

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CRAIG BERNARD HILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68035

FILED

JAN 04 2016

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 sale of a controlled substance, a category B felony. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant Craig Hill asserts four assignments of error, each related to the events at trial. First, Hill contends the district court abused its discretion in denying his challenges for cause. Second, he contends the district court erred in overruling his objections pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). Third, he contends the State presented insufficient evidence to support his conviction. Fourth, he argues the district court erred in settling the jury instructions.

This appeal arises out of an undercover decoy operation initiated by the Las Vegas Metropolitan Police Department (LVMPD) to seek out and purchase controlled substances. On October 16, 2014, four undercover police officers patrolled the downtown area near Fremont Street. As part of the decoy operation, Detective Michael Garces approached Hill, who was standing on a corner with his bicycle, and asked to purchase "a dub of chronic." According to Garces, Hill replied, "yeah," and the two men moved around a corner. Once around the corner, Hill handed Garces a small bag containing 0.05 grams of marijuana. Garces

then handed Hill a marked \$20.00 bill. Once the transaction was complete, three additional undercover police officers approached and arrested Hill.

At trial, Hill raised the affirmative defense of entrapment. After a two-day trial, a jury found Hill guilty of sale of a controlled substance. The district court sentenced Hill to a maximum of 60 months and a minimum of 24 months imprisonment in the Nevada Department of Corrections. The district court, however, suspended the sentence and placed Hill on probation for a period not to exceed four years. Hill now appeals.

The district court did not abuse its discretion in denying Hill's challenges for cause

Hill argues the district court violated his Fifth and Fourteenth Amendment due process rights by denying his challenges for cause to juror numbers 223, 229, 248, and 232. He contends that some of the answers to questions during jury selection by these prospective jurors demonstrated an "unequivocally anti-defense bias" and "equivocation about the presumption of innocence." We review a district court's denial of a challenge for cause to a venireperson for an abuse of discretion. *Stephans v. State*, 127 Nev. 712, 722, 262 P.3d 727, 734 (2011). "Because such rulings involve factual determinations, the district court enjoys broad discretion in ruling on challenges for cause." *Blake v. State*, 121 Nev. 779, 795, 121 P.3d 567, 578 (2005).

In Nevada, a party may challenge a juror for cause if the juror has "formed or expressed an unqualified opinion or belief as to the merits of the action, or the main question involved therein," or the juror has evinced "enmity against or bias to either party." NRS 16.050(1)(f), (g). "A prospective juror should be removed for cause only if the prospective juror's views would prevent or substantially impair the performance of his

duties as a juror in accordance with his instructions and his oath.” *Preciado v. State*, 130 Nev. ___, ___, 318 P.3d 176, 178 (2014) (internal quotation marks omitted). But the mere existence of any preconceived notion as to the accused’s guilt or innocence, without more, is insufficient to rebut the presumption of a prospective juror’s impartiality. *Blake*, 121 Nev. at 795, 121 P.3d at 577. Rather, a prospective juror who expresses a preconceived notion as to the defendant’s guilt or innocence is still deemed impartial so long as the juror can “lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Id.* (internal quotation marks omitted).

First, Hill argues the district court abused its discretion in denying his challenge for cause to juror no. 223 because she unequivocally stated Hill was guilty if he sold drugs to an undercover police officer. Juror no. 223 added, however, that Hill was guilty if he sold marijuana to an undercover police officer *and* if the police followed all the requisite procedures. Although juror no. 223 indicated she believed Hill had to prove officers failed to follow procedure if the State proved a drug sale, she agreed to listen to all the evidence and find Hill guilty if the State proved the elements of the crime. Because juror no. 223’s statements, considered as a whole, do not indicate bias, we conclude the district court did not abuse its discretion in denying Hill’s challenge for cause. *See Weber v. State*, 121 Nev. 544, 581, 119 P.3d 107, 125 (2005) (requiring the district court to consider the juror’s statements as a whole in evaluating the juror’s impartiality).

Second, Hill argues the district court abused its discretion in denying his challenge for cause to juror no. 229 because she believed Hill was guilty and had to prove his innocence. Juror no. 229 expressed that she felt Hill was guilty because she “heard he was caught.” She indicated,

however, that she “would wait until [she] hear[d] everything in order to make up [her] mind” and unequivocally stated she would follow the court’s instruction if instructed Hill was innocent until proven guilty. Thus, while juror no. 229 expressed a preconceived notion as to Hill’s guilt, she indicated she would lay aside her impression and render a verdict based on the evidence presented. Accordingly, juror no. 229’s statements do not show partiality, and we conclude the district court did not abuse its discretion in denying Hill’s challenge for cause. *See Blake*, 121 Nev. at 795-96, 121 P.3d at 578 (concluding the district court did not abuse its discretion in denying appellant’s challenge for cause because the prospective juror did not express that his opinion was “unqualified,” he unequivocally stated that he could set aside what he had seen and heard about the case, and twice stated he could render a decision based on the evidence presented at trial).

Third, Hill argues the district court abused its discretion in denying his challenge for cause to juror no. 248 because she believed Hill had to prove his innocence, either by showing he did not sell the drugs or that someone else did. Although juror no. 248 initially indicated Hill had to prove his innocence, she later clarified her statement. She subsequently stated, “I’d say [Hill’s] innocent until proven guilty. But *if* he got caught doing the act, then I don’t think there could be any other way I could decide anything.” (Emphasis added.) Juror no. 248’s initial statements merely suggest she was unaware Hill could exonerate himself with the defense of entrapment. Juror no. 248 stated, however, that she would consider the evidence that police must follow certain procedures and the defenses to sting operations. Accordingly, because juror no. 248’s statements do not demonstrate she had formed an unqualified opinion and

because she twice stated Hill was innocent until proven guilty, the district court did not abuse its discretion in denying Hill's challenge for cause.

Fourth, Hill argues the district court abused its discretion in denying his challenge for cause to juror no. 232 because he was equivocal about Hill's innocence. When defense counsel asked juror no. 232 whether Hill was innocent, juror no. 232 responded, "I'm not sure. I'm assuming—I don't want to assume, but I guess we have to that [sic] the sale was, in fact, made and that it was an illegal sale." Juror no. 232's statements thus demonstrate that his belief depended on the evidence presented at trial. Furthermore, juror no. 232 purported not to have any preconceived feelings one way or the other about Hill's guilt or innocence. For these reasons, and because juror no. 232 also indicated he would follow the court's instructions, we conclude the district court did not abuse its discretion in denying Hill's challenge for cause to juror no. 232.

Moreover, none of these jurors raised their hands when asked by the court whether they would be unable to follow the court's instructions, whether they would be unable to wait until they heard all the evidence to form an opinion, or whether they did not understand the basic principle of our justice system that "the defendant is presumed innocent and the State must prove the defendant is guilty beyond a reasonable doubt." We therefore conclude the district court did not abuse its discretion in denying Hill's challenges for cause to juror numbers 223, 229, 248, and 232. Because we find no error, we need not address Hill's argument that the district court's erroneous denial of his challenges for cause deprived him of any constitutional rights by requiring him to exercise his peremptory challenges.

The district court did not err in overruling Hill's Batson objections

Hill argues the district court violated his Fifth and Fourteenth Amendment rights in overruling his *Batson* objections to the State's exercise of peremptory challenges to dismiss one Hispanic juror and one African American juror. The State violates the Equal Protection Clause of the United States Constitution when it uses a peremptory challenge to remove a potential juror on the basis of race. See *Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008) (citing *Batson*, 476 U.S. at 86). When a defendant asserts an equal protection objection to the State's exercise of a peremptory challenge, the objection is evaluated using the three step analysis outlined by the United States Supreme Court in *Batson*. *Conner v. State*, 130 Nev. at ___, ___, 327 P.3d 503, 508 (2014). First, the defendant "must make out a prima facie case of discrimination." *Id.* (internal quotation marks omitted). Second, the burden of production shifts to the State to provide a race-neutral explanation for the challenge. *Id.* Third, the district court must determine whether the defendant has proved purposeful discrimination. *Id.*

The third step of the *Batson* analysis "involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 338 (2006)). Whether the district court believes the State's facially race-neutral explanation turns largely "on an evaluation of credibility and usually will involve an evaluation of the demeanor of the jurors and the attorney who exercises the challenge." *Id.* at ___, 327 P.3d at 509. Accordingly, the district court's findings on the issue of discriminatory intent are entitled to great deference, and "will not be

overturned unless clearly erroneous.” *Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

Here, defense counsel objected to the State’s use of peremptory challenges to dismiss juror no. 251, a Hispanic man, and juror no. 252, an African American man. In raising the objection, defense counsel argued the State exhibited a propensity to strike minority jurors because it exercised three of its peremptory challenges against two Hispanic men and one African American man. Defense counsel argued the case contained a racial aspect, as Hill is African American, and if the district court overruled its *Batson* objections, the State’s challenges left only one African American woman in the venire, and one African American man as an alternate.¹ Defense counsel also indicated that the two jurors “did not have any great questioning done on them in general,” and “certainly didn’t indicate anything either way in their personal beliefs.”

The State then justified its challenge on the basis of the jurors’ lack of participation in voir dire and disinterested demeanors. Specifically, the State explained the jurors “were slouching the entire time,” “didn’t seem engaged,” “didn’t act like they wanted to be [there],” and “didn’t answer any of [the State’s] questions.” After the State offered its explanation, the district court asked whether defense counsel had “[a]nything else,” and defense counsel briefly responded, “No, Your Honor.” The district court then overruled Hill’s *Batson* objections, summarily stating, “[t]here appears to be a rational basis for the

¹The district court also stated that it believed another Hispanic man remained on the panel, but explained “I could be wrong because I don’t – you know, I can’t count on me being right on that.”

peremptory challenges exercised by the State. . . . Rational and non-race related.”

On appeal, Hill argues the district court’s failure to make specific findings regarding the State’s reasons makes it unclear whether it credited the State’s explanation, and thus this court should “discount” the State’s reasons. The Nevada Supreme Court has directed district courts to “clearly spell out the three-step analysis when deciding *Batson*-type issues” because “an adequate discussion of the district court’s reasoning may be critical to [a reviewing court’s] ability to assess the district court’s resolution of any conflict in the evidence regarding pretext.” *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30 (internal quotation marks omitted). In this case, the district court found the State’s reason to be race-neutral. Although the district court should have made a clearer statement of its reasoning on the third step of the *Batson* analysis, *see id.*, we conclude that we may properly defer to the district court’s determination.

First, the State’s explanation does not reflect an inherent intent to discriminate. Demeanor which suggests inattentiveness or a disinterest in the proceedings is a valid race-neutral reason for striking a juror. *See U.S. v. Warren*, 788 F.3d 805, 813 (8th Cir. 2015) (stating that “[p]assivity, inattentiveness, and confusion are common race neutral reasons for striking jurors” and “a party should not be required to assume the risk of a juror about whom little information has been made available”); *McCurdy v. Montgomery Cty., Ohio*, 240 F.3d 512, 521 (6th Cir. 2001) (noting that “body language and demeanor are permissible race-neutral justifications for the exercise of a peremptory [strike]”) (citing *U.S. v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993)). Although the State expressed concern that neither juror answered any of the State’s questions during voir dire, the State’s explanation focused primarily on the jurors’

demeanor, which does not reflect an inherent intent to discriminate. See *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 578 (2006) (“Where a discriminatory intent is not inherent in the State’s explanation, the reason offered should be deemed neutral.”).

Moreover, Hill did not challenge the State’s explanation as a pretext for racial discrimination. We emphasize that “[t]he opponent of the challenge bears a heavy burden in demonstrating the State’s facially race-neutral explanation is pretext for discrimination.” *Conner*, 130 Nev. at ___, 327 P.3d at 509. And that “[i]n order to carry that burden, the defendant *must* offer some analysis of the relevant considerations,” such as comparative juror analysis or disparate questioning, which demonstrates “that it is more likely than not that the State engaged in purposeful discrimination.” *Id.* Where, as here, defense counsel fails to respond to the State’s explanation, such failure limits this court’s ability to review an equal-protection claim. See *Hawkins v. State*, 127 Nev. 575, 578, 256 P.3d 965, 967 (2011) (“Failing to traverse an ostensibly race-neutral explanation for a peremptory challenge as pretextual in the district court stymies meaningful appellate review which, as noted, is deferential to the district court.”).

The Nevada Supreme Court has, however, addressed a comparative juror analysis raised for the first time on appeal. See *Nunnery v. State*, 127 Nev. 749, 784 n.17, 263 P.3d 235, 258 n.17 (2011) (conducting comparative juror analysis for the first time on appeal “out of an abundance of caution” where appellant raised comparative juror analysis for the first time on appeal to show purposeful discrimination). Here, however, Hill has not presented a comparative juror analysis. Hill argues instead that the State’s discriminatory intent is apparent from its failure to direct any questions to the jurors about their willingness to

serve,² and because each juror “clearly and unequivocally stated they could be fair and impartial.”

A review of the record reveals that the venire consisted of 31 people and 11 people did not respond to any of the State’s questions. Of those 11 prospective jurors, 7 were eventually impaneled. In other words, while the State expressed concern that juror numbers 252 and 251 did not answer any of the State’s questions, it did not challenge the 9 other prospective jurors who also did not respond to any of its questions. While this might suggest pretext, the State only had 4 or 5 peremptory challenges and the State’s explanation focuses primarily on the jurors’ demeanors, which under these circumstances, cannot be determined from the record. Because Hill did not offer any comparative analysis to the district court and the district court did not provide a detailed reasoning in the third step, it is impossible for this court to discern the relative demeanors of the venire members compared to juror numbers 252 and 251. Accordingly, because discriminatory intent is not inherent in the State’s explanation, we cannot say the district court’s decision to overrule Hill’s *Batson* objections was clearly erroneous.

²Hill cites *Miller-El v. Dretke*, 125 S. Ct. 2322, 2328 (2005) for the proposition that “[t]he State’s failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and pretext for discrimination.” In *Miller-El*, however, the State’s failure to ask the juror any further questions about the influence his family history had on his position was one of several reasons the Supreme Court found the State’s explanation to be mere pretext. *See id.*

Whether sufficient evidence supports Hill's conviction

Hill argues there is insufficient evidence to support his conviction because the State failed to prove beyond a reasonable doubt that he was predisposed to commit the crime of sale of a controlled substance. "The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charged has been proven beyond a reasonable doubt." *Conner*, 130 Nev. at ___, 327 P.3d at 507 (internal quotation marks omitted). "To determine whether due process requirements are met, the standard of review in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

Here, Hill raised the affirmative defense of entrapment. See *State v. Colosimo*, 122 Nev. 950, 957, 142 P.3d 352, 357 (2006) (recognizing that entrapment is an affirmative defense). Entrapment requires proof of two elements: (1) the State presents an opportunity for a defendant to commit an offense; and (2) the defendant is predisposed to commit the offense. See *Miller v. State*, 121 Nev. 92, 95, 110 P.3d 53, 56 (2005) (internal quotation marks omitted). "[T]he defendant bears the burden of production on the first element, while the prosecution subsequently bears the burden of proof on the second element." *Foster v. State*, 116 Nev. 1088, 1091, 13 P.3d 61, 63 (2000) (internal quotation marks omitted). Accordingly, once Hill proffered evidence of governmental instigation, the State was required to prove, as an essential element of its case, Hill's predisposition to commit the charged crime. See *id.* at 1095, 13 P.3d at 66.

The Nevada Supreme Court has recognized five factors, though not exhaustive, which are helpful in determining whether a person is predisposed to commit the act: "(1) the character of the defendant; (2) who first suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant demonstrated reluctance; and (5) the nature of the government's inducement." *Colosimo*, 122 Nev. at 958, 142 P.3d at 357. The most important factor, however, is whether the defendant demonstrated reluctance which was overcome by government inducement. *Id.*

We conclude the first factor slightly favors the State because the State argued the jury could infer Hill's character from the fact he was near Fremont Street at midnight with apparently no other purpose for being there, had marijuana in his sock, and understood what "a dub of chronic" meant. We conclude the second factor weighs in favor of Hill because it is undisputed the State first suggested the criminal activity. We conclude the third factor weighs in favor of the State because Garces testified that Hill accepted the \$20.00, and Sergeant Roger Palmer testified the marked \$20.00 fell from Hill's possession upon arrest. Accordingly, it is clear Hill engaged in the activity for profit.

We conclude the fourth factor also weighs in favor of the State. Garces testified that Hill did not hesitate in responding, "yeah," when asked if he had "a dub of chronic." Garces also testified he only had to ask Hill once, and that Hill readily accepted the \$20.00. Although Hill argued the length of the transaction demonstrates his reluctance, none of the four officers who testified stated the transaction lasted longer than five minutes. Fifth, and finally, because there was no evidence presented at trial that the police were coercive or did not follow standard procedure, we conclude the fifth factor also weighs in favor of the State. *See Froggatt v.*

State, 86 Nev. 267, 270, 467 P.2d 1011, 1013 (1970) (“A suspected criminal may be offered an opportunity to transgress in such manner as is usual therein, but extraordinary temptations or inducements may not be employed by officers of the government.”).

Because four of the five factors, including the most important fourth factor, weigh in favor of the State and only one factor weighs in favor of Hill, we conclude the State met its burden and provided sufficient evidence of Hill’s predisposition and thus, a rational juror could conclude Hill was predisposed to commit the crime. “Where, as here, there is substantial evidence to support the jury’s verdict, it will not be disturbed on appeal.” *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Whether the district court erred in settling the jury instructions

Hill first argues the district court violated his rights to due process and a fair trial in settling the jury instructions because the instructions given were inconsistent and unfair. Here, the district court overruled Hill’s objections to instruction numbers 15, 16, and 18, each related to police decoy operations and entrapment, and declined to give one of Hill’s proposed instructions on decoy operations. We first address Hill’s objections to instruction numbers 15, 16, and 18.

As an initial matter, the State contends Hill did not object to instruction numbers 15, 16, and 18 on all the grounds he now asserts on appeal. Hill does not dispute the State’s contention, and requests this court to review the grounds not properly preserved for plain error. To the extent a party properly objects to a proposed instruction, “this court reviews the district court’s decision for an abuse of . . . discretion or judicial error.” *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Id.*

(internal quotation marks omitted). This court, however, reviews de novo “whether an instruction is a correct statement of the law.” *Clancy v. State*, 129 Nev. ___, ___, 313 P.3d 226, 229 (2013).

We recognize Hill objected to instruction numbers 15, 16, and 18 on the record and adds new grounds for the objection on appeal. Thus, to the extent Hill provides new grounds for his objections, we review those for plain error. See *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (providing that while generally “the failure to clearly object on the record to a jury instruction precludes appellate review[,] . . . this court has the discretion to address an error if it was plain and effected the defendant’s substantial rights.”) (internal quotation marks omitted)).

Instruction No. 15

Hill argues the district court abused its discretion in giving instruction no. 15, which provides:

If a person originally and independently of police officers was ready, willing and intending, whenever the opportunity arose, to commit the acts constituting the crime, the mere fact that police officers and police undercover agents, in good faith and for the purpose of detecting or discovering criminal conduct, furnished an opportunity or aided or encouraged in the commission of the crime, there is no entrapment. You are instructed that law enforcement officers may provide opportunity for the commission of a crime and extend their apparent cooperation for the purpose of detecting the offender. The law approves of the use of police undercover agents in the investigation of criminal activities.

At trial, Hill objected to this instruction on the grounds it was confusing, duplicative, and inappropriate because the cases cited for the instruction did not apply to the facts of his case. According to Hill, the State cited *In re Davidson*, 64 Nev. 514, 520, 186 P.2d 354, 357 (1947) and *Oliver v.*

State, 101 Nev. 308, 703 P.2d 869 (1985) for the instruction. Hill argued *In re Davidson* did not apply because, as an administrative appeal, it did not involve a jury, and further, because it pre-dates current case law on entrapment. Hill also argued that *Miller*, 121 Nev. 92, 110 P.3d 53, overruled *Oliver*, and neither case contained the language in the instruction. The district court held *Miller* did not overrule *Oliver*, and that the instruction was “not an incorrect statement of law.”

We conclude the district court did not err in finding *Miller* did not overrule *Oliver*, as *Miller* overturned *Oliver* only to the extent *Oliver* was “inconsistent with the entrapment standard set forth in [*Miller*].” *Miller*, 121 Nev. at 95 n.2, 110 P.3d at 56 n.2. The instruction, here, does not set forth the elements of entrapment. Further, the district court did not err in finding the language correctly states the law. Although the language comes from *In re Davidson*, the court’s analysis of entrapment has not been overruled. 64 Nev. at 520, 186 P.2d at 357. Accordingly, we conclude the district court did not err in giving instruction no. 15 to the jury.³

Instruction No. 16

Hill argues the district court abused its discretion in giving instruction no. 16, which provides:

³To the extent Hill continues to challenge the relevancy of the instruction on appeal by proffering new reasons as to why the instruction was irrelevant, we conclude Hill has failed to demonstrate plain error affecting his substantial rights. See *Green*, 119 Nev. at 545, 80 P.3d at 95 (“In conducting plain error review, we must examine whether there was ‘error,’ whether the error was ‘plain’ or clear, and whether the error affected the defendant’s substantial rights.”).

An officer may, when acting in good faith with a view to detecting crime, make use of deception, trickery, or artifice; and so it is not a defense that decoys were used to present an opportunity for the commission of the crime or that detectives or others feigning complicity in the act were present and apparently assisting in its commission. There are circumstances where deceit, trickery, artifice and decoys are the only practicable law enforcement technique available. It is only when the State's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment can be asserted.

Hill objected to this instruction at trial, arguing the instruction was confusing, duplicative, and unsupported by the cases cited for the instruction. Hill again raised his argument that *In re Davidson* does not apply to the facts of his case. The district court did not make any findings on Hill's objection.

On appeal, Hill further argues the instruction minimized the State's burden of proof, vouched for the State's witnesses, and contained unsupported factual assertions. Specifically, Hill contends the phrase "decoys are the only practicable law enforcement technique available" is an unsupported factual assertion that implicitly minimizes the State's burden of proof and improperly advises jurors about decoy operations.

We conclude the district court did not err in giving this instruction to the jury because this instruction does not misstate the law. The first sentence of the instruction comes directly from *In re Davidson*, which, as previously noted, is still good law. 64 Nev. at 520, 186 P.2d at 357. As to the second sentence, our supreme court has approved the use of decoy operations to enforce the law. *See Miller*, 121 Nev. at 95-96, 110 P.3d at 56 ("The Government may use undercover agents to enforce the law.") (internal quotation marks omitted). Finally, the third sentence is

also a correct statement of law. See *id.* at 96, 110 P.3d at 56 (“[U]ndercover agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.”) (internal quotation marks omitted)). To the extent Hill presents new grounds for his objections on appeal, we conclude he has failed to demonstrate any error affecting his substantial rights. See *Green*, 119 Nev. at 545, 80 P.3d at 95.

Instruction No. 18

Hill argues the district court abused its discretion in giving instruction no. 18, which provides:

Entrapment is the seduction or improper inducement to commit a crime for the purpose of instituting a criminal prosecution, but if a person in good faith and for the purpose of detecting or discovering a crime or offense, furnishes the opportunity for the commission thereof by one who has the requisite criminal intent, it is not entrapment. The defendant has the burden of proving by preponderance of the evidence that he was entrapped into the commission of the crime. Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.

Hill objected to this instruction at trial, questioning whether *Bonacci v. State*, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980), the case cited for the instruction, contained the correct standard of proof for the defense of entrapment. In overruling his objection, the court found the instruction contained a correct statement of law and “was important because it emphasizes the defense’s burden on the affirmative defense as only preponderance of the evidence and then the burden shifts back to the State for the other factors.”

On appeal, Hill argues the instruction misstates the law because it minimizes the State's burden of proof, as the defense is not required to prove the entire defense of entrapment by a preponderance of the evidence. Although the Nevada Supreme Court has repeatedly approved of the language in the first sentence of the instruction,⁴ we conclude the district court erred in instructing the jury that the "defendant has the burden of proving by preponderance of the evidence that he was not entrapped into the commission of the crime." This language improperly shifts the burden of proof from the State to the defendant on the issue of defendant's predisposition to commit the crime. See *Corbin v. State*, 111 Nev. 378, 382, 892 P.2d 580, 582 (1995) (concluding the district court's instruction that "entrapment is an affirmative defense and one that a Defendant must prove by a preponderance of the evidence" warrants reversal).⁵

We conclude, nevertheless, that under the facts and circumstances of this case, the error was harmless beyond a reasonable doubt. "[J]ury instruction errors are subject to a harmless-error analysis if they do not involve the type of jury instruction error which vitiates all

⁴See *Oliver*, 101 Nev. at 309, 703 P.2d at 870, *Moore v. State*, 93 Nev. 645, 646, 572 P.2d 216, 217 (1977), and *In re Wright*, 68 Nev. 324, 329, 232 P.2d 398, 400 (1951), each *overruled on other grounds by Miller*, 121 Nev. at 95 n.2 110 P.3d at 56 n.2 (overruling prior case law to the extent the elements of entrapment, as stated there, are inconsistent with the elements of entrapment as articulated in the court's opinion).

⁵Although the court in *Bonacci*, 96 Nev. at 899, 620 P.2d at 1247 summarily concluded an identical instruction "seem[ed] to be in general conformity with the law," the court subsequently concluded in *Corbin* that such an instruction "does not conform to the law as announced in *Shrader*," 111 Nev. at 382, 892 P.2d at 582.

the jury's findings' and produces consequences that are necessarily unquantifiable and indeterminate." *Nay v. State*, 123 Nev. 326, 333-34, 167 P.3d 430, 435 (2007) (internal quotation marks omitted). We conclude that the jury instruction error in this case is subject to harmless-error review. "[A]n error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 334, 167 P.3d at 435.

Here, the jury instructions contained two specific instructions clarifying the State's burden of proof. First, instruction no. 17 provided:

The State must demonstrate the defendant's predisposition to commit the crime. Thus, if you find beyond a reasonable doubt, along with the elements of the offense in issue, that the defendant had the criminal intent, originally and independently of law enforcement, to commit the offense whenever the opportunity arose, then he should be found guilty.

Further, instruction No. 19 stated: "To sustain a verdict of guilt, the State must prove beyond a reasonable doubt that the Defendant was predisposed to commit the crime."

Thus, when considering instruction no. 18's general statement in light of instruction numbers 17 and 19's more specific statements regarding the State's burden, we conclude the inclusion of the second sentence in the instruction was harmless beyond a reasonable doubt. *See Greene v. State*, 113 Nev. 157, 167, 931 P.2d 54, 61 (1997) (explaining that jury instructions must be read together), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); *U.S. v. Long*, 706 F.2d 1044, 1055 (9th Cir. 1983) ("The adequacy of jury instructions is determined by examining the instructions as a whole."). Therefore, we conclude the district court did not err in giving the jury instruction

numbers 15 and 16, and any error in instruction no. 18 was harmless beyond a reasonable doubt.

Hill's proposed instruction

Hill argues the district court abused its discretion in failing to give his purposed instruction on decoy operations. “[A] criminal defendant is entitled to have the jury instructed on [his] theory of the case, no matter how weak or incredible the evidence supporting the theory may be.” *Barron v. State*, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989). But a criminal defendant is not entitled to an instruction that is misleading, inaccurate or duplicitous. *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

At trial, Hill proposed the following jury instruction:

Decoy operations by law enforcement are not unlawful per se. If it is not to be illegitimate, however, a decoy operation must focus upon some real, substantial, and subsisting problem of antisocial behavior, and that it must be structured so as to identify actual social predators who are engaging in such behavior, rather than merely being structured to ensnare weak and gullible persons in the hope of frightening the predators. If a decoy operation is not so structured, we will not deem it to be justified by a contention that the operation may have successfully lured potential criminals of tomorrow into actual criminal conduct today.

At trial, Hill argued this instruction correctly states the law, and is appropriate given the breath of the State's entrapment instructions and the thorough explanation of entrapment law. The district court indicated it refused the instruction because “it dealt primarily with policy issues, and [it had] taken out all references to policy issues that were in the jury instructions.”

On appeal, Hill argues the district court abused its discretion in rejecting his proposed instruction because the instruction had particular applicability to the facts of the case, provided context to jurors' evaluation of decoy operations, and contrasted with the State's positive depiction of decoy operations in instruction numbers 15 and 16. Hill further argues that the district court's rejection of his proposed instruction on the basis that it incorporated public policy conflicts with the district court's decision to give instruction no. 16, which he argues incorporates public policy.

Hill relies on *Crawford* to argue the district court should have given his proposed instruction because it fit the facts of his case. See 121 Nev. at 754, 121 P.3d at 588. In particular, Hill highlights the Nevada Supreme Court's language in *Crawford*, where it stated: "Jurors should . . . be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." *Id.* We conclude Hill's argument on this basis lacks merit for two reasons. First, Hill's proposed instruction does not provide a clear recitation of applicable legal principles. The instruction does not identify the elements of entrapment nor remind jurors of the State's burden. *Cf. Crawford*, 121 Nev. at 753, 121 P.3d at 588 (providing 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").

Second, while we recognize that the language in the proposed instruction comes directly from *Sheriff, Washoe Cnty v. Hawkins*, 104 Nev. 70, 77, 752 P.2d 769, 774 (1988), the facts of *Sheriff* are unlike the facts of this case. *Sheriff* involved an apparently helpless, intoxicated, and unconscious decoy with exposed money protruding from his back pocket.


104 Nev. at 75, 752 P.2d at 772. Due to the extraordinary temptation presented by the decoy, the Nevada Supreme Court found impermissible entrapment. *Id.* 104 Nev. at 72, 752 P.2d at 770. Here, however, the police decoy did not appear helpless, feign lack of consciousness, or otherwise exhibit such a degree of vulnerability that created extraordinary temptation. *See Miller*, 121 Nev. at 96, 110 P.3d at 56 (stating that the court has “drawn a clear line between a realistic decoy who poses an alternative victim of potential crime and the helpless intoxicated, and unconscious decoy with money hanging out of his pocket). Accordingly, we conclude that the facts in *Sheriff* are not particularly applicable to the facts of the present case. And further, we emphasize that the language in the proposed instruction does not come from one of the jury instructions given in *Sheriff*; rather, the language comes from the policy discussion in the opinion. *See* 104 Nev. at 77-78, 752 P.2d at 774.

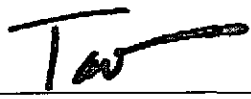
Therefore, in light of the accurate and clear statement of applicable legal principles contained in instruction numbers 14, 17, and 19, and further explanation of decoy operations in instruction numbers 15 and 18, we conclude the instructions given fully explained Hill’s defense theory of the case. Accordingly, we conclude the district court did not abuse its discretion in refusing to give this particular instruction proposed by Hill. *See Wyatt v. State*, 86 Nev. 294, 299, 468 P.2d 338, 341 (1970) (“If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.”)

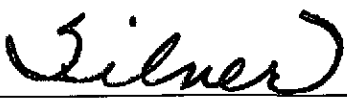
Accordingly, because we conclude the district court did not err in denying Hill’s challenges for cause or in overruling his *Batson* objections, and because any error in settling the jury instructions was

harmless beyond a reasonable doubt, and because the State presented sufficient evidence of Hill's predisposition to commit the charged crime, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk