IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD BENNETT TABISH, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 45189
RICHARD BENNETT TABISH, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 47312

FILED

FEB 29 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 45189 is an appeal from a judgment of conviction, upon a jury verdict, of one count of conspiracy to commit burglary/larceny, one count of burglary, and one count of grand larceny. Docket No. 47312 is an appeal from orders of the district court denying a post-conviction petition for a writ of habeas corpus and other post-conviction motions. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. We previously consolidated these cases for all appellate purposes.

In 2000, appellant Richard Tabish was convicted of conspiracy to commit murder and/or robbery, murder with use of a deadly weapon, and robbery with use of a deadly weapon (Binion counts); conspiracy to commit burglary and/or grand larceny, burglary, and grand larceny (silver counts); and conspiracy to commit extortion, first-degree kidnapping with use of a deadly weapon, assault with a deadly weapon, and extortion with use of a deadly weapon (Casey counts). Tabish appealed, and in 2003, this court affirmed the Casey counts, but reversed and remanded for a new

trial on the Binion counts and the silver counts.[1] On retrial in 2004, the jury found Tabish guilty on the silver counts and not guilty on the Binion counts.

Tabish now appeals from the judgment of conviction on the silver counts and from the district court's denial of certain post-conviction motions and a post-conviction habeas petition. The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition. We conclude that all of Tabish's assignments of error are without merit, and we affirm the judgment of conviction and the district court orders in their entirety.

Denial of post-conviction petition for writ of habeas corpus

In December 2003, Tabish filed a post-conviction petition for writ of habeas corpus, challenging the conviction on the Casey counts. In his petition, Tabish argued that the State "knowingly proffered a fabricated motive" for the Casey counts, "elicited and failed to correct materially false statements from its witnesses," and committed misconduct by refusing to grant immunity to defense witnesses. Tabish claimed that this prosecutorial misconduct "infected the trial so prejudicially and unfairly" as to deny him due process and that absent the fabricated motive and false statements, there was insufficient evidence to support Tabish's convictions. Tabish also alleged that newly discovered evidence involving Casey's testimony would have led to acquittal at trial had it been presented. The district court denied the petition.

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[1]Tabish v. State, 119 Nev. 293, 314, 72 P.3d 584, 597 (2003).

We determine that Tabish waived his prosecutorial misconduct claims by failing to raise them on direct appeal and by failing to demonstrate good cause for his failure to present them and actual prejudice.[2] To the extent that Tabish claimed that his appellate counsel was ineffective for failing to raise these claims on direct appeal, he failed to demonstrate that these claims would have had a reasonable probability of success on appeal. We determine that the district court properly rejected Tabish's claim concerning newly discovered evidence for two reasons. First, Tabish has failed to demonstrate good cause for failing to present the issue to the district court in a timely-filed motion for a new trial under NRS 176.515(3).[3] Second, Tabish has not demonstrated that the district court erred by finding that the evidence was not newly discovered.[4] For these reasons, we affirm the district court's denial of Tabish's petition for a writ of habeas corpus.[5]

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[2]See NRS 34.810(1)(b), (3).

[3]See NRS 34.810(1)(b).

[4]See Mortensen v. State, 115 Nev. 273, 286, 986 P.2d 1105, 1114 (1999) (requiring a defendant to establish that the evidence upon which a motion for a new trial rests is newly discovered).

[5]See Kirksey v. State, 112 Nev. 980, 987, 998, 923 P.2d 1102, 1107, 1114 (1996) (holding that to demonstrate ineffective assistance of appellate counsel a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that "the omitted issue would have a reasonable probability of success on appeal"); see also Strickland v. Washington, 466 U.S. 668 (1984).

Denial of motion to dismiss and motion for arrest of judgment for lack of venue

In June 2004, Tabish moved to dismiss the silver counts for lack of venue and lack of jurisdiction. The district court denied the motion. In March 2005, after he had again been convicted on the silver counts, Tabish moved for arrest of judgment, making the same arguments that he made in the motion to dismiss. The district court denied this motion as well. Tabish argues that the district court abused its discretion by denying the motions because the Nye County justice court retained exclusive original jurisdiction of the case under NRS 171.060 and NRS 174.085(6)(a) and the charging document was fatally defective because it failed to establish a nexus with Clark County. We conclude that Tabish's contentions are without merit and that venue was proper in the Clark County district court under NRS 171.030.

We review a district court's decision to deny a motion to dismiss for an abuse of discretion.[6] Tabish's motions raise issues of statutory construction, and this court reviews questions of statutory construction de novo.[7] "When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them 'in a way that would not render words or phrases superfluous or make a provision nugatory.'"[8] "Further, it is the duty of this court,

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[6]McNelton v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999).

[7]Nelson v. Heer, 123 Nev. ___, ___, 163 P.3d 420, 425 (2007).

[8]Southern Nev. Homebuilders v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990), overruled on other grounds by Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000)).

when possible, to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent."[9]

Although Tabish argues that Clark County lacked jurisdiction, NRS 171.030, NRS 171.060, and NRS 174.085(6)(a) are not jurisdictional statutes. Rather, NRS 171.030 and NRS 171.060 govern venue, and NRS 174.085(6)(a) prevents prosecutors from dismissing and refiling a criminal complaint in order to have a different judge assigned to the case. To the extent that Tabish argues that these statutes limited the authority of the Clark County district court to preside over his trial on the silver counts, his argument concerns venue, not jurisdiction.

We determine that venue was proper in Clark County under NRS 171.030. Under NRS 171.030, venue for prosecution of a public offense is proper in any county in which acts constituting or requisite to the consummation of the offense take place. NRS 171.030 provides:

> When a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the venue is in either county.

In this case, the silver theft occurred in Nye County, but several acts that were requisite to the theft occurred in Clark County. It was in Clark County that Binion commissioned Tabish to build an underground vault, and thus it was there that Tabish saw the silver, became involved in the

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[9]Id. (quoting Washington v. State, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)).

appraisal process and ascertained the amount of silver and its worth, learned exactly where the silver was kept after it was removed from Clark County and how to access it, and acquired the vehicles he used to excavate the silver. Further, it was in Clark County that Tabish conspired to steal the silver from the vault. All of these acts qualify as acts "constituting or requisite to the consummation of the offense," and therefore venue was proper in Clark County.

However, Tabish argues that Clark County was an improper venue for the prosecution of the silver charges under NRS 171.060 or NRS 174.085(6)(a). First, we conclude that NRS 171.060 is not applicable to the instant case. NRS 171.060 provides:

> When property taken in one county by burglary, robbery, larceny or embezzlement has been brought into another, the venue of the offense is in either county, but if, at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former.

NRS 171.060 deems venue proper in both the county where a defendant takes property by burglary, robbery, larceny, or embezzlement and in any county into which the defendant subsequently carries the property. It further provides a procedural process for transporting the defendant if both counties choose to prosecute. In this case, NRS 171.060 does not apply because Tabish did not actually remove the silver from Nye County. Therefore, NRS 171.060 is inapplicable to the facts of this case.

Next, we consider and reject Tabish's argument that under NRS 174.085(6)(a), prosecution of the silver charges was proper only in Nye County. Tabish asserts that NRS 174.085(6)(a) requires a re-filed complaint to be assigned to the same judge to whom it was initially

assigned, thus implicitly limiting venue to the first county in which charges were filed. Because Tabish's interpretation of NRS 174.085(6)(a) as a statutory limitation on venue would lead to absurd results, we reject Tabish's argument and conclude that venue for prosecution of the silver charges was proper in Clark County.

The Legislature enacted NRS 174.085(6)(a) to prevent prosecutors from "judge shopping," or dismissing a complaint and refiling it in the same county so as to have a new judge assigned to the case.[10] NRS 174.085(6)(a) states:

> If a prosecuting attorney files a subsequent complaint after a complaint concerning the same matter has been filed and dismissed against the defendant:
>
> (a) The case must be assigned to the same judge to whom the initial complaint was assigned.

NRS 174.085(6)(a) places no limitation on a county's venue; it is concerned solely with preventing prosecutors from attempting to shop for judges within the same county. If we accept Tabish's interpretation of NRS 174.085(6)(a), a prosecutor in any county where venue was proper could prevent any other county from prosecuting a case simply by filing and dismissing charges. We decline to interpret NRS 174.085(6)(a) in a manner that would make venue improper in contravention of the clear and unambiguous language of NRS 171.030, which deems venue proper in any county in which acts constituting or requisite to the consummation of an offense take place. Accordingly, we do not read NRS 174.085(6)(a) as

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[10]Hearing on A.B. 270 Before the Senate Comm. on Judiciary, 69th Leg. (Nev., June 30, 1997).

placing any limitation on venue. We therefore determine that the district court did not abuse its discretion by denying Tabish's motion to dismiss and motion for arrest of judgment.

Denial of motion for credit for time served

In April 2005, Tabish supplemented his motion for arrest of judgment and moved for the district court to apply time credits to his sentences on the silver counts. He argued that the district court should apply the 451 days of presentence credit he received in his original judgment of conviction and the 72 months that he served discharging the original Binion count 1 (conspiracy to commit murder and/or robbery) toward his sentences for the silver counts. The district court denied the motion. Tabish argues that the district court erred by refusing to apply the presentence credits and time served to his sentence on the silver counts. We disagree.

NRS 176.055 governs the application of credit for presentence confinement.[11] This court has noted that "the purpose of NRS 176.055 . . .

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[11]NRS 176.055(1) provides:

> Except as otherwise provided in subsection 2, whenever a sentence of imprisonment in the county jail or state prison is imposed, the court may order that credit be allowed against the duration of the sentence, including any minimum term thereof prescribed by law, for the amount of time which the defendant has actually spent in confinement before conviction, unless his confinement was pursuant to a judgment of conviction for another offense. Credit allowed pursuant to this subsection does not alter the date from which the term of imprisonment is computed.

is 'to ensure that all time served is credited towards a defendant's ultimate sentence.'"[12] Thus, presentence credit should be applied once where concurrent sentences are imposed.[13] "'The credit applied once, in effect, is applied against each concurrent sentence. This is done because the longest term of the concurrent sentences determines the total length of the imprisonment.'"[14]

Here, the district court imposed the sentences for the Binion count 1 and the Casey counts to run concurrently, and therefore the 451 days of presentence credit and the 72 months of time served were applied toward the sentences for each of these counts. This court's reversal of the Binion counts did not affect the application of either the presentence or the time-served credit to the sentences on the Casey counts. Because the district court imposed Tabish's sentences for the silver counts to run consecutively to those for the Casey counts, he is not entitled to have the presentence or time-served credit applied toward his sentences for the silver counts.[15] Therefore, we determine that the district court did not err by denying Tabish's motion for time credits.

Denial of motion to modify an illegal sentence

In December 2003, Tabish filed a motion to modify his sentences on the Casey counts. In the motion, Tabish argued that the

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[12]Johnson v. State, 120 Nev. 296, 299, 89 P.3d 669, 671 (2004) (quoting Kuykendall v. State, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996)).

[13]Id.

[14]Id. (quoting State v. Tauiliili, 29 P.3d 914, 918 (Haw. 2001)).

[15]See id.; Tauiliili, 29 P.3d at 918.

sentences were illegal because the district court improperly considered Tabish's convictions on the Binion and silver counts, which this court had reversed. The district court denied the motion. We conclude that the district court did not err in denying the motion.

A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment."[16] A motion to modify a sentence that raises issues outside the very narrow scope of permissible issues may be summarily denied.[17]

At the hearing on Tabish's motion, the district court, in expressing its rationale for imposing the sentences on the Casey counts, stated, "Forget the murder. Forget the burglary." It then summarized the events detailed in the presentence report concerning the Casey counts and concluded by stating, "This is what I have in front of me. Forget the murder case. Forget the burglary case." The record thus reflects that the district court did not improperly consider Tabish's other convictions or base its decision on mistaken assumptions concerning his criminal record. Accordingly, we affirm the district court's denial of the motion to modify sentence.

Sufficiency of the evidence

Tabish argues that his convictions on the silver counts are not supported by sufficient evidence. Specifically, Tabish claims that (1) he could not have committed burglary because he had permission to enter the

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[16]Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

[17]Id. at 708-09 n.2, 918 P.2d at 325 n.2.

vault and therefore, the State could not have proven asportation of the silver; (2) he was entrapped by estoppel, which negates the elements necessary to sustain convictions for conspiracy, burglary, and larceny; and (3) the State argued impermissible theories of vicarious liability.[18] We determine that Tabish's convictions are supported by sufficient evidence.

This court will not overturn a verdict on appeal if it is supported by sufficient evidence.[19] "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt."[20] Additionally, "'[i]t is for the jury to determine what weight and credibility to give various testimony.'"[21]

Conspiracy

A conspiracy is "'an agreement between two or more persons for an unlawful purpose.'"[22] "'Evidence of a coordinated series of acts

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[18]Tabish also argues that the State impermissibly changed its theories of liability, which denied him due process. We have considered this claim and conclude that it lacks merit. The charging document provided Tabish with adequate notice of the theories of liability that the State pursued at trial.

[19]Buff v. State, 114 Nev. 1237, 1242, 970 P.2d 564, 567 (1998).

[20]Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

[21]Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (quoting Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994)).

[22]Bolden v. State, 121 Nev. 908, 912, 124 P.3d 191, 194 (2005) (quoting Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996),

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furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction.'"[23] "'However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy.'"[24]

The State adduced evidence at trial establishing that Murphy told her beautician that Tabish and his associates intended to excavate silver from Binion's vault after Binion's death from a drug overdose, which Murphy indicated would occur soon. The State also presented evidence that while Tabish was excavating the silver, there were four phone calls placed from a cellular phone attributed to Murphy to a cellular phone attributed to Tabish. Finally, the State presented evidence from Dario Costantino, the bail bondsman who helped arrange bail for Tabish, that Tabish and Mike Milot stated that they needed to post bail for Dave Mattsen immediately because they did not "want him to talk."

Based on this evidence, a rational trier of fact could have found the essential elements of conspiracy beyond a reasonable doubt. Specifically, a rational trier of fact could have found that Tabish actually entered into an agreement with at least one other person to commit

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overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).

[23]Id. at 912-13, 124 P.3d at 194 (quoting Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000), overruled in part by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002)).

[24]Id.

burglary and larceny with respect to the vault and the silver. Accordingly, we conclude that Tabish's conviction for conspiracy to commit burglary and/or larceny is supported by sufficient evidence.

Burglary and grand larceny

NRS 205.220(1)(a) states that a person commits grand larceny if he intentionally "steals, takes and carries away, leads away, or drives away" another person's goods or property worth $250 or more. NRS 205.060(1) states that a person who enters any one of several facilities with the intent to commit grand larceny is guilty of burglary. Larceny and burglary are specific intent crimes.[25]

Although Tabish maintains that he had permission to enter the vault from Binion and from law enforcement, Sheriff Wade Lieseke testified that he told Mattsen that he could not authorize anyone to remove property from the vault. Lieseke also testified that when Binion was still alive, Binion asked him to watch the site because he did not want anyone excavating there. Furthermore, Tabish admitted that he lied to Nye County police officers when they approached the site and asked him to explain his activities–Tabish told Sergeant Ed Howard that he was cleaning up concrete, when in fact he was removing the silver from the vault. The police officers then discovered silver in some of Tabish's equipment.

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[25]See Crane v. State, 88 Nev. 684, 686-87, 504 P.2d 12, 13 (1972) (indicating that larceny is a specific intent crime); Crawford v. State, 121 Nev. 744, 749, 121 P.3d 582, 585 (2005) (indicating that burglary is a specific intent crime).

Based on this evidence, a rational trier of fact could find the essential elements of larceny and burglary beyond a reasonable doubt. Specifically, a rational trier of fact could determine that Tabish intentionally stole and carried away more than $250 worth of Binion's property and that Tabish entered the vault intending to steal the silver. Accordingly, we conclude that Tabish's convictions for grand larceny and burglary are supported by sufficient evidence.

Additionally, we have considered Tabish's argument that the State argued and the district court instructed the jury on a legally erroneous theory of vicarious liability in violation of this court's recent holding in Bolden v. State.[26] We conclude that his contention is without merit because the district court's instruction complied with the requirements for instructing juries on specific intent crimes as set forth in Bolden.[27]

Denial of motion to sever the Binion counts from the silver counts

Before the new trial on the Binion and silver counts, Tabish filed a motion to sever the Binion counts from the silver counts. The district court denied the motion. First, we reject the State's contention that this issue is controlled by the law of the case,[28] because in Tabish v. State,[29] Tabish did not challenge the joinder of the Binion counts with the

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[26]121 Nev. 908, 124 P.3d 191 (2005).

[27]Id. at 922, 124 P.3d at 200-01.

[28]See State v. Dist. Ct. (Riker), 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005) ("[T]he law of a prior appeal is the law of the case in later proceedings in which the facts are substantially the same.").

[29]119 Nev. 293, 72 P.3d 584 (2003).

silver counts. Second, we determine that the district court did not abuse its discretion in denying Tabish's motion to sever.

This court reviews a district court's decision to join or sever charges for an abuse of discretion.[30] "Error resulting from misjoinder of charges is harmless unless the improperly joined charges had a substantial and injurious effect on the jury's verdict."[31]

Under NRS 173.115(2), the State may charge two or more offenses in the same information, with a separate count for each offense, if the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Here, the State's theory of the case was that Tabish and Murphy killed Binion in order to steal the silver and enjoy the resultant financial prosperity. Under this theory, the Binion counts and the silver counts constituted parts of a common scheme or plan because Tabish had to commit the former in order to commit the latter. Furthermore, any prejudicial effect resulting from the joinder of the Binion and the silver counts was adequately addressed by the district court's limiting instruction.[32] We

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[30]Weber v. State, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005).

[31]Id. at 570-71, 119 P.3d at 119.

[32]Tabish v. State, 119 Nev. 293, 304, 72 P.3d 584, 591 (2003) ("In assessing the potential prejudice created by joinder, this court has held that '[t]he test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever.' When some potential prejudice is present, it can usually be adequately addressed by a limiting instruction to the jury.") (alteration in original) (quoting Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 367 (2002), overruled on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005)).

therefore conclude that the district court did not abuse its discretion by denying Tabish's motion to sever the Binion counts from the silver counts.

Denial of motion for mistrial based on admission of alleged hearsay statements

During the new trial on the Binion and silver counts, Tabish moved for a mistrial on the silver counts based on hearsay testimony that the State had elicited two days earlier from Binion's attorney, Richard Wright. The district court denied the motion. Tabish argues that the district court abused its discretion in denying the motion. We disagree.

"When testimony has been improperly admitted in violation of the hearsay rule, we must determine whether the error was harmless beyond a reasonable doubt."[33] "An error is harmless when it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"[34] Additionally, this court will not reverse a district court's decision to deny a motion for a mistrial "'absent a clear showing of abuse.'"[35]

We conclude that, even if the district court erred by admitting Wright's testimony, the error was harmless because the jury acquitted Tabish of the Binion counts, and, as discussed above, Tabish's convictions on the silver counts are supported by sufficient evidence absent the error.

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[33]Weber, 121 Nev. at 579, 119 P.3d at 124.

[34]Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. ___, 147 P.3d 1101 (2006) (quoting Neder v. U. S., 527 U.S. 1, 18 (1999)).

[35]Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (quoting Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001)).

Thus, we conclude that the district court did not abuse its discretion by denying Tabish's motion for a mistrial.

Denial of motion for a new trial and request for evidentiary hearing based on allegedly perjurious testimony by a witness

After the jury returned its verdict in the new trial, Tabish filed a motion to dismiss or, in the alternative, for a new trial based on newly discovered evidence and requested an evidentiary hearing. The motion was based primarily on Tabish's assertion that Sheriff Lieseke committed perjury concerning his knowledge of the vault's location and contents, the degree to which he participated in a taped interview of Tabish, whether he gave Tabish permission to enter the vault site, and whether he initially went to the incorrect site when he was summoned to the vault. The motion also alleged that the State was aware of the alleged perjury. The district court denied the motion for a new trial, concluding that the evidence was not newly discovered or material to the defense. Tabish now claims that when the district court denied his request for an evidentiary hearing, it improperly abdicated the fact-finding process and deprived him of the opportunity to present proof. We reject Tabish's contention.

This court has held that a district court's refusal to conduct an evidentiary hearing into alleged misconduct is not improper if the misconduct was not prejudicial.[36] Additionally, this court reviews the district court's decision to deny a motion for new trial for an abuse of discretion.[37]

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[36]Johnson v. State, 118 Nev. 787, 797, 59 P.3d 450, 457 (2002).

[37]Steese v. State, 114 Nev. 479, 490, 960 P.2d 321, 328 (1998).

Where a defendant moves for a new trial based on newly discovered evidence, this court has held that

> the defendant must show that the evidence is newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.[38]

We conclude that Tabish failed to demonstrate that he could not have discovered and produced the proferred evidence with the exercise of reasonable diligence. We conclude further that any additional evidence suggesting that Sheriff Lieseke perjured himself by denying that he had given anyone permission to enter the vault site would not render a different result reasonably probable, because Tabish had already claimed that Lieseke had given him permission and Lieseke had already denied it. Accordingly, we conclude that the district court did not abuse its discretion by denying Tabish's motion for a new trial and request for an evidentiary hearing.

Prosecutorial misconduct and Brady violations

In 2004, Tabish filed a motion pursuant to Brady v. Maryland[39] for specific discovery of materials not disclosed by the State. The district court apparently granted the Brady motion as to materials not

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[38]Mortensen v. State, 115 Nev. 273, 286, 986 P.2d 1105, 1114 (1999).

[39]373 U.S. 83 (1963).

previously disclosed. On appeal, Tabish argues that the State committed misconduct by withholding exculpatory Brady material and that this failure to disclose denied Tabish a fair trial under the United States Constitution and the Nevada Constitution. We reject Tabish's contention.

To determine whether the State has adequately disclosed Brady information, this court must consider both factual circumstances and legal issues.[40] Accordingly, this court reviews de novo a district court's decision concerning a motion for discovery of Brady materials.[41]

This court has held that "Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. . . . [E]vidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed."[42] This court has summarized the three components of a Brady violation: "the evidence at issue is favorable to the accused; the evidence was withheld by the [S]tate, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material."[43]

We conclude, first, that to the extent Tabish's motion concerned counts on which Tabish was acquitted, there was no prejudice, and thus the third component of a Brady violation has not been satisfied. We conclude, second, that Tabish has failed to establish that had the

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[40]Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

[41]Id.

[42]Id. (internal citations omitted).

[43]Id. at 67, 993 P.2d at 37.

additional materials that he requested been disclosed, there is a reasonable probability that the result would have been different. Finally, we conclude that Tabish has failed to demonstrate that any of these items would actually be exculpatory. Accordingly, we conclude that Tabish has not established prosecutorial misconduct or Brady violations warranting reversal.

Denial of motion for a new trial on the Casey counts

Tabish argues that he is entitled to a new trial on the Casey counts for the following reasons: (1) his acquittal on the Binion counts in the second trial effectively constitutes newly discovered evidence; (2) the jury in the first trial rendered a general verdict that could have been based on legally valid or invalid grounds, which contravenes this court's recent holding in Bolden v. State;[44] (3) Garcia v. State[45] requires this court to set aside Tabish's conviction for false imprisonment incidental to extortion; and (4) Walters v. State[46] requires this court to set aside the sentence enhancement for use of a deadly weapon. We reject each of Tabish's arguments.

Although Nevada does not have a statutory definition of "evidence," the definition contained in California's evidence code is instructive: "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or

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[44]121 Nev. 908, 124 P.3d 191 (2005).

[45]121 Nev. 327, 113 P.3d 836 (2005).

[46]108 Nev. 186, 825 P.2d 1237 (1992).

nonexistence of a fact."[47] We conclude that under this definition, an acquittal is not evidence, and therefore, Tabish's acquittal on the Binion counts does not constitute newly discovered evidence warranting a new trial.

We note that Tabish never pursued these claims in a motion for a new trial on the Casey counts in the district court following the first trial.[48] Accordingly, we determine that Tabish's arguments are untimely. To the extent his claim is based on newly discovered evidence, it was brought more than two years after the verdict in the first trial.[49] To the extent his claims are based on other grounds, they were brought more than seven days after the verdict.[50] Moreover, we decline to consider issues regarding the Casey counts raised in the first instance on appeal from the judgment of conviction on the Binion and silver counts. Accordingly, we reject Tabish's contention that he is entitled to a new trial on the Casey counts.

Cumulative error

Tabish asserts that he is entitled to a reversal of his convictions on the silver counts based on the doctrine of cumulative error.

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[47]Cal. Evid. Code § 140 (1967).

[48]Although Tabish asserts that he raised the claim concerning erroneous theories of vicarious liability on direct appeal after the first trial, he failed to include documentation in the record on appeal to support this contention.

[49]See NRS 176.515(3).

[50]See NRS 176.515(4).

"Relevant factors to consider in evaluating a claim of cumulative error include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'"[51]

Tabish faced serious charges on the silver counts. But, as discussed above, sufficient evidence established that Tabish actually entered into an agreement with at least one other person to commit burglary and larceny with respect to the vault and the silver. Sufficient evidence also established that Tabish intentionally stole and carried away more than $250 worth of Binion's property and that Tabish entered the vault intending to steal the silver. Thus, we determine that the issue of Tabish's innocence or guilt on the silver counts is not close. Additionally, any errors—and we do not conclude that there were any—were harmless. Moreover, the quantity and character of any errors was minimal and unremarkable. Consequently, we conclude that Tabish has failed to demonstrate cumulative error and is not entitled to reversal on that ground.

Having considered Tabish's claims and concluded that they lack merit, we

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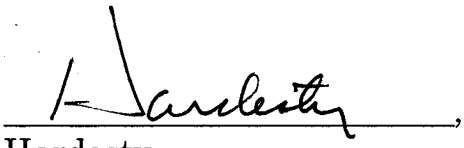
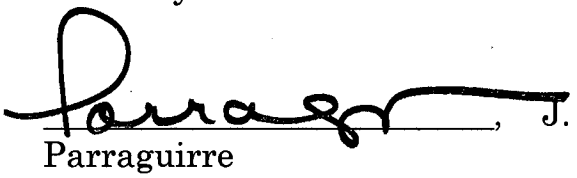
[51]Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (quoting Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1288 (1996)).

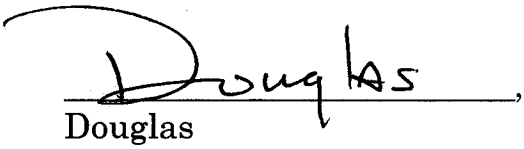
ORDER the judgment of conviction and the orders of the district court AFFIRMED.



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

cc: Eighth Judicial District Court Dept. 6, District Judge
Michael H. Schwarz
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Cristalli & Saggese, Ltd.
Eighth District Court Clerk