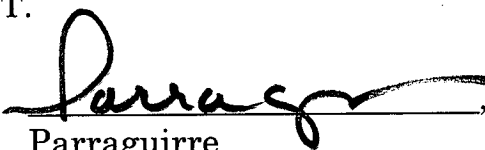
In the present case, the district court instructed the jury that a knife is a deadly weapon. Thus, the court implicitly determined that the knife found in the kitchen and brandished at the victim, Marco DeSantiago, was as a matter of law, a dangerous or deadly weapon. This implicit determination is incorrect.

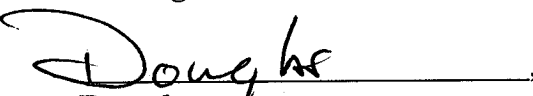
Nevada's deadly weapon enhancement statute specifically describes dirks, daggers, machetes, switchblade knives, and knives that are an integral part of a belt buckle as dangerous or deadly weapons. See NRS 202.265, 202.320, 202.350. However, the deadly weapon enhancement statute does not denominate knives in general as dangerous or deadly weapons. See NRS 193.165. Accordingly, we conclude that this instruction is an incorrect statement of law.


We further conclude that this instruction usurped the jury's role as fact-finder. In Apprendi v. New Jersey, the United States Supreme Court held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. 530 U.S. 466, 490 (2000). This court has since recognized that Apprendi applies to statutory enhancements such as the deadly weapon enhancement at issue here. See Abrego v. State, 118 Nev. 54, 60, 38 P.3d 868, 871 (2002). Accordingly, we conclude that the deadly weapon enhancement instruction improperly removed from the jury's consideration the factual issue of whether the knife found in the kitchen was a deadly weapon, which is a necessary element of the burglary offense and a required factual finding for the deadly weapon enhancement to the robbery charge. Finally, we conclude that this error was plain and that it affected Selmon's substantial rights. We therefore reverse the burglary conviction and the deadly weapon enhancement to the robbery charge. However, we affirm the convictions of robbery and conspiracy to commit robbery.

Having considered Selmon's contentions and for the reasons discussed above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Hon. David Wall, 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