

IN THE SUPREME COURT OF THE STATE OF NEVADA

BYRON JAMES FORE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43456

FILED

NOV 24 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery by a prisoner in lawful custody with the use of a deadly weapon. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Byron James Fore to serve a prison term of 48 to 120 months.

Fore first contends that reversal of his conviction is warranted because the prosecutor committed misconduct by expressing his personal opinion that defense witness, Ely State Prison inmate William Irwin, was a liar. Irwin testified that, two months after arguing with the victim over whether there were "skin head gangs in prison," he stabbed the victim nine times. Irwin had previously pleaded guilty to the battery and testified at Fore's trial that Fore was not involved in the attack in any way.

During closing argument, the prosecutor discussed Irwin's testimony stating:

[C]orrectional officers who were right there involved say well this lasts about a minute it was plenty of time for correctional officers to see what was happening in front of them. They both testified with credibility that Fore was armed and that [the victim] was seriously injured.

Now I don't know and it's not my job to figure out if Irwin was lying. Now [defense counsel] said that [Irwin] came here today, he got

this off his chest. I don't think he's too worried about getting anything off his chest. He didn't seem so concerned. He was trying to take the fall. He's entered his plea. He wants to help his buddy.

Fore, however, did not object to the alleged prosecutorial misconduct. This court has recognized that the failure to object to prosecutorial misconduct at trial precludes appellate review unless the asserted error is plain or constitutional in magnitude.<sup>1</sup> We conclude that no such error occurred in this case. The prosecutor did not improperly express a personal opinion that Irwin was a liar, but instead argued that Irwin had a motive to lie and the correctional officers' testimony was more credible. That type of argument is permissible under our case law.<sup>2</sup>

Fore next contends that reversal of his conviction is warranted because the State failed to gather exculpatory evidence by procuring the testimony of a former correctional officer, who purportedly would have testified that Fore was not involved in the altercation. Fore contends that the jury should have been given an instruction informing them of the correctional officer's testimony because the State's failure to obtain a forwarding address for him amounted to gross negligence. We conclude that Fore's contention lacks merit. Fore failed to establish that the evidence was likely to have been material or that the State's failure to maintain a current forwarding address was attributable to negligence.<sup>3</sup> Accordingly, reversal of Fore's conviction is not warranted based on the State's failure to gather evidence.

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<sup>1</sup>Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993).


<sup>2</sup>See, e.g., Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990); Klein v. State, 105 Nev. 880, 883-84, 784 P.2d 970, 972-73 (1989).


<sup>3</sup>See Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998).


Finally, citing to Brady v. Maryland,<sup>4</sup> Fore contends that the district court erred in denying his motion seeking the criminal histories of the State's witnesses. Fore contends that the criminal histories of the State's witnesses were relevant because the case turned on witness credibility. We conclude that Fore failed to allege a sufficient factual predicate entitling him to the criminal histories of the State's witnesses.<sup>5</sup> Moreover, Fore failed to cite any relevant legal authority requiring the State to provide such information where the defendant's request is broad, speculative and unsupported by a specific factual basis.<sup>6</sup> Accordingly, the district court did not err in denying the motion.

Having considered Fore's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Gibbons

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<sup>4</sup>373 U.S. 83 (1963).

<sup>5</sup>Sonner v. State, 112 Nev. 1328, 1340-41, 930 P.2d 707, 715 (1996).

<sup>6</sup>Cf. id. at 1340, 930 P.2d at 715 ("the State is under no obligation to accommodate a defendant's desire to flail about in a fishing expedition to try to find a basis for discrediting a victim").

cc: Hon. Steve L. Dobrescu, District Judge  
State Public Defender/Carson City  
State Public Defender/Ely  
Attorney General Brian Sandoval/Ely  
White Pine County Clerk