IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN DEAN COMSTOCK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44540

FILED

DEC 23 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of stolen property. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. The district court adjudicated appellant Stephen Dean Comstock as a habitual criminal and sentenced him to serve a prison term of 10-25 years.

Comstock contends that the district court erred in denying his motion for a new trial based on (1) newly discovered evidence,[1] and (2) the State's failure to disclose exculpatory information.[2] The victim provided a statement for inclusion in the presentence investigation report (PSI) prepared by the Division of Parole and Probation. In it, the victim stated, in part –

> I am not convinced that my ring was stolen. To have a clear conscience in this matter, I have to bring up the possibility that I may have placed my ring on the ground while outside my apartment washing my motorcycle. . . . I don't remember putting it back on. . . . I volunteered this info to

[1]NRS 176.515(1) states that "[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence."

[2]See Brady v. Maryland, 373 U.S. 83 (1963).

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> Detective Reed & Detective Erickson but it never came up [at] trial. I never realized my ring was even missing until Detective Reed called [and] said he found it in [the] pawn shop. I'd hate to see this gentleman sentenced for possession of stolen property if it was out of my ignorance of misplacing it.

(Emphasis added.) After reviewing the PSI and the victim's statement, Comstock filed a motion for a new trial. The State opposed the motion and the district court subsequently denied the motion without conducting an evidentiary hearing. Comstock claims that the victim's statement provides newly discovered impeachment evidence and is reversible error due to the State's failure to disclose. We disagree.

First, we conclude that the victim's statement does not amount to newly discovered evidence warranting a new trial. The victim's statement is mere speculation – he wrote only that it was possible that he left the ring outside. Further, the victim's statement does not contradict his trial testimony or rise to the level of a recantation.[3] The victim testified that he was not aware of ever dropping the ring while outside, but that he "could have" without knowing it. In fact, the victim stated that he was not even aware the ring was missing until he was contacted by Reno detectives. The victim was also asked on cross-examination by defense counsel whether he ever lost the ring outside his apartment, to which the victim replied, "I don't know." The impeachment value of the victim's statement was minimal and would not have created a reasonable probability of a different verdict had the information been disclosed to the

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[3]See Callier v. Warden, 111 Nev. 976, 989-90, 901 P.2d 619, 627-28 (1995).

jury.[4] Therefore, we conclude that the district court did not abuse its discretion in rejecting this claim.[5]

Second, we conclude that the State's alleged failure to disclose information did not violate the mandate of Brady. Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense.[6] A claim that the State committed a Brady violation must show that (1) the evidence at issue is favorable to the accused; (2) the State failed to disclose the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.[7] If a specific request is made for information, materiality may be established upon a showing that a different result would have been reasonably possible if the evidence had been disclosed.[8] Determining whether the State adequately disclosed information under Brady involves both questions of fact and law, therefore, this court will conduct a de novo review.[9]

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[4]See Mortensen v. State, 115 Nev. 273, 286-87, 986 P.2d 1105, 1114 (1999) (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)).

[5]See Servin v. State, 117 Nev. 775, 791-92, 32 P.3d 1277, 1289 (2001); Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85.

[6]See Strickler v. Greene, 527 U.S. 263, 280 (1999); see also Kyles v. Whitley, 514 U.S. 419, 441-45 (1995) (holding that the prosecution must also disclose evidence that provides grounds for the defense to impeach the credibility of prosecution witnesses).

[7]Id. at 281-82.

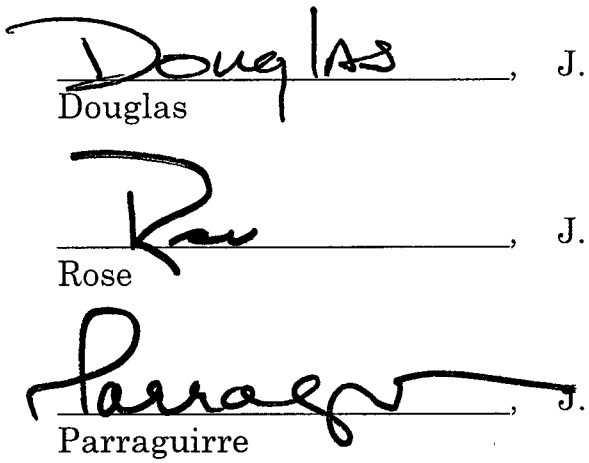
[8]See Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996).

[9]See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003).

Initially, we note that the State disputes the assertion in the victim's statement that he "volunteered" information suggesting that he misplaced his ring while washing his motorcycle. Further, Comstock cannot demonstrate that the allegedly withheld evidence was either exculpatory or material, or that there was a reasonable possibility of a different outcome had the victim's post-verdict statement been disclosed to the jury prior to the rendering of a verdict. Therefore, we conclude that the district court did not err in rejecting this claim.

Having considered Comstock's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas

_____, J.
Rose

_____, J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
Jack A. Alian
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk