IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROBERT SPACKEEN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35596

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery by a prisoner in lawful custody. David Spackeen, an inmate at the Nevada State Prison, was charged with assaulting another inmate, James Summerford. Following a three-day jury trial, Spackeen was convicted, and the district court sentenced Spackeen to serve twenty-four to seventy-two months in the Nevada State Prison, consecutive to his existing sentences. Spackeen appeals on several grounds. He alleges that the prosecution committed misconduct and that the district court erred by failing to grant him eight peremptory challenges, failing to instruct the jury on self-defense, allowing the state's gang expert to testify without statutory notice, and by admitting partially covered drawings into evidence. We hold that the district court committed reversible error by failing to instruct the jury on self-defense as the defense requested. Because this issue is dispositive, we will not discuss the remaining contentions, except to note that they either lack merit or have not been preserved for appeal.

A defendant in a criminal case is entitled to jury instructions on his theory of the case, so long as there exists evidence to support it.[1] An assault is justified by self-defense when the defendant reasonably believes he is about to be attacked.[2] The defendant need not believe that he is in

[1]Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 895 (1987); Krueger v. State, 92 Nev. 749, 755, 557 P.2d 717, 721 (1976).

[2]Giordano v. Spencer, 111 Nev. 39, 42, 888 P.2d 915, 917 (1995).

danger of great bodily harm and need not wait to be attacked before engaging in self-defense.[3] We conclude that based on the evidence presented at trial, a rational jury could have found that Spackeen was acting in self-defense, such that it was error for the district court to deny Spackeen's request for a self-defense jury instruction.

Spackeen testified at trial that a cell door opened and the victim stepped out of his cell, which was unusual. He heard someone say, "Don't do it." Spackeen testified that a shot was fired, causing him and the victim to "fumble up into cell 32." He was under the impression that Summerford, his alleged victim, was coming towards him. This testimony alone, if the jury found it to be credible, a decision solely within the province of the jury,[4] could support a finding of self-defense.

In addition, the correctional officers who testified at trial could not say with certainty who the aggressor was. While one officer suggested that he thought Spackeen was the aggressor, another testified that they both started punching at about the same time. Spackeen also testified that he did not notice any other inmates come out of their cells, only Summerford. Based upon this testimony, we submit that a juror could have found that Spackeen acted in self-defense and that the district court should have, therefore, instructed the jury accordingly.

Failure to give proper jury instructions is reviewed to determine if it was harmless error.[5] Under this test, an error can only be deemed harmless if it is beyond a reasonable doubt that the jury would have reached the same conclusion absent the error.[6] Because of the testimony presented at trial, a juror could have found that Spackeen acted in self-defense, if so instructed, and, therefore, could have reached a different result. We, therefore,

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[3] Id.

[4] Feazell v. State, 111 Nev. 1446, 1450, 906 P.2d 727, 730 (1995).

[5] Wegner v. State, 116 Nev. ___, ___, 14 P.3d 25, 30 (2000).

[6] Id.

ORDER the district court's conviction REVERSED and REMANDED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Michael R. Griffin, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City Clerk