

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IVAN HERRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88756-COA

FILED

MAY 21 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ivan Herrera appeals from a judgment of conviction, entered pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon and two counts of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Herrera's sole contention on appeal is that the statutory reasonable doubt instruction given at trial is constitutionally deficient and, therefore, its use constitutes structural error. He asserts the instruction is facially unconstitutional as well as unconstitutional as applied to him because it affords state criminal defendants fewer due process rights than the federal model reasonable doubt instruction.

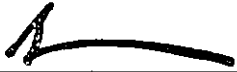
Herrera did not object on this basis below. Instead, Herrera asserted that the instruction was "confusing" and did not "inform the jury about what reasonable doubt is." This objection was insufficient to preserve the constitutional error he now argues. *See Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) ("[Appellant] cannot change [their] theory underlying an assignment of error on appeal."). Herrera concedes in his brief to this court that his trial counsel "did not argue this specific due

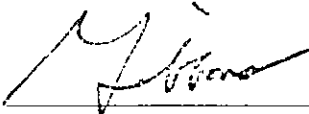
process argument that we are arguing now.” While this court may consider constitutional issues for the first time on appeal, unpreserved constitutional errors are reviewed for plain error. *Martinoirellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015). To demonstrate plain error, an appellant must show there was an error, the error was plain or clear under current law from a casual inspection of the record, and the error affected the appellant’s substantial rights. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).


In asserting that he is entitled to de novo review and that the alleged instructional error was structural, Herrera does not argue that the district court’s giving of the instruction clearly contradicted current law from a casual inspection of the record, nor does he argue that the error affected his substantial rights. *See id.* Nevada law mandates this exact reasonable doubt jury instruction. *See* NRS 175.211(2) (stating “[n]o other definition of reasonable doubt may be given”). The United States Constitution does not require any particular phrasing to advise the jury regarding reasonable doubt so long as the instructions accurately inform the jury of “the concept of reasonable doubt.” *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (quotation marks omitted). The Nevada Supreme Court has “repeatedly rejected challenges to the constitutionality of this particular instruction.” *See Garcia v. State*, 121 Nev. 327, 339-40 & n.26, 113 P.3d 836, 844 & n.26 (2005). And the United States Court of Appeals for the Ninth Circuit has held that Nevada’s reasonable doubt jury instruction does not violate constitutional standards. *Ramirez v. Hatcher*, 136 F.3d 1209, 1211-14 (9th Cir. 1998); *Darnell v. Swinney*, 823 F.2d 299, 302 (9th Cir. 1987). Herrera cites no authority suggesting that the Nevada instruction violated due process or that the use or existence of the federal model

instruction rendered the Nevada instruction unconstitutional. To date, the United States Supreme Court has only found one reasonable doubt instruction to be constitutionally deficient, *see Cage v. Louisiana*, 498 U.S. 39 (1990), and both the Ninth Circuit and Nevada Supreme Court have determined that NRS 175.211 sufficiently differs from the Louisiana instruction and therefore does not constitute a denial of due process, *see Ramirez*, 136 F.3d at 1211-13; *Lord v. State*, 107 Nev. 28, 40, 806 P.2d 548, 556 (1991). In light of the foregoing, Herrera fails to demonstrate the reasonable doubt instruction amounted to plain error. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Carli Lynn Kierny, District Judge
Lowe Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk