IN THE SUPREME COURT OF THE STATE OF NEVADA

KASARD OMAR BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40718

FILED

SEP 03 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF REVERSAL

Appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a short-barreled shotgun and murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant Kasard Omar Brown and Rebekah Joy Hanson were involved in a turbulent and sporadic relationship for approximately eight years. On September 8, 2001, Brown fired a shotgun into the back of Hanson's head, killing her instantly. Brown maintains that he believed an intruder was in his apartment and that the shooting was an accident.

Following a jury trial, Brown was sentenced to two consecutive terms of life imprisonment without the possibility of parole and one maximum concurrent term of thirty-six months.

On appeal, Brown first argues that the district court erred by not allowing Lawrence Casias' lay opinion testimony that the shooting was an accident.

This court will not overturn a district court's decision to admit or exclude evidence absent manifest error.[1] To be admissible, lay witness opinion testimony must be: (1) rationally based on the perception of the

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[1] Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

witness, and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.[2]

Although Casias did not see Brown for at least ten seconds prior to the shooting, he heard the events surrounding the shooting and he observed Brown shortly before the shooting and immediately after. We conclude that Casias' opinion that the shooting was an accident was rationally based on his perceptions. Because Casias' opinion may have assisted the jury, we conclude that the district court erred by excluding the testimony. However, given the overwhelming evidence adduced against Brown, we conclude the error was harmless.

Next, Brown argues that the district court erred by refusing to provide his proferred possession of a short-barreled shotgun jury instruction. We disagree.

If a proffered jury instruction "misstates the law or is adequately covered by other instructions, it need not be given."[3]

We conclude that Brown's proffered instruction was cumulative as it was adequately covered by other jury instructions, which correctly state the law and the requisite mental status to sustain a conviction for possession of a short-barreled shotgun. Thus, we conclude that the district court did not err by refusing to provide the proffered instruction.

Brown also argues that the district court erred by denying his motion for a mistrial when a juror saw him being transported by two correction officers. We disagree.

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[2]NRS 50.265.

[3]Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

"'A criminal defendant clearly has the right . . . to appear before his jurors clad in the apparel of an innocent person."[4] In Dickson v. State, we concluded that it was reversible error when one of the jurors saw the defendant in chains and the incident was discussed at length in front of all the jurors.[5]

Nothing in the record indicates that the juror saw Brown's chain or cuffs, or that the chains and cuffs were even visible, when the juror saw Brown in the hallway being transported by correction officers. The district court admonished the juror not to discuss the incident with the other jurors. We conclude that the district court did not err by denying Brown's motion for a mistrial under these circumstances.

Finally, Brown argues that the district court erred by refusing to give his theory of the case jury instruction. Specifically, Brown proffered two alternate theory of the case jury instructions, indicating that if the State failed to prove beyond a reasonable doubt that it was not an accident, then he was entitled to a not guilty verdict.

A criminal defendant is entitled to have the jury instructed on his theory of the case, no matter how weak or incredible the evidence supporting the theory may be.[6]

In this case, while the jury was properly instructed on Brown's theory of the case, we conclude that the jury was not properly instructed

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[4]Dickson v. State, 108 Nev. 1, 3, 822 P.2d 1122, 1123 (1992) (quoting Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980) (citations omitted)).

[5]Id. at 4, 822 P.2d at 1124 (noting that at least one juror indicated that it would be hard to weigh the evidence fairly because of the incident).

[6]Barron, 105 Nev. 773, 783 P.2d 444.

on the State's burden of proof concerning the accident defense. Similar to self-defense, once Brown proffered sufficient evidence from which the jury could conclude that the shooting was an accident, the State has the burden of proving beyond a reasonable doubt that the shooting was not an accident. Thus, we reverse the judgment because the jury was not properly instructed. Accordingly, we

ORDER the judgment of the district court REVERSED.[7]

Becker, J.
Becker

Agosti, J.
Agosti

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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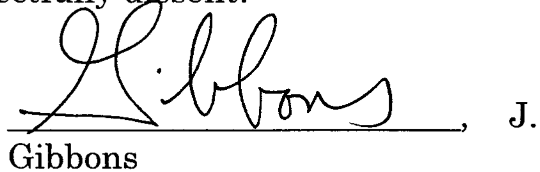
[7]Because we are reversing the judgment, we decline to consider the district court's admission of prior bad act evidence. Upon remand, the district court should consider the admissibility of the prior bad act evidence in light of Crawford v. Washington, 124 S. Ct. 1354 (2004).

GIBBONS, J., dissenting:

The district court had the discretion to refuse to allow Lawrence Casias to testify regarding his lay opinion that the shooting was an accident. I also believe the jury instructions in their totality, which were approved by the district court, properly set forth the State's burden of proof. For these reasons, I respectfully dissent.



_______________, J.
Gibbons