IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMAAL JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46202

FILED

NOV 22 2006

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's motion for a new trial.[1] Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On November 20, 2003, the district court convicted appellant Jamaal Johnson, pursuant to a jury verdict, of burglary while in possession of a firearm, conspiracy to commit robbery, and two counts each of robbery with the use of a deadly weapon and first-degree murder with the use of a deadly weapon. The district court sentenced Johnson to serve four consecutive terms of life in prison without the possibility of parole for the two murders, as well as lesser terms for the other crimes. This court affirmed the judgment of conviction and sentence on direct appeal.[2]

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[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

[2]Johnson v. State, Docket No. 42291 (Order of Affirmance, July 11, 2005).

While his direct appeal was pending, Johnson filed a motion for a new trial. After hearing argument, the district court denied the motion. This appeal followed.

When questioned by police about the crimes, Johnson confessed. The State played the tape of his questioning at trial. Johnson testified at trial, denied any role in the killings, and claimed his confession was coerced.

Demarco Parker testified at Johnson's trial. Parker had been charged in state and federal court for his role in the crimes. Parker agreed to plead guilty in federal court. The state charges against him were subsequently dropped. Monique Morris also testified against Johnson. Morris had recently pleaded guilty to unrelated federal charges.

This court stated in Mortensen v. State[2] that when a defendant seeks a new trial based on newly discovered evidence,

> 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." The grant or denial of a new trial based on newly discovered

[2]115 Nev. 273, 286-87, 986 P.2d 1105, 1114 (1999) (internal citation omitted).

> evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion.

Johnson's alleged newly discovered evidence consists of documents pertaining to Parker's criminal history, the federal government's agreement to refrain from seeking the death penalty against him in exchange for his guilty plea, his grand jury testimony, his statements to the FBI, Morris's criminal history, her federal plea agreement, the benefits she received for pleading guilty, her grand jury testimony, and her statements to the FBI. Johnson contends the State violated Brady v. Maryland[3] by failing to disclose these documents, that his right to effective cross-examination was violated by the failure, and that the State committed prosecutorial misconduct by failing to correct Morris's testimony about the terms of her plea agreement.

Brady and its progeny require a prosecutor to disclose exculpatory and impeachment evidence that is material to the defense.[4] A claim that the State committed a Brady violation must show that: the evidence at issue is favorable to the accused; the State failed to disclose the evidence, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.[5] If no request or only a general request for

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[3]373 U.S. 83 (1963).

[4]See Strickler v. Greene, 527 U.S. 263, 280 (1999).

[5]Id. at 281-82.

information is made, the evidence is material if there is a reasonable probability that the result of the trial would have been different had the evidence been disclosed.[6] If the request is specific, however, materiality may be established upon the lesser showing that a different result was reasonably possible if the evidence had been disclosed.[7] The undisclosed evidence is considered collectively and not item by item.[8]

A "working relationship" between the State and the federal government may obligate the State to obtain and disclose information in the possession of the federal government.[9] From the record before us, we cannot establish the relationship between the State and the federal agencies involved in this case. Nor can we establish whether the State attempted to obtain the information Johnson claims should have been disclosed.

Without deciding whether the State actually or constructively possessed the information, we conclude that disclosure of the information would not, collectively or individually, have made a different outcome "reasonably probable" or "reasonably possible." For the same reasons, the

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[6]See id. at 289, 296.

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

[8]See Kyles v. Whitley, 514 U.S. 419, 436 (1995).

[9]See Wade v. State, 115 Nev. 290, 296-97, 986 P.2d 438, 442 (1999) (modifying Wade v. State, 114 Nev. 914, 918-19, 966 P.2d 160, 163-64 (1998)).

information was not material under Mortensen. Parker testified on direct examination that he was serving a federal life-without-parole sentence for his role in the crimes and that he had prior convictions for robbery, possession of a controlled substance, and ex-felon in possession of a firearm. The jury also learned that his federal plea agreement provided that the government could request a reduced sentence if he cooperated in the prosecution of another. Appellate counsel asserts that further evidence would have disclosed that Parker had a prior charge and/or conviction for escape, but we conclude that putting this additional information before the jury had no likelihood of affecting the outcome of Johnson's trial.

Aside from appellate counsel's assertion, there is no indication in the record that the federal government agreed not to seek the death penalty against Parker in exchange for his guilty plea. Nor would such information have been material given the substantial impeachment evidence presented.

Johnson sets forth no facts to demonstrate that Parker's or Morris's grand jury testimony or statements to the FBI exculpated Johnson or were different from their trial testimony. Johnson also fails to demonstrate that Morris had a prior criminal history, other than the federal charges she pleaded guilty to, which were discussed at Johnson's trial.

The State did not call Morris to testify until its rebuttal case, after Johnson testified that he spoke to her after the killings but did not really remember the substance of their conversation. Morris testified that

she had read her guilty plea agreement but did not remember what it said. She did not believe that it required her to testify at Johnson's trial or that she could get any benefit from the federal government for testifying. She then testified that she had spoken to Johnson about the killings and said she had heard that Parker "froze up" during the incident. She said Johnson indicated that was true. On cross-examination, Morris acknowledged that Johnson's responses to her questions were mostly in "grunts and moans" and that Parker's "freezing up" was widely known around the neighborhood. She also said Johnson never told her that he played a role in the crimes and never said he had been there or done anything. Disclosure of Morris's federal plea agreement may have enabled defense counsel to further challenge Morris's credibility, but even if this had occurred, we conclude there was no probability of a different outcome at trial had he done so given the insignificance of Morris's rebuttal testimony and the weight of the other evidence establishing Johnson's guilt.

Next, Johnson contends the State committed prosecutorial misconduct by failing to correct Morris's testimony about the terms of her federal plea agreement. That agreement provided the possibility that her sentence could be reduced if she cooperated; she testified that she was unfamiliar with the terms of the agreement and denied that she was receiving any benefit from testifying. "If the prosecution uses perjured testimony which it knew or should have known was perjurious, a conviction obtained by such testimony is 'fundamentally unfair' and 'must be set aside if there is any reasonable likelihood that the false testimony

could have affected the judgment of the jury.'"[10] Even assuming that Morris deliberately lied and the State knew or should have known of the lie, we conclude there was no reasonable likelihood that the false testimony could have affected the outcome of the trial.

Johnson also contends the district court erred by preventing him from obtaining discovery in connection with his new-trial motion. Johnson's appellate counsel subpoenaed records from various State agencies, some of which responded with motions to quash, which the district court apparently never ruled on. Johnson fails to demonstrate prejudice from the district court's alleged error. He fails to identify any document or information still sought that would have led to a successful motion for a new trial.

Johnson contends his conviction should be reversed based on a jury instruction that was potentially improper pursuant to Bolden v. State,[11] which was decided after Johnson's conviction became final. Johnson failed to raise this argument below, and we thus decline to address it here.[12]

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[10]Jimenez, 112 Nev. at 622, 918 P.2d at 694 (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)).

[11]121 Nev. ___, 124 P.3d 191 (2005). Johnson's conviction became final on August 5, 2005; Bolden was decided on December 15, 2005.

[12]See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).

Finally, Johnson contends cumulative error requires the reversal of his conviction. We disagree. Although we cannot establish from the record whether any of the material sought was constructively or actually in the State's possession, we conclude that none of the material had a reasonable possibility of changing the outcome of Johnson's trial.

Having reviewed Johnson's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Honorable Jackie Glass, District Judge
Lavelle & Associates
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk