IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID LEE LOVING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68712

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a controlled substance second offense, a category E felony. First Judicial District Court, Carson City; James E. Wilson, Judge.

An undercover drug enforcement officer witnessed appellant David Lee Loving and a female walking through an unlit parking lot in a high-crime area late one night. Upon spotting the officer, Loving walked away from the female, and the officer observed Loving drop something to the ground. Shortly after both were detained, a different officer discovered a bag containing methamphetamine and a pipe on the ground where the initial officer saw Loving drop the object.[1]

On appeal, Loving claims the district court abused its discretion by failing to give a proposed instruction, by denying Loving's request for a mistrial, and by admitting evidence of the methamphetamine pipe. Loving further asserts insufficient evidence supports his conviction. We agree the district court erred in failing to give the proposed

[1]We do not recount the facts except as necessary to our disposition.

instruction, but we conclude this error does not merit reversal because this proposed instruction was in actuality an inverse elements instruction that was covered by other instructions the court presented to the jury. We further conclude Loving's additional arguments are without merit,[2] and affirm the district court.

We accord district courts broad discretion to settle jury instructions, and we will uphold a district court's decision absent abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Generally, "a defendant is entitled to a jury instruction on his theory of the case, so long as there is evidence to support it." *Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010).

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[2]Evidence of the pipe is admissible under both NRS 48.035(3) and NRS 48.045(2). The pipe was discovered in the same bag that contained the methamphetamine, and, therefore, is so intertwined with the facts at issue that it would be impossible for the witnesses to testify fully without referencing the pipe. *See Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). Likewise, the record supports the district court's conclusion the evidence was admissible under NRS 48.045(2) as the pipe was relevant and proved by clear and convincing evidence, and the prejudicial effect did not outweigh the probative value. *See Bigpond v. State*, 128 Nev. ___, ___, 270 P.3d 1244, 1249 (2012).

Nor did the district court err in denying the motion for a mistrial, as the detective's comments were vague and did not identify any bad acts, nor did the jury learn anything regarding the nature of the prior conduct, the type of offense, or the number of prior offenses. Under these facts, Loving was not prejudiced by the comments nor did the comments prevent him from receiving a fair trial. *See Glover v. Dist. Ct.*, 125 Nev. 691, 703, 220 P.3d 684, 693 (2009).

Further, the evidence when viewed in the light most favorable to the State is sufficient to establish Loving's guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Although the district court may not refuse to give a proposed instruction merely because it is substantially covered by another instruction, error in failing to give an instruction is harmless if the jury was accurately instructed on the law and "the reviewing court is 'convinced beyond a reasonable doubt that the jury's verdict was not attributable to [that] error.'" *See Guitron v. State*, 131 Nev. ___, ___, 350 P.3d 93, 102 (Ct. App. 2015) (holding the district court's failure to give an inverse elements instruction was harmless error where the jury was correctly instructed on the elements of the crime and substantial evidence supported the verdict) (quoting *Crawford*, 121 Nev. at 756, 121 P.3d at 590).

On appeal, as below, Loving argues his proposed *mere presence* instruction was necessary to his defense theory because he was "merely present where the drugs were found and [] he did not knowingly possess them." A mere presence defense generally arises where the defendant argues he or she is a spectator to a crime, not a participant. *See, e.g.*, *Brooks v. State*, 103 Nev. 611, 747 P.2d 893 (1987) (the defendant's brother testified he dropped a vial of narcotics and kicked it toward the defendant, where officers discovered it); *Konold v. Sheriff, Clark County*, 94 Nev. 289, 579 P.2d 768 (1978) (the defendant was one of several people found in a room where marijuana residue was discovered in a smoking pipe); *U.S. v. Manning*, 618 F.2d 45 (8th Cir. 1980) (the defendant was one of three passengers in a car and someone in the car dropped a sawed-off shotgun into the gutter). Loving argues his case is analogous to *Brooks*, where the district court erred in failing to give the following instruction:

> Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a

> reasonable doubt that the defendant is a participant and not merely a knowing spectator.

Brooks, 103 Nev. at 613, 747 P.2d at 894.

Loving's proposed instruction read:

> Mere presence in the area where the narcotic is discovered is insufficient to support a finding of possession; proof that the defendant exercised dominion and control over the contraband is required to support a possession charge.

We disagree. Contrary to Loving's assertion that under *Brooks*, the district court should have instructed the jury on *mere presence,* Loving's proposed instruction was not the same instruction approved by the Nevada Supreme Court in *Brooks*. Instead, Loving's instruction was actually an inverse instruction regarding the law of possession, despite starting with the words *mere presence*. Importantly, Loving's proposed instruction did not instruct the jury on the law regarding *mere presence*, or criminal liability involving a participant of a crime versus an unknowing spectator. Here, Loving never proffered the defense that he was a spectator to a crime and was therefore, *merely present* when the officer found the methamphetamine on the ground. Instead, Loving argued that he was never in possession of methamphetamine.

Under these facts, we conclude Loving did not proffer an instruction on the law regarding *mere presence*, but instead proffered an inverse elements instruction regarding the law of possession. As such, this case is not similar to *Brooks*, but is closer to *Guitron*, where the district court refused to give an inverse elements instruction. *See Guitron*, 131 Nev. at ___, 350 P.3d at 102-03. And, just as in *Guitron*, Loving's proffered instruction was a correct statement of the law, was not misleading, and would not have created confusion. *See id.* Therefore, we

agree with Loving that the district court erred in refusing to give the proffered instruction.

Nevertheless, as in *Guitron*, we conclude this error does not merit reversal under these facts. Loving's proposed instruction was covered by other instructions, which accurately instructed the jury on the elements of possession, and nothing in the record reflects that the verdict was attributable to the district court's failure to give this inverse elements instruction. Therefore, under these facts, the district court's error was harmless. *See id.* Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. James E. Wilson, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk