IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD GARNER A/K/A EDWARD EUGENE GARNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56989

FILED

SEP 13 2012

TRACIE K. LINDEMAN
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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. Eighth Judicial District Court, Clark County; Stefany Miley, Judge. Appellant Edward Garner raises three claims of error on appeal.

Garner's challenges to prospective jurors for cause

Garner contends that the district court erroneously denied his challenges to two prospective jurors for cause, depriving him of his right to a fair trial because he was compelled to exercise peremptory challenges to remove the jurors. We disagree.

A district court has "broad discretion" when ruling on a challenge for cause because the district "court is better able to view a prospective juror's demeanor than a subsequent reviewing court." Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001). Here, Garner challenged jurors 169 and 326 because they felt that Garner's presence at trial indicated that he had done something wrong. But if a prospective

juror expresses a preconceived bias, he should not be removed for cause if the record as a whole demonstrates that he could "'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)). Both jurors were questioned about their bias and both acknowledged that they could judge the case based upon the evidence adduced at trial. Therefore, we conclude that the district court did not err by denying Garner's motion to remove the jurors for cause. Even if we found error in the district court's actions, Garner has failed to demonstrate resulting prejudice because he has not alleged or demonstrated that any seated juror was unfair or partial. See Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125-26 (2005) (holding that defendant must show a bias existed in the seated jurors).

Sufficient evidence supports Garner's conviction

Garner argues that there is insufficient evidence to support the deadly weapon enhancement. We review insufficiency claims in the light most favorable to the prosecution and determine whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). Garner was at a bus stop with his uncle when he observed the victim walking on the other side of the street. Garner approached the victim and asked for money. When the victim refused, Garner removed a firearm from his backpack, showed it to the victim, and then returned it to his backpack. Garner followed the victim, repeating his request for money. Finally, Garner threatened that if the victim did

not give him money he was "going to get shot." Based on the victim's testimony, we conclude that there was sufficient evidence that Garner "used" the firearm. See Allen v. State, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980) (holding that "use" of a deadly weapon requires only conduct which produces fear of harm by displaying the deadly weapon in aiding the commission of the crime), overruled on other grounds by Berry v. State, 125 Nev. 265, 212 P.3d 1085 (2009).

Jury instructions

First, Garner argues that the district court erred by failing to instruct the jury on the offense of drawing a deadly weapon in a threatening manner under NRS 202.320, which Garner claims is a lesser-included offense. But defendants in Nevada are not entitled to jury instructions on lesser-related, as distinguished from lesser-included, offenses. Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). Here, the district court correctly reasoned that NRS 202.320 is a lesser-related offense because it applies only when the accused draws the weapon in the presence of two or more persons. Therefore, we conclude that the district court did not abuse its discretion or commit judicial error in refusing Garner's requested instructions. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1001 (2001) (setting forth the standard of review for jury instructions).

Next, Garner contends that the district court erred by refusing to give a negatively phrased instruction relating to the robbery charge. Negatively phrased position or theory instructions should be given upon

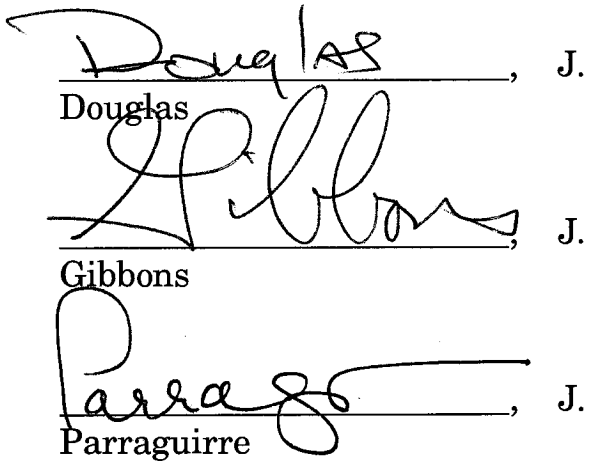
request, and a "'positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased'" instruction. Crawford v. State, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005) (quoting Brooks v. State, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987)). Here, Garner requested a negatively phrased instruction that supported his theory of defense. Accordingly, we conclude that the district court abused its discretion by refusing the proffered instruction. See Margetts v. State, 107 Nev. 616, 618-620, 818 P.2d 392, 393-95 (1991) (concluding that, in a prosecution for swindling and obtaining money by false pretenses, the district court erred by refusing to give a negatively worded instruction regarding the lack of specific intent to defraud). But we further conclude that the error was harmless beyond a reasonable doubt. See Carter v. State, 121 Nev. 759, 767 n.23, 121 P.3d 592, 598 n.23 (2005) (applying harmless error analysis to the failure to give a negatively phrased instruction). Here, the record shows that the district court gave "positive instructions" which accurately instructed the jury on the elements of the crime and the prosecution's burden of proof. Further, substantial evidence supported Garner's conviction. Therefore, "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of this case." Crawford, 121 Nev. at 756, 121 P.3d at 590.

Finally, Garner argues that the district court abused its discretion by overruling his objection to the jury instruction on the presumption of innocence because the instruction marginalized the State's burden of proof. Here, the jury instruction was a correct statement of the

law and therefore the district court did not abuse its discretion. See NRS 175.191; Blake, 121 Nev. at 799, 121 P.3d at 580 (rejecting challenge to use of the word "until" in instruction).

Having considered Garner's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Stefany Miley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk