IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE ZOZAYA A/K/A JOSE EMILIO ZOZAYA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54395

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon and possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. Appellant challenges two matters on appeal.

First, appellant contends that NRS 194.010(7) is unconstitutionally vague because the statute fails to assign the burden of proof relative to a duress defense. As a corollary to this issue, appellant argues that the district court erred by rejecting his proposed instructions relating to duress and instructing the jury that the defense bore the burden of proving by a preponderance of the evidence that duress caused his commission of the crime.

"[V]agueness challenges are not generally raised when a statutory affirmative defense is at issue," Sanders v. State, 119 Nev. 135, 138, 67 P.3d 323, 326 (2003), but even if such a challenge were appropriate, appellant's claim lacks merit. Although we have not specifically addressed the burden of proof relative to a duress defense, the

United States Supreme Court has concluded that placing the burden on a defendant to establish the existence of duress by a preponderance of the evidence does not violate due process. See Dixon v. U.S., 548 U.S. 1, 8 (2006). And, generally, a defendant bears the burden of proving the existence of affirmative defenses by a preponderance of the evidence. See Foster v. State, 116 Nev. 1088, 1091-92, 13 P.3d 61, 63-64 (2000) (concerning entrapment defense); Jorgenson v. State, 100 Nev. 541, 544-45, 688 P.2d 308, 310 (1984) (concerning defense of necessity). Accordingly, we conclude that NRS 194.010(7) is not unconstitutionally vague on the ground appellant asserts. Similarly, we conclude that the district court did not err in rejecting his proposed duress instructions and provided proper instructions regarding duress.

Second, appellant argues that the district court erred by refusing to instruct the jury, in accordance with Sanborn v. State, 107 Nev. 399, 407-08, 812 P.2d 1279, 1285-86 (1991), that the State's failure to test the firearm linked to the offenses for fingerprints or DNA created an irrebuttable presumption that appellant's companion in the robbery held and fired the weapon. Even assuming the State was obliged to test the firearm, we discern no prejudice in light of appellant's admissions to the police and counsel's concession at trial that appellant committed the robbery with a firearm, and the presence of a companion's fingerprints and DNA would not exculpate appellant under the facts of this case. See id. at 407, 812 P.2d at 1285 ("[A] conviction may be reversed when the state loses evidence if the defendant is prejudiced by the loss."); Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003).

Having considered appellant's arguments and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Mark P. Chaksupa
Gabriel L. Grasso, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk