

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFFREY MICHAEL RICHARDS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 67142

**FILED**

JUL 31 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Williams*  
DEPUTY CLERK

**ORDER OF AFFIRMANCE**

This is an appeal from a jury conviction of Burglary and Attempt to Obtain Property by False Pretenses. Appellant contends the matter should be reversed because insufficient evidence exists to support his convictions, and also because the district court erred in failing to give his proposed instructions. This court concludes the district court did err, but that any error was harmless and thus affirm the convictions. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

**FACTUAL AND PROCEDURAL BACKGROUND**

Appellant, Jeffrey Michael Richards, was charged with the crimes of Burglary and Attempt to Obtain Property by False Pretenses after Richards entered a Kay Jewelers store and tried to purchase a diamond ring valued at \$9,516.60 by presenting a check drawn from an account that contained no funds. Only hours prior to entering the jewelry store, Richards had been informed by the bank that the account contained no funds, yet Richards told employees of the jewelry store later that same day that he was a wealthy and successful published author (which he was not) and that a large sum of money had recently been deposited into the account. Richards also told those employees that the diamond ring was for his girlfriend, who had dropped him off at the store. However, the woman

who dropped him off at the store later denied that any romantic relationship existed. Richards proceeded to jury trial and was convicted.

During trial, Richards' counsel submitted several proposed jury instructions, which the district judge declined to give. The proposed jury instructions were filed as court exhibits with the district court, and have been presented to this court as part of the record on appeal. The rejected instructions included the following three:

“If you find Mr. Richards did not have the specific intent to defraud Kay Jewelers, you must find him not guilty of all charges.”

“You must find Mr. Richards had the specific intent to defraud in order to convict him of Attempted Obtaining Property by false pretenses.”

“It is not enough that Mr. Richards passed a check with insufficient funds to convict him of Attempted Obtaining Property By False Pretenses. The State must prove beyond a reasonable doubt that Mr. Richards specifically intended to defraud Kay Jewelers.”

The first instruction quoted above was an “inverse” instruction to Instruction 12 given by the court (“The crime of Burglary is complete when the building is entered with specific intent to obtain property by false pretenses or to commit any felony therein”). The latter two instructions quoted above, although not inverse instructions, would have expanded upon Instruction 15 given by the court (which defined the crime of Attempt to Obtain Property by False Pretenses as requiring “the intent to cheat or defraud the other person”).

## ANALYSIS

On appeal, Richards asserts that his conviction must be reversed because the district court erred in failing to give his proposed instructions and because insufficient evidence exists to support his convictions.

The district court possesses broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005). In addressing whether Richards' proposed jury instructions should have been given, the State first argues that, because the district judge settled the instructions off the record in chambers, Richards has waived his right to appeal the court's decision not to give certain instructions. The only authority cited by the State for this proposition is a case, *Carson Ready Mix, Inc. v. First National Bank of Nevada*, 97 Nev. 474, 635 P.2d 276 (1981), whose sole holding was an interpretation of Rule 51 of the Nevada Rules of Civil Procedure (NRCP).

In civil lawsuits initiated by private litigants and governed by the NRCP, a litigant must preserve a challenge to rejected instructions by following the procedures expressly set forth in NRCP 51. But NRCP 51 does not apply to criminal cases. Even if the procedures set forth in NRCP 51 somehow could be read to apply to criminal prosecutions, there is no indication in the record that the district court would have agreed to follow those procedures and settle the instructions any other way. The district judge's decision to settle jury instructions off the record cannot be interpreted as an affirmative waiver by Richards of his right to appeal any error resulting from the district court's decision.

In its briefing, the State concedes that existing case law holds that a defendant is entitled to jury instructions that support his theory of

defense and are correctly based in law. However, the State asks that we overrule that line of cases, asserting that this principle “seems rather unbalanced” as the State possesses no parallel entitlement. But criminal prosecutions are intentionally asymmetrical, because only a defendant faces the possibility of conviction. To paraphrase the words of the United States Supreme Court in *Giles v. California*, 554 U.S. 353, 376 n. 7 (2008),

The [State] implies that we should not adhere to *Crawford* because the confrontation guarantee limits the evidence a State may introduce without limiting the evidence a defendant may introduce. That is true. Just as it is true that the State cannot decline to provide testimony harmful to its case or complain of the lack of a speedy trial. The asymmetrical nature of the Constitution's criminal-trial guarantees is not an anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent. The State is at no risk of that.

Here, the rejected instructions were filed with the trial court and made a part of the trial record, and are properly included in the record on appeal. The rejected instructions all bear the judge's handwritten notation “not given” and the judge's initials, so it is clear they were presented to the judge, reviewed and considered by the court, and yet not given to the jury. Each proposed instruction contains, at the bottom, citations to case law upon which it is based. The State agrees that these case law citations are accurate and that the instructions themselves are proper (the State's briefing admits “there are no obvious flaws in the instructions [proposed by Richards]”). The State further concedes that Richards' defense at trial focused on arguing the absence of criminal intent (the State's briefing notes that “the closing arguments of both

parties focused on intent”), which was precisely the subject of the rejected instructions.

In short, the State concedes that the instructions correctly state the law and that they accurately reflect Richards’ theory of defense at trial. The primary justification presented by the State to defend the preclusion of Richards’ proposed instructions is that they were “somewhat redundant.” But mere redundancy is not a reason for a trial court to refuse to give a proposed inverse instruction that correctly states the law and is supported by evidence. *See Crawford v. State*, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005) (“a positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased position or theory instruction”). Under these circumstances, the State effectively concedes that at least one of the proposed instructions (the first instruction cited hereinabove) should have been given. *See Guitron v. State*, 131 Nev. \_\_\_, \_\_\_, 350 P.3d 93, 102 (Nev. Ct. App. 2015); *Crawford v. State*, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005) (“[t]his court has consistently recognized that specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request”). With respect to the other two rejected instructions, they were not necessarily inverse instructions of those given by the court but nonetheless embodied the defense theory of the case (which was to challenge the lack of specific intent) and therefore should also have been given. *See Guitron*, 131 Nev. at \_\_\_, 350 P.3d at 102 (“the district court may not refuse to give a proposed defense instruction simply because it is substantially covered by the other instructions given”).

Nonetheless, the failure to give the proffered instructions was harmless under the particular facts of this case considering the overwhelming evidence of Richards' criminal intent. Richards was marginally employed and had been told earlier the very same day that his bank account was devoid of money. Yet when he visited the jewelry store, he attempted to purchase the most expensive ring in the store, one priced at \$9,516.60, using a check drawn from the empty account. During the transaction, he lied about his employment (informing the cashier that he was a wealthy published author when he was not), lied about the amount of money in his account (informing the cashier that he had just deposited money into the account), and lied about the purpose of purchasing the ring (informing the cashier that he was buying the ring for someone he identified as his girlfriend who, at trial, denied being his girlfriend). Thus, the jury was presented with overwhelming evidence of Richards' intent and any error accruing from the omission of the proposed jury instructions was harmless.


Richards also argues that the evidence was insufficient to support his convictions because it only shows that Richards may have developed criminal intent at some point after he entered the store, not that he possessed any criminal intent at the moment he entered the store which is a prerequisite to a burglary conviction. As an initial observation, this argument is unrelated to his conviction for the crime of Attempt to Obtain Property by False Pretenses, since that conviction would stand regardless of whether Richards formed his intent before or after entering the store so long as the intent existed at the time of the attempted purchase. Furthermore, even with respect to the burglary count, we find this argument unpersuasive when the evidence demonstrates that

Richards entered the jewelry store at all -- a store selling only high-end, expensive items -- with no money and with blank checks issued against an account he knew to be empty, and then immediately began to look at diamond rings when he not only had no money but had no girlfriend to buy such rings for. Under these circumstances, we conclude that legally sufficient evidence was presented that Richards possessed criminal intent at the very moment he entered the jewelry store.

*CONCLUSION*

We therefore,  
AFFIRM the judgment of conviction.

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

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Lidia Stiglich, District Judge  
Washoe County Public Defender  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk