

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFERY JOHNSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51903

**FILED**

**MAY 21 2009**

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in the possession of a firearm or deadly weapon and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Jeffery L. Johnson entered an Albertson's grocery store in Las Vegas, Nevada, and approached Patricia Barrett, who was working in the slot machine area. According to Barrett, Johnson approached her, opened a bank pouch, and displayed a gun inside the pouch. Barrett said he told her to put all her money in the pouch and said either that he did not want to shoot her or that he did not want to hurt her. Barrett gave Johnson over \$3,000 cash, which had a tracking device in it. She called 911 and the police apprehended Johnson a half hour later at a nearby Walgreens. Two officers searched for the gun at Walgreens, in a nearby bar, in Johnson's car, in other nearby cars, and in all nearby areas where they suspected the gun might be hidden. An air unit and a canine unit also searched the surrounding area. The police never found the gun.

The police obtained a surveillance video of the Albertson's entrance, which showed Johnson entering and leaving the store. Santos Vega, an Albertson's security guard, told the District Attorney's office that

there was also a video of the slot machine area, where the robbery occurred, but that no one requested it. Johnson testified that he did rob Barrett, but that he did not have a gun. He said he may have given her the impression that he had a gun or she may have mistaken a black wallet that was in the bank pouch for a gun.

After a two-day trial, a jury convicted Johnson of burglary while in possession of a firearm or deadly weapon and robbery with the use of a deadly weapon. Johnson now appeals, arguing: (1) the district court erred in refusing his jury instruction regarding lost or destroyed evidence; (2) the district court erred in refusing his credibility jury instruction; (3) the reasonable doubt jury instruction coupled with the denial of Johnson's tendered instruction diminished the State's burden of proof, denying his due process rights; and (4) the amendments to NRS 193.165 allowing reduced sentence enhancements for the use of a deadly weapon should be applied retroactively to his case.

We conclude that: (1) the district court acted within its discretion in refusing Johnson's jury instruction regarding lost or destroyed evidence; (2) the district court acted within its discretion by refusing Johnson's credibility instruction and giving a different credibility instruction; (3) the district court properly refused Johnson's proffered reasonable doubt instruction and instead gave the instruction required under NRS 175.211; and (4) the amendments to NRS 193.165 do not apply retroactively.

The parties are familiar with the facts and procedural history of this case, and we do not recount them except as necessary to our disposition.

The district court acted within its discretion in refusing Johnson's jury instruction regarding lost or destroyed evidence

Johnson argues that the district court erred in refusing his jury instruction regarding lost or destroyed evidence, thereby denying his rights to due process, a fair trial, and to present a defense. He argues that the denial of due process warrants a dismissal of his convictions. We conclude that the district court acted within its discretion in denying Johnson's lost-evidence jury instruction.

Johnson argues that the surveillance video of the slot machine area would have corroborated his testimony that he did not have a gun during the robbery. The State produced a video of the store entrance, but not the slot machine area. Vega, the security officer at the store, testified that a video of the slot machine area was available, but that the District Attorney's office did not request it the first time he spoke with them. When Vega spoke with the District Attorney's office a second time, the video was unavailable because it is automatically recorded over about every 30 days.

Johnson requested a jury instruction regarding lost or destroyed evidence that created a presumption that the evidence was unfavorable to the state. The district court refused the instruction and did not instruct the jury on lost evidence. Johnson's proposed instruction stated:

If you determine that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, and that the explanation for the loss, destruction, or failure to preserve is inadequate, then you should assume that the evidence was unfavorable to the State.

### Due process

This court reviews a district court's decision to give a jury instruction for abuse of discretion. Grey v. State, 124 Nev. \_\_\_, \_\_\_, 178 P.3d 154, 163 (2008). "Loss or destruction of evidence by the State violates due process 'only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.'" Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) (quoting Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001)). "To establish prejudice, the defendant must show that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense." Id. (quoting Cook v. State, 114 Nev. 120, 125, 953 P.2d 712, 715 (1998)). If the defendant establishes that the loss of evidence violated his due process rights, then he is entitled either to reversal of his conviction or a jury instruction regarding a conclusive presumption that the evidence was exculpatory to the defense. Cook, 114 Nev. at 126, 953 P.2d at 716 (reversing the conviction); Daniel, 119 Nev. at 521, 78 P.3d at 905 (discussing jury instruction with presumption in favor of defendant).

In this case, Vega testified that he spoke with the District Attorney's office and told them that the tape of the slot machine area was available, but no one requested the tape. When he spoke with the District Attorney's office the second time, the tape had already been automatically recorded over. This evidence may establish that the State was negligent in timely requesting the tape. However, we conclude this is insufficient to establish that the State failed to preserve the evidence in bad faith.

Also, the exculpatory nature of the tape may not have been apparent to the State because, in her police interview, Barrett said that Johnson had the gun in a dark blue pouch and that he never removed the

gun from the pouch. Thus, it is doubtful that the surveillance video would have shown the inside of the pouch to reveal whether there was a gun in it. To establish prejudice, Johnson must show more than that the evidence may have helped establish his defense, but that it could reasonably be anticipated that it was exculpatory and material to his defense. Daniel, 119 Nev. at 520, 78 P.3d at 905. Given that it was unlikely that the tape would show whether Johnson had a gun, it could not have been reasonably anticipated that the video would have been material and exculpatory to Johnson. Because Johnson did not establish bad faith or prejudice and the apparent exculpatory nature of the video, the district court's refusal of the jury instruction did not violate his due process rights.

Right to present a defense

Johnson argues that the district court's denial of his lost-evidence jury instruction denied him the right to present his defense that he did not have a weapon. We disagree.

A defendant has a right to have the jury instructed on his theory of the case, regardless of the weakness of the evidence that supports it, and a court cannot refuse an instruction because the law can be inferred from other instructions. Brooks v. State, 124 Nev. \_\_\_, \_\_\_, 180 P.3d 657, 662 (2008).

Here, Johnson's proposed instruction created a presumption in his favor that the video would have been exculpatory. However, as discussed above, he did not establish that the video would have been exculpatory. The defense highlighted the fact that the police never recovered the gun by cross-examining the responding police officers. The defense also made clear through Vega's testimony that the District Attorney's office could have, but did not, request the tape that may have

been exculpatory. Therefore, the district court's denial of Johnson's lost-evidence instruction did not violate Johnson's right to present his defense to the jury or his right to a fair trial. As such, the district court acted within its discretion in refusing Johnson's lost-evidence jury instruction.

The district court acted within its discretion by refusing Johnson's credibility instruction and giving a different credibility instruction

Johnson argues that the district court erred in refusing his jury instruction regarding witness credibility and that the district court's credibility instruction was erroneous because it misstated Johnson's theory of the case and unduly commented on his testimony. We disagree.

Johnson argues that his theory of the case was that the witnesses were mistaken, not that they were lying. Because the credibility instruction that was given at the trial discussed lying, Johnson asserts that it misstated his theory of the case. Johnson also argues that the jury could have interpreted the credibility jury instruction as applying specifically to him. Part of Jury Instruction No. 19 stated, "If you believe a witness has lied about any material fact in the case, you may disregard the testimony of that witness or any portion of his testimony which is not proved by other evidence." The analogous part of Johnson's proposed instruction stated,

In deciding whether or not to believe a witness, keep in mind people sometimes forget things. You need to consider whether a contradiction is an innocent lapse or distortion of memory, and that may also depend on whether it has to do with an important fact or with only a small detail.

The only two witnesses that had direct knowledge of the weapon were Barrett and Johnson. The instruction used only "he," rather than being gender neutral, and only Johnson was accused of lying at trial. Therefore,

Johnson argues that the jury could have understood the instruction to apply to only him, thereby improperly commenting on his testimony.

NRS 175.171 states, “no special instruction shall be given relating exclusively to the testimony of the defendant.” It is proper for the district court to instruct the jury on witness credibility in general, but improper to comment on one witness’ testimony. Anderson v. State, 86 Nev. 829, 837, 477 P.2d 595, 600 (1970). This court has upheld a jury instruction stating that impeachment of the defendant’s testimony can be considered for determining credibility as well as for determining guilt along with all the other evidence. Id. at 836 n.2, 837, 477 P.2d at 600 & n.2.

In this case, the jury instruction discussed witness credibility in general. The use of the male pronoun rather than a gender neutral drafting did not single out Johnson’s testimony because several other male witnesses testified, including police officers and Vega. Also, the instruction mentions lying in the context of general witness credibility and is not commenting on or misstating Johnson’s theory of the case. Therefore, we conclude that the district court acted within its discretion in refusing Johnson’s jury instruction or in giving Jury Instruction No. 19.

The district court properly refused Johnson’s proffered reasonable-doubt instruction and gave the instruction required under NRS 175.211

Johnson argues that the district court’s reasonable-doubt instruction and its denial of his proffered instruction diminished the State’s burden to prove him guilty beyond a reasonable doubt, in violation of Johnson’s constitutional rights. We conclude that the district court properly gave the reasonable-doubt instruction required by NRS 175.211.

The jury instruction that the district court used, Jury

Instruction No. 17, tracked NRS 175.211 and defined reasonable doubt as follows:

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

Johnson's proffered instruction defined reasonable doubt as,

a doubt based upon reason and common sense. Proof beyond a reasonable doubt must be proof of such a convincing character that, after consideration, you would be willing to rely and act upon it without hesitation in your important affairs. An accused is never to be convicted on mere suspicion or conjecture.

This definition, however, differs from the statutory definition contained in NRS 175.211.

Under NRS 175.211(2), the only reasonable-doubt instruction that a district court is authorized to submit to the jury is the instruction that the district court gave, and therefore Johnson's proffered instruction is improper. Garcia v. State, 121 Nev. 327, 340, 113 P.3d 836, 844 (2005). Thus, the district court properly refused Johnson's proffered instruction and giving Jury Instruction No. 17.

The amendments to NRS 193.165 allowing for reduced sentence enhancements for use of a deadly weapon do not apply retroactively


Johnson argues that the amendments to NRS 193.165 allowing for reduced sentence enhancements for use of a deadly weapon should be applied retroactively in this case. We disagree.

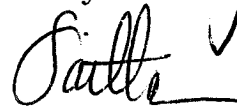



Regarding the robbery and deadly weapon conviction, the district court sentenced Johnson to the statutory minimum: two years for the robbery plus two years for the deadly weapon enhancement. The district court stated that if this court should decide that the amendments apply retroactively, it would reduce the sentence enhancement to one year.

The Legislature amended NRS 193.165 regarding sentence enhancements for use of a deadly weapon and made the amendments effective July 1, 2007. State v. Dist. Ct. (Pullin), 124 Nev. \_\_\_, \_\_\_, 188 P.3d 1079, 1081 (2008). The amendments allow district court judges to sentence defendants convicted of use of a deadly weapon to not less than one year and not more than 20 years. Id. Prior to these amendments, district courts had to sentence defendants to a term equal and consecutive to the sentence for the primary offense. Id. In Pullin, this court held that these amendments do not apply retroactively. Id. Rather, the amendments apply to anyone who committed a crime with the use of a deadly weapon after July 1, 2007. Johnson committed this crime on March 15, 2007, and therefore, the amendments are inapplicable in this case. Thus, we affirm Johnson's sentence. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Eighth Judicial District Court Dept. 7, District Judge  
Susan D. Burke  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk