IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KHALED MUBAREK, A/K/A KHALED MUBARAK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71060

ORDER OF AFFIRMANCE

Khaled Mubarek appeals from a judgment of conviction after a bench trial. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Mubarek was charged with one count of burglary while in possession of a deadly weapon, two counts of robbery with use of a deadly weapon, two counts of battery by prisoner, and two counts of unlawful acts relating to human excrement or bodily fluids.[1] Mubarek waived his right to a jury trial. After a three-day bench trial, the district court found Mubarek guilty of all counts. The district court sentenced Mubarek to an aggregate term of 72 months to 240 months in prison.

On appeal, Mubarek claims that each of the following four alleged errors warrant a reversal of his conviction: (1) he did not make a knowing and voluntary waiver of his Sixth Amendment and statutory right to a jury trial; (2) he was denied due process and the right to assistance of counsel when the district court did not allow the parties to submit jury instructions and did not prepare written findings of fact and conclusions of law to support the convictions; (3) the evidence was insufficient to convict

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

him of using a deadly weapon; and (4) cumulative error warrants reversal. We disagree.

Waiver of the right to a jury trial

Mubarek argues that he did not make a knowing and voluntary waiver of his right to a jury trial nor was the waiver intelligently made. This court reviews factual determinations for clear error; however, when there is a question of whether there has been a denial of the right to a jury trial, the matter will be reviewed de novo. *Gallimort v. State*, 116 Nev. 315, 318, 997 P.2d 796, 798 (2000).

A defendant may waive a jury trial in a non-capital case if the waiver is in writing with the approval of the court and consent of the State. NRS 175.011(1). In *Gallimort v. State*, the court recommended that, before granting a defendant's request to waive his right to a jury trial, the district court inform the defendant of: "(1) the number of members of the community composing a jury; (2) the defendant's ability to take part in jury selections; (3) the requirement that jury verdicts must be unanimous; and (4) that the court alone decides guilt or innocence if the defendant waives a jury trial." 116 Nev. at 320, 997 P.2d at 799. The court did not require these notices be given, but strongly encouraged district courts to provide them in order to avoid any misunderstandings made by the defendant. *Id.*

Here, Mubarek asserts that that his waiver was not knowing or voluntary because the district court did not advise him pursuant to *Gallimort*. In addition, Mubarek contends that his mental incompetence prevented him from making a knowing and intelligent waiver. We disagree.

The district court covered the *Gallimort* recommendations during its canvass of Mubarek. Furthermore, the district court gave Mubarek several days to consider the differences between a jury trial and bench trial after the initial canvass. The district court then canvassed

Mubarek again using the *Gallimort* guidelines. Mubarek insisted he understood his rights and preferred a bench trial. He then signed a written waiver before the start of the bench trial, which stated that he knew he was giving up "a constitutionally protected right [to a jury trial]," he had discussed with his attorneys "the consequences of requesting a bench trial," and he understood and accepted those consequences.

Further, while the district court was on notice that Mubarek had suffered from a mental disorder, Mubarek was found competent before he waived his right to a jury. Therefore, we conclude that Mubarek's written waiver, his oral waiver, and his colloquy with the district court demonstrates that Mubarek knowingly, voluntarily, and intelligently waived his right to a jury trial. *See Gallimort*, 116 Nev. at 318-19, 997 P.2d at 798 (concluding that a new trial was unwarranted because the defendant signed a written waiver and, before the bench trial, orally made a knowing and intelligent waiver of his right to trial by jury on the record); *see also United States v. Shorty*, 741 F.3d 961, 966 (9th Cir. 2013) ("A writing confers on a waiver the presumption that it was made knowingly and intelligently.").

Jury Instructions

Mubarek argues that his conviction should be reversed because he was denied due process and the right to assistance of counsel when the district court (1) did not allow parties to submit jury instructions and (2) did not prepare written findings of fact and conclusions of law to support the guilty verdicts. We find this argument unpersuasive.

On the first day of trial, the district court told both parties that jury instructions were unnecessary and that any law-related arguments should be reiterated during closing arguments. During deliberation, the

district court used jury instructions from previous trials. We conclude this procedure does not merit reversal.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Jeffries v. State*, 133 Nev. ___, ___, 397 P.3d 21, 27 (2017) (quoting *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005)). A criminal defendant does not have an absolute right to present a jury instruction. *See Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010) (holding that in a criminal *jury* trial, "a defendant is entitled to a jury instruction on his theory of the case so long as there is evidence to support it . . . ."); *see also Zahari v. State*, 131 Nev. ___, ___, 343 P.3d 595, 599 (2015) (holding that the *Hoagland* rule "does not give the defendant the absolute right to have his own instruction given, particularly when the law encompassed in that instruction is fully covered by another instruction." (quoting *Milton v. State*, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995)) (internal quotation marks omitted)).

Here, the case was not tried by a jury of laypeople, but by the judge as the trier of fact. The judge concluded that he did not need to receive law-related arguments in the form of jury instructions from the parties, as there was no jury and he was not a layperson. Instead, the judge instructed the parties to present those arguments directly to him during closing arguments. We find no abuse of discretion in this directive.

Even if this procedure amounted to an abuse of discretion, this court employs plain error review because Mubarek did not object to the district court's use of its own jury instructions at trial. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) ("When an error has not been preserved, this court employs plain-error review. Under that standard, an

error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights . . . ."). Mubarek fails to articulate how the district court's actions, or the instructions used, were inconsistent with Nevada law, or show how the result would have been different had he submitted his own jury instructions.

Mubarek further claims that the district court denied him the right of assistance of counsel by preventing his counsel from submitting jury instructions. However, Mubarek's counsel could have submitted jury instructions. Either party may present to the district court any written charge and request that it be given. *See* NRS 175.161(3). If the district court thinks it correct and pertinent, it must be given; if not, it must be refused. *Id.* Accordingly, had Mubarek's counsel submitted instructions prior to or at the conclusion of the presentation of evidence, despite the district court directing otherwise, the district court would have been required to consider the submission. *See id.* Overall, Mubarek has not shown how the alleged error affected his substantial rights, and therefore, plain error is not established.

The district court's oral pronouncement of findings

Mubarek argues the district court misapplied NRCP 52 by making an oral pronouncement of its findings from the bench. NRCP 52, by its own terms, applies solely to civil bench trials. As this is a criminal case, the rule does not apply here. Mubarek has cited no authority for his argument that the Nevada Rules of Civil Procedure must be applied to criminal proceedings nor has he explained how requiring a judge presiding over a criminal bench trial to set forth findings of fact and conclusions of law implicates a constitutional right. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that

this court need not consider arguments that are not supported by relevant authority). Accordingly, we reject Mubarek's argument.[2]

Insufficient evidence

Mubarek argues that the evidence at trial was insufficient to convict him of using a deadly weapon. "When determining whether a verdict was based on sufficient evidence to meet due process requirements, this court will inquire '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.'" *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). "This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Id.*

Throughout the trial, the knife Mubarek used was described by multiple witnesses as a "paring knife" with a red handle displayed in a threatening manner. At the conclusion of the trial, the district court found that the red-handled paring knife was a deadly weapon capable of causing

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[2]Mubarek argues, without more, that inconsistencies between the district court's oral pronouncement of its findings and the jury instructions it relied upon also amounted to a denial of due process and the assistance of counsel. However, the district court did not state it strictly applied those standard jury instructions in Mubarek's case; rather, it stated that it "kind of, consider[ed] [it]self governed by the standard jury instruction that we give in most cases . . . ." Further, Mubarek does not cite any authority to support his position that, in deciding a criminal bench trial, the district court may not review or rely on any source that is distinguishable from the case before it. Accordingly, we reject Mubarek's argument. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (noting that this court need not consider arguments that are not supported by relevant authority).

serious bodily harm or death given the way in which it was designed or used. Mubarek claims the knife is not capable of causing bodily harm or death because it has a "rounded tip like a butter knife." Viewing the evidence in the light most favorable to the prosecution, we conclude that there is sufficient evidence in the record for a rational trier of fact to find that Mubarek's paring knife, as it was used, was a deadly weapon under NRS 193.165(6)(b). *See id.* (concluding that the witness testimony and physical evidence presented at trial was sufficient for a rational trier of fact to find the defendant used a deadly weapon).[3] Accordingly, we reject Mubarek's contention that insufficient evidence was presented to support the district court's finding that his knife was a deadly weapon.

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[3]The State suggests Mubarek accurately points out that the knife at issue here would not qualify as a deadly weapon "as a matter of law under NRS 193.165." This statement is not dispositive given that the district court, as the trier of fact, found that the evidence presented proved beyond a reasonable doubt that Mubarek's knife was a deadly weapon *in its design* and *as it was used*. "Deadly weapon" is defined as:

> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; [or]
>
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death . . . .

NRS 193.165(6)(a), (b). Accordingly, as it appears the district court applied the definition of "deadly weapon" found in subsections (a) and (b) of the statute, we are unpersuaded that the State's possible concession in its appellate brief changes the result here.

Cumulative error

Finally, Mubarek argues that even if no single error occurred at trial that was individually enough to warrant a reversal, this court should consider the cumulative errors that occurred during trial and reverse his conviction based on such errors. We disagree as no errors have been shown to cumulate. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk