

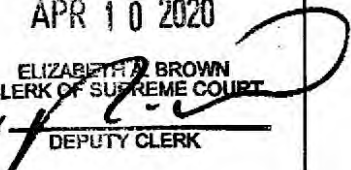
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE AZUCENA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78372-COA

FILED

APR 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jose Azucena appeals pursuant to NRAP 4(c) from a judgment of conviction entered pursuant to a jury verdict of two counts of battery by a prisoner with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

First, Azucena argues the district court erred by declining to instruct the jury regarding self-defense. 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 Azucena acted in self-defense. Rather, the evidence demonstrated Azucena was the initial aggressor and struck the two victims while they sat and played a card game. Therefore, a self-defense instruction would have been improper. See *Williams v. State*, 91 Nev. 533, 535, 539 P.2d 461, 462 (1975) (holding that a self-defense instruction "should not be given if there is no supportive evidence"); *Mirin v. State*, 93 Nev. 57, 59, 560 P.2d 145, 146 (1977) (providing that a defendant was not entitled to a jury instruction on self-defense where the defendant was the initial aggressor in the conflict).

Second, Azucena argues the district court erred by directing the court marshal to instruct the jury to continue to deliberate in an effort to reach a unanimous verdict. Azucena contends the district court should not have delegated this duty to the court marshal, the district court's directions to the marshal were not as clear as they should have been, and it is possible the marshal used coercive language when conveying the district court's directions to the jury.

The jury began deliberations and later informed the district court it had reached a verdict. The jury's verdict was announced as guilty, but when polled individually by the district court one juror stated she had not reached a guilty verdict. The district court directed the court marshal to take the jurors back to the jury room. The district court asked the parties what they would prefer the district court to do as a result of the juror's statement and both parties agreed that the district court would instruct the jury to continue to deliberate. Following the discussion with the parties, the district court instructed the court marshal to inform the jury that a unanimous verdict had not been reached and to continue to deliberate. The district court instructed the court marshal to inform the jury that there is

“no time frame placed on them” and that the jury could continue deliberations that day or return the next day to continue with deliberations. The marshal reported that the jury decided to continue deliberations that day. The jury later reached a unanimous guilty verdict.

Azucena did not object when the district court directed the court marshal to instruct the jury regarding continuing deliberations, and thus, he is not entitled to relief absent a demonstration of plain error. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018), *cert. denied*, 139 S. Ct. 415 (Oct. 29, 2018). Under the plain error standard, we determine whether there was an error, whether the error was plain or clear, and whether the error affected the defendant’s substantial rights. *Id.* Azucena failed to demonstrate the district court erred by directing the court marshal to convey its instructions to the jury. See NRS 175.391 (permitting an appropriate officer to communicate with the jury “by order of the court”). We also conclude that any alleged errors regarding the instructions the court conveyed to the marshal or that the marshal conveyed to the jury do not plainly appear on the record, and Azucena failed to demonstrate any alleged errors affected his substantial rights. Therefore, Azucena failed to demonstrate plain error in this regard. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk