IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARCUS RIVES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74249-COA

ORDER OF REVERSAL AND REMAND

Marcus Rives appeals from a judgment of conviction pursuant to a jury verdict of burglary and possession of stolen property. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

The State prosecuted Rives based on Donna Radford's allegation that Rives—a friend and former co-worker—stole some of Radford's belongings while he was temporarily living with her.[1] Rives' defense was that Radford wanted a romantic relationship and she became a "stalker" after he refused her advances and moved out-of-state. Rives further claimed that while he was living with Radford she often requested he perform errands for her, including paying her bills, and that Radford gave Rives valuables and money to perform these errands.

During Rives' trial, Radford's erratic behavior became a focal point. First, Radford attempted to speak to a juror. Outside the presence of the other jurors, the juror affirmed that Radford approached him outside of the courtroom and asked him if he was a juror on Rives' case. The juror told the judge that he responded with "no" and walked away

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

from Radford. The district court denied Rives' motion for mistrial based on Radford's intentionally speaking to a juror, and there was no questioning of Radford to attempt to determine her motive.

Second, despite contacting a juror during trial, Radford next contacted Vicki Long, who Radford knew was Rives' ex-girlfriend and a witness, right before Long's testimony at trial. Radford intentionally telephoned Long and spoke to her and also texted her by cellular phone. At a hearing outside the presence of the jury, Long testified that Radford's telephone call and texts did not influence her trial testimony. The district court allowed defense counsel limited cross-examination on this point.

Third, Radford intentionally telephoned the district court judge's chambers and spoke with the judicial law clerk. Radford told the district court judge's law clerk that, Rives' counsel went to her home and superglued her circuit breakers and cut her power off. Further, Radford claimed that Rives' counsel also attacked Long in the courthouse hall. Rives filed a motion requesting that the district court hold Radford in contempt for contacting the court's chambers and lying about defense counsel's conduct. Without conducting an evidentiary hearing, the district court summarily found that Radford's allegations against defense counsel were not relevant, and did not allow Radford to be questioned in front of the jury about her claims against Rives' counsel.

On appeal, Rives argues that the district court erred when it rejected his proposed jury instructions. We agree and conclude that the district court erred in rejecting Rives' proposed jury inverse instructions, and under these particular facts, we cannot hold that the district court's refusal to instruct the jury on Rives' inverse instructions was harmless.

"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." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). But Nevada law is clear: a district court *shall* give a defendant's proposed inverse instruction that correctly states the law and is supported by the evidence. *See id.* at 751, 121 P.3d at 586; *see also Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010). In *Crawford*, the Nevada Supreme Court explained, "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." 121 Nev. at 753, 121 P.3d at 588. And, upon the defense counsel's request a district court must include "significance" instructions that support the defense theory of the case.

Moreover, a "district court *may not refuse* to give a proposed defense instruction simply because it is substantially covered by the other instructions given." *See Guitron v. State*, 131 Nev. 215, 229, 350 P.3d 93, 102 (Ct. App. 2015) (emphasis added); *see also Crawford*, 121 Nev. at 753-54, 121 P.3d at 588 (holding that a district court may not refuse an instruction on the ground that the legal principle may be inferred from other instructions). Thus, a district court *shall* give a criminal defendant's proffered inverse instruction unless the proposed instruction would be misleading or would confuse the issues. *See Guitron*, 131 Nev. at 229, 350 P.3d at 102; *see also Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005) (noting that district courts are not required to accept "misleading, inaccurate or duplicitous jury instructions."). The failure to do so will warrant reversal unless the error is harmless. *Guitron*, 131 Nev. at 229-30, 350 P.3d at 102.

Finally, even if a defendant's proposed inverse instructions are poorly drafted, the district court still must ensure that "the substance of the defendant's requested instruction is provided to the jury" while also correctly stating the law. *See Crawford*, 121 Nev. at 754-55, 121 P.3d at 589; *see also Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). To this end, the State may request that additional language be added to the instructions. *Carter*, 121 Nev. at 765, 121 P.3d at 596. But if the parties cannot craft proper instructions, the district court should assist the parties or complete the instructions sua sponte. *Id.*

We first conclude the district court erred by refusing to give Rives' proposed inverse instructions because they were not misleading nor did they confuse the issues. To the contrary, Rives' proposed inverse instructions were proper inverse instructions: they mirrored the indictment that the State filed in this case, which was reiterated as the court's instruction number three; the inverse instructions correctly stated the law; and the proposed instructions were the inverse of other instructions given at trial regarding intent. Moreover, as Rives never disputed that, at Radford's request, he went into the pawn shop and pawned the wedding ring set, permission and consent were the key issues in this case, and Rives' proposed instructions go directly to those issues. Further, the district court erred when it concluded that Rives' proposed instruction regarding consent improperly focused on one element; that is precisely what an inverse instruction is meant to do, and therefore, that conclusion directly conflicts with *Crawford*. And, even if we were to assume that Rives' proposed instructions were poorly drafted or misleading, as the State claims by gratuitously adding particular facts, we note a district court may abuse its discretion by not assisting the

parties in crafting proper inverse instructions or doing so sua sponte. *See Carter*, 121 Nev. at 765, 121 P.3d at 596. The district court's offer of assistance in this case was illusory because the court restricted Rives' ability to focus on the key inverse element of the charge: consent. Accordingly, the district court should have given Rives' proposed instructions pursuant to *Crawford* and therefore erred by refusing to give them.

We next conclude that the failure to give Rives' proposed inverse instructions was not harmless. Under harmless error review this court may affirm only if it is "convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of th[e] case." *Crawford*, 121 Nev. at 756, 121 P.3d at 590. Here, the key and only witness against Rives on the issues of permission and consent was Radford—whom Rives had lived with and who wanted a romantic relationship with Rives. Significantly, the jury apparently may not have fully believed Radford's testimony as the jury found Rives not guilty of Count 1-Grand Larceny, despite the State's theory that Rives stole other miscellaneous jewelry items from Radford while living with her. Because Rives did not dispute that he pawned Radford's wedding ring set, the only issue was whether the jury believed that Radford gave Rives permission and actually directed him to pawn the jewelry, or, as the State alleged, whether Rives had the intent when he entered the pawn shop to obtain money under false pretenses. Tellingly, Radford admitted on cross-examination that she had provided Rives with large sums of money to do other errands for her. And, the jury only found Rives guilty of a lesser misdemeanor charge

on Count 3-Possession of Stolen Property, which was tied to Count 2-Burglary, as described above.

Notably, Radford's own conflicting testimony and her apparent continued misconduct and violation of court rules at trial undermined her credibility and integrity as a witness. Had the district court given Rives' proffered inverse instructions, the jury may have determined that a reasonable doubt existed as to Rives' intent, found that the State failed to meet its burden, and acquitted Rives on the remaining charges. Therefore, this court is not convinced beyond a reasonable doubt that the jury's verdict was not attributable to the district court's error of rejecting Rives' proposed inverse instructions, and we cannot conclude that the error was harmless.[2] Accordingly, we

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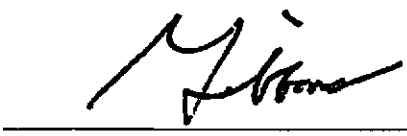
[2]Rives also claims that the district court erred when it: (1) denied his motions for mistrial; (2) denied his motion for sanctions; (3) denied his motion for new trial, or in the alternative, motion for judgment of acquittal; (4); and (5) limited his cross-examination of Long and Radford. Additionally, Rives argues that the evidence was not sufficient to sustain his conviction, and that cumulative error warrants reversal. In light of our disposition, we need not reach the other issues Rives raises on appeal. But on remand, the district court must revisit the restrictions it placed on cross-examination of Radford. The totality of the Radford's actions raise the appearance of bias and call into question her credibility as a witness in this trial, and, therefore, a more thorough cross-examination should have been allowed, especially in light of the allegation that Radford *falsely claimed* defense counsel committed two crimes: vandalizing Radford's home and attacking a witness, Vicki Long, during trial. *See Baltazar-Monterrosa*, 122 Nev. 606, 619, 137 P.3d 1137, 1146 (2006) (stating that "where bias is the object to be shown . . . an examiner must be permitted to elicit any facts which might color a witness's testimony") (citation and internal quotations omitted). Plus, the prior relationship and past actions

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Silver



_____, J.
Gibbons

TAO, J., dissenting:

The majority reverses a felony jury verdict on the grounds that the district court abused its discretion by failing to give "inverse" instructions proposed by the defense. I respectfully dissent. These aren't true inverse instructions, but even if they were, any error associated with not giving them was clearly harmless.

I.

Here are the instructions proposed by the defense:

> In addition to any other reasonable doubt you may have relating to any element of the offense charged, you must find Marcus Rives Not Guilty on both Count 2, Burglary and Count 2, Possession of Stolen Property, if you have a reasonable doubt that Donna Radford gave

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between Radford and Rives suggest the issue of consent is the key to the whole case, and liberal exploration into this area is necessary under these particular facts.

> Marcus Rives permission to take possession of the ladies wedding ring set.
>
> In addition to any other reasonable doubt you may have relating to any element of the offense charged, you must find Marcus Rives Not Guilty on Count 2, Burglary, if you have a reasonable doubt as to whether Marcus Rives had the specific intent to obtain money under false pretenses when he entered the EZ PAWN, located at 2820 East Craig Road, Las Vegas, Clark County, Nevada.

On appeal, Rives argues that these represent "inverse" instructions that the district court was required to give pursuant to *Crawford v. State*, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005).

They're not. Both proposed instructions go beyond being mere statements of legal principle and are instead packed with factual allegations, including such things as the name of the alleged victim (Donna Radford); the street address of the EZ Pawn Store allegedly burglarized; and the store's location within Clark County, Nevada. Thus, the instructions go beyond presenting any "neutral statement of law." *See Chums, Ltd. v. Snugz/USA, Inc.*, No. 94-4109, 1995 WL 503975, at *2 (10th Cir. Aug. 25, 1995) (agreeing that a proper jury instruction must consist of a "neutral statement[ ] of law"); *Luong v. SF City & County*, No. C 11-05661 MEJ, 2013 WL 2389648 (N.D. Cal. May 30, 2013); *Salt Lake Tribune Pub. Co., LLC v. MediaNews Group, Inc.*, Nos. 2:00-CV-00936 PGC, 2:03-CV-00565 PGC, 2007 WL 2156612 (D. Utah Jul. 26, 2007); *Antoninetti v. Chipotle Mexican Grill, Inc.*, Nos. 05CV1660-J (WMc), 06CV2671-J (WMc), 2007 WL 4162804 (S.D. Cal. Nov. 19, 2007). The

proposed instructions not only recite facts, they assume them to be true and then go on to apply the law to them, which is normally considered the province of the jury. *See Commonwealth v. Maylott*, 841 N.E. 2d 717, 720 (Mass. App. Ct. 2006) (it is the jury's "obligation to apply the law to the facts."); *State v. Bowman*, 866 P.2d 193, 199 (Idaho Ct. App. 1993) (same).

And these aren't just random facts, they were factual allegations central to the charges that the State bore the affirmative burden of independently proving at trial in order to convict. For example, the State must prove that a crime occurred and (generally) who the victim was. Similarly, as part of every felony trial the State must prove that proper subject matter jurisdiction exists over the crime, and if subject matter jurisdiction is lacking, the conviction cannot stand. Among other things, the prosecutor must affirmatively establish through evidence that the crime occurred within the boundaries of the State and of the relevant county in which the charges were filed.

Here, the first proposed jury instruction concedes the name of the victim, and the second expressly informs the jury that the EZ Pawn was "located at 2820 East Craig Road, Las Vegas, Clark County, Nevada," as if both had already been proven. That alone makes the proposed instructions something other than true inverses, because they go beyond simply reverse-defining the elements of the charged crimes to instead presenting some factual concessions. In all probability, Rives decided that challenging these basic facts was not his best avenue of defense and decided to concede them in favor of other defenses more likely to bear fruit. But that's the whole point: selectively conceding facts isn't a question of law, it's a trial tactic. *See generally Armenta-Carpio v. State*, 129 Nev. 531, 306 P.3d 395 (2013) (discussing so-called concession-of-guilt

defenses). Jury instructions are for instructing the jury on relevant principles of law, not a vehicle for outlining the parties' trial strategies; those are left for the attorneys to argue during closing summations.

I would therefore conclude that the proposed instructions were not true inverse instructions and did not need to be given. For any proposed instruction other than a true inverse, district courts are given considerable discretion to decide which instructions are appropriate, and may refuse to give any instructions that are confusing, unclear, or that duplicate other instructions. *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005); *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002); *Guitron v. State*, 131 Nev. 215, 230, 350 P.3d 93, 102 (Nev. Ct. App. 2015). I would conclude that the district court acted within its considerable latitude in refusing to give these instructions and no abuse of discretion occurred.

II.

Even if some error occurred, the next question we must ask is: what effect did it have on the verdict? Only errors that necessarily affected the verdict require reversal; affirmance is in order when some error occurred but the result of the trial would have been the same without the error. *See Collman v. State*, 116 Nev. 687, 722-23, 7 P.3d 426, 449 (2000).

In general, the failure to give inverse instructions can almost never result in reversal. The problem is this: if the instructions at issue were indeed true "inverse" instructions, then by definition they would say nothing more about the law than was already stated in other instructions. After all, the very definition of an "inverse" instruction is that it is a negatively phrased version of another positively phrased instruction

setting forth precisely the same law. *See Crawford,* 121 Nev. at 753, 121 P.3d at 588. A true inverse instruction therefore adds nothing of substance to its positive version—if it added something new or different, then it would not be an inverse instruction at all. Consequently, the Nevada Supreme Court rarely concludes that the failure to give one ever results in anything other than harmless error. Quite to the contrary, the court came exceedingly close to conceding, only a few months ago, that the failure to give a true inverse instruction can virtually *never* amount to anything other than harmless error:

> We recognize that *Crawford*'s, observation regarding a defendant's right to an inverse instruction is essentially unenforceable if harmless-error review applies. At the same time, however, we are not prepared to hold that a failure to provide a requested inverse instruction automatically warrants reversal of a defendant's conviction.

Hardin v. State, Docket No. 72067 *4 n.4 (Order of Affirmance Jul. 26, 2018).

This is so simply because the harmless-error inquiry asks whether something about the omitted instruction itself poisoned the jury's verdict, such as would be the case if a missing instruction failed to apprise the jury of an essential element of the crime. If the jury wasn't even made aware of an essential element of the law, then its verdict almost certainly cannot be relied upon. *Collman*, 116 Nev. at 723, 7 P.3d at 449. But when all that went missing was a true inverse instruction that merely re-stated the same law already positively stated in other instructions, then the jury was properly apprised of all the law it needed, accurately so, and the

missing instruction could not have had any effect whatsoever on the verdict.

The majority nonetheless concludes that this is one of those exceedingly rare cases in which the failure to give an inverse instruction resulted in error that was not harmless. How it reaches this conclusion, I'm not entirely sure. It apparently believes that the evidence against Rives was thin because everything depended upon the credibility of the victim who the majority thinks may have been "biased." But I don't see the connection. The question for harmless-error analysis is whether omitting an instruction of itself likely produced an error in the jury's decision, not whether the State's case was strong or weak in a general sense having nothing to do with any particular jury instruction. There must be causation, not mere correlation: it's not whether some error occurred and incidentally the jury might also have made the wrong decision for unrelated reasons; it's whether the error *caused* the jury to go astray. *See generally Norfolk & Western Ry. Co. v. Ayers,* 538 U.S. 135, 173 (2003) (Kennedy, J., dissenting) ("Correlation is not causation."). Absent that linkage, the majority's observation about the victim's credibility is a logical non sequitur to its totally unrelated conclusion that the proposed inverse instructions were appropriate to give.

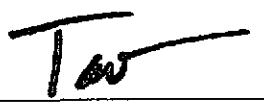
Here, the majority correctly observes that the proposed instructions related to the central issues of whether the victim gave consent and whether her denial was credible. But the question is not whether the missing instructions related in some way to some important issue in the case (they always will or else the matter is not worth raising on appeal). The question is whether the *omission* of the proposed instructions deprived the jury of something it needed to evaluate her

credibility. Simply by being inverse instructions, the answer must be no. As the Nevada Supreme Court observed that this type of causation can almost never be found in any case involving true inverse instructions. But it's especially so in a case like this where Rives' counsel vigorously argued the very point made in the proposed inverse instructions throughout the trial, so in the end Rives fully presented his defense and the jury heard everything the inverse instructions would have stated anyway.

Finally, no prejudice exists if the defendant's "closing argument would not have been materially different or more effective with the benefit of the [omitted] instruction." *Dawes v. State*, 110 Nev. 1141, 1147, 881 P.2d 670, 674 (1994). Notably, Rives didn't supply us with a transcript of the closing argument even though most of the rest of the transcript is there, which leaves me wondering whether that omission was intentional and strategic. Thus, we are deprived of the ability to see for ourselves whether anything different might have occurred. We're required to presume that any missing portions of the record support, not undermine, the jury's verdict. *See Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("It is appellant's responsibility to make an adequate appellate record. We cannot properly consider matters not appearing in that record." (citation omitted)); *Riggins v. State*, 107 Nev. 178 182, 808 P.2d 535, 538 (1991) (concluding that if materials are not included in the record on appeal, the missing materials "are presumed to support the district court's decision"), *rev'd on other grounds by Riggins v. Nevada*, 504 U.S. 127 (1992). Without that critical portion of the transcript, we must presume that any error was harmless and not allow Rives to argue otherwise while dodging his responsibility to create an adequate appellate record.

III.

For all of these reasons, I would conclude that no error occurred when the district court failed to give the proposed inverse instructions at issue. And even if any error occurred, such error was harmless and had nothing to do with the verdict. I would affirm the conviction and therefore respectfully dissent.



_____, J.
Tao

cc: Hon. Stefany Miley, District Judge
Mueller Hinds & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk