IN THE SUPREME COURT OF THE STATE OF NEVADA

SERGIO CERVANTES RODRIGUES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57610

FILED

NOV 18 2011

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, for first-degree murder with use of a deadly weapon, and assault with a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge. Appellant Sergio Cervantes Rodrigues raises five issues on appeal.

First, Rodrigues argues that the district court erred in denying his motion to dismiss the information because the district court did not consider the prejudice to him resulting from the State's failure to preserve the audio recording of a key witness's voluntary statement to police. Rodrigues contends that, according to the transcript of the witness's voluntary statement, the witness told the police that the victim shot at Rodrigues first, which would have supported Rodrigues's theory that he shot and killed the victim in self-defense. Because the witness at trial denied making this statement and testified that the transcript contained an incorrect translation of his statement to the police, Rodrigues argues that the audio recording would have impeached the witness and supported his theory of self-defense.

We review a district court's decision to deny a motion to dismiss a charging document for abuse of discretion. See Hill v. State, 124

Nev. 546, 550, 188 P.3d 51, 54 (2008). "The State's failure to preserve potentially exculpatory evidence may result in dismissal of the charges if the defendant can show 'bad faith or connivance on the part of the government' or 'that he was prejudiced by the loss of the evidence.'" Daniels v. State, 114 Nev. 261, 266-67, 956 P.2d 111, 115 (1998) (quoting Howard v. State, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979)); see also Crockett v. State, 95 Nev. 859, 865, 603 P.2d 1078, 1081 (1979). We conclude that the district court did not abuse its discretion in denying Rodrigues's motion to dismiss. There is no evidence that the State acted in bad faith. The State presented evidence at trial that the digital audio recording of the witness's interview was inadvertently erased after being transcribed. In addition, Rodrigues could not show that he was prejudiced by the deletion of the audio recording. At trial, the witness testified that the inconsistency between his in-court statement and the transcript of his voluntary statement to the police was caused by a translation error during transcription, and the officer who served as an interpreter for the witness during the police interview also testified to this effect. Both the witness and the officer were subject to cross-examination regarding the inconsistency between their testimony and the transcript. Accordingly, we conclude that Rodrigues was not prejudiced by the State's failure to preserve the audio recording.[1]

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[1]Rodrigues contends that the district court applied the wrong test in addressing his motion to dismiss and did not consider the prejudice that he suffered from the State's failure to preserve the evidence. Although the district court did not specifically include the prejudice prong in its recitation of the applicable test, the record reflects that the district court considered prejudice to Rodrigues in denying his motion to dismiss.

Second, Rodrigues claims that the district court erred by refusing to instruct the jury that, because the State failed to preserve the audio recording of the witness's voluntary statement, Rodrigues was entitled to a presumption that the evidence would have been unfavorable to the State. "District courts have broad discretion to settle jury instructions," Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008), and this court will not overturn a district court's refusal to issue an instruction absent abuse of discretion or judicial error. See Higgs v. State, 126 Nev. ___, ___, 222 P.3d 648, 661 (2010). We conclude that the district court did not abuse its discretion in rejecting this instruction. As stated above, there is no evidence supporting a determination of bad faith, and Rodrigues was not prejudiced by the spoliation of the audio recording. See Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1285-86 (1991) (concluding that the defendant was entitled to irrefutable presumption where the State failed to preserve potentially "critical, corroborative evidence of self-defense," and the State's case "was buttressed by the absence of this evidence").

Third, Rodrigues argues that the district court erred by admitting, as improper hearsay testimony, the officer's own translation of the witness's voluntary statement about the shooting. Rodrigues did not object to this testimony on hearsay grounds; therefore, we review this issue for plain error affecting his substantial rights. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). The officer's testimony regarding his translation of the witness's statement was not hearsay, as the officer was not offering the translation of the witness's statement for the truth of the matter asserted in that statement, but rather to show the officer's understanding as to what the witness said. See NRS 51.035 (defining "hearsay" as "a statement offered in evidence to prove the truth of the

matter asserted"). Therefore, we discern no plain error in the admission of this testimony.

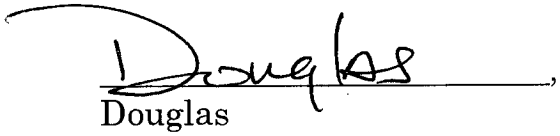
Fourth, Rodrigues argues that the district court erred by rejecting his proposed jury instruction on the "no duty to retreat" rule for his self-defense theory. We disagree. The district court may refuse a jury instruction on the defendant's theory of the case that is substantially covered by other instructions. Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). Here, the district court instructed the jury that the defendant did not have a duty to retreat if he reasonably believed that he was about to be killed or seriously injured by his assailant, unless the defendant was the original aggressor. This instruction is legally correct and substantially covered the proposed instruction. See Culverson v. State, 106 Nev. 484, 489, 797 P.2d 238, 241 (1990); see also Earl, 111 Nev. at 1308, 904 P.2d at 1031. Thus, we conclude that the jury was fully instructed on the issue, and the district court did not abuse its discretion in refusing to give the proposed instruction.

Finally, Rodrigues argues that the district court abused its discretion by admitting evidence of weapons that were found in his house but not used to shoot the victim. He argues that evidence of weapons other than the 9-mm handgun that he admittedly fired at the victim was not relevant, was misleading to the jury, and was highly prejudicial because it implied nefarious behavior and a predisposition to the use of firearms. We review the district court's decision to admit evidence for abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). To be admissible, evidence must be relevant and its probative value must not be "substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). The State presented evidence that ammunition cartridges and

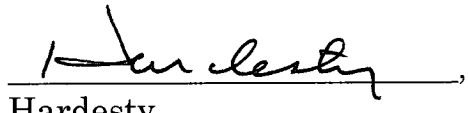
a .380-caliber handgun, which was registered to Rodrigues, were found in a purse in Rodrigues's apartment on the night of the murder. This evidence was relevant because some of the cartridges matched the casings found at the scene of the crime, and the .380-caliber handgun registered to Rodrigues connected him to the cartridges found in the purse. Given the probative value of the evidence, we cannot say that it is outweighed by any unfair prejudice. Accordingly, we conclude that the district court did not abuse its discretion in admitting this evidence.[2]

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

ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas



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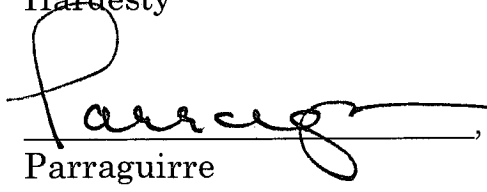

_____, J.
Parraguirre

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[2]Rodrigues asserts for the first time in his reply brief that the district court abused its discretion in admitting evidence of a rifle and shotgun that were found in his apartment. Rodrigues did not reference this particular evidence in his opening brief, and the State did not address that evidence in its answering brief. See NRAP 28(c) (reply briefs shall "be limited to answering any new matter set forth in the opposing brief"). Thus, we will not consider this argument.

cc: Hon. David B. Barker, District Judge
Gabriel L. Grasso, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk