

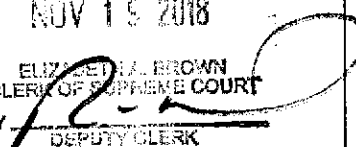
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID BROOKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73730-COA

FILED

NOV 19 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

David Brooks appeals from a judgment of conviction, pursuant to a jury verdict, of battery constituting domestic violence—strangulation, and felony battery constituting domestic violence. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Brooks was arrested and charged after his girlfriend alleged that Brooks beat and strangled her. The case proceeded to trial, and immediately following jury selection, juror four informed the court he was unable to appear for jury service the following day. When the court refused to excuse juror four, he informed the court marshal, in front of the other jurors, that he would find the defendant guilty regardless of the evidence. The court thereafter struck juror four from the jury, replaced him with an alternate juror, and canvassed the other jurors regarding the incident. All of the jurors unequivocally asserted that the incident did not affect their ability to be fair and impartial. Brooks moved for a mistrial, but the court concluded the remaining jurors remained impartial and denied the motion.

At trial, the victim testified that Brooks slapped her and when she tried to escape, grabbed her, pinned her to the sofa, and choked her

while telling her to die. The State also presented testimony from a responding officer and a paramedic who treated the victim, as well as photographs and the victim's 9-1-1 call. Brooks did not testify or present a case-in-chief. Brooks proffered a self-defense instruction, which the district court refused to give on grounds that no evidence was introduced showing Brooks acted in self-defense. The jury found Brooks guilty of battery constituting domestic violence—strangulation, and felony battery constituting domestic violence.¹

On appeal, Brooks argues the district court reversibly erred by (1) failing to grant his motion for a mistrial and (2) failing to give his proffered self-defense instruction. We disagree.

The district court should grant a mistrial for juror misconduct where the defendant shows both juror misconduct and prejudice, in that the misconduct likely affected the verdict. *Jeffries v. State*, 133 Nev. ___, ___, 397 P.3d 21, 26 (2017). In appropriate circumstances, the court may replace a juror with an alternate juror instead of granting a mistrial. *Viray v. State*, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005). We review the district court's decision to deny a mistrial for an abuse of discretion, but review the district court's factual findings for clear error. *Jeffries*, 133 Nev. at ___, 397 P.3d at 27.

Here, the district court carefully canvassed the jurors and found they remained impartial. Nothing in the record suggests this finding was in error, and Brooks does not demonstrate that juror four's statements prejudiced the other jurors against him or likely affected the

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

outcome of the trial. Accordingly, we conclude the district court did not abuse its discretion by denying Brooks' motion for a mistrial.

Next, we consider whether the district court erred by declining to give Brooks' self-defense instruction. District courts have broad discretion to settle jury instructions, and 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). "[A] defendant is entitled to a jury instruction on his theory of the case, [when] there is evidence to support it, regardless of whether the evidence is weak, inconsistent, believable, or incredible." *Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010). However, the district court is not required to instruct the jury on a defense when the evidence is legally insufficient to sustain an element of that defense. *Id.*; see also *Runion v. State*, 116 Nev. 1041, 1051, 13 P.3d 52, 58-59 (2000) (noting that "[w]hether [self-defense] instructions are appropriate in any given case depends upon the testimony and evidence of that case").


We have carefully reviewed the record and conclude the district court did not err by declining to instruct the jury on self-defense. Critically, no evidence was introduced at trial showing Brooks acted in self-defense; therefore, a self-defense instruction would have been improper.² See *Williams v. State*, 91 Nev. 533, 535, 539 P.2d 461, 462

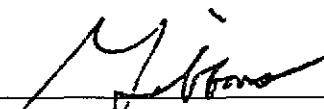
²We note Brooks failed to include the proffered instruction or the instructions given by the district court in his appendix. See *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (holding that it is appellant's responsibility to provide an adequate record and that the failure to do so may preclude appellate review).

(1975) (holding that a self-defense instruction "should not be given if there is no supportive evidence"). Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Law Office of Nadine Morton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk