

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRED LOUIS WARD A/K/A FREDRICK
LOUIS WARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48758

FILED

MAY 31 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of selling, supplying, and/or giving away a controlled substance. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court sentenced appellant Fred Louis Ward to a prison term of 12-36 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed 36 months.

Ward contends that the district court erred by rejecting an instruction informing the jury that it could presume that evidence not collected and preserved would have been unfavorable to the State. Ward proposed the following instruction:

The State failed to seize and test the glass smoking pipe and cigarette pack that the Defendant allegedly handed the detective for the existence of fingerprints and DNA. Because of this, it is presumed that this evidence would have been unfavorable to the State.

Ward claims that if the glass pipe and cigarette pack had been preserved and tested rather than photographed and destroyed, "there might have been" exculpatory fingerprint evidence. Ward states that the defense theory of the case was that the police arrested the wrong man, and

therefore, identity was an issue, and the failure to preserve the only physical evidence amounted to gross negligence requiring the reversal of his conviction. We disagree.

“The State’s loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.”¹ In proving prejudice to the defendant, “[i]t is not sufficient to show ‘merely a hoped-for conclusion’ or ‘that examination of the evidence would be helpful in preparing [a] defense.’”² This court has stated that in determining whether evidence that was lost is material, the evidence “‘must be evaluated in the context of the entire record.’”³

In this case, the evidence in question was gathered, photographed, then destroyed. Initially, we note that Ward has not provided any authority for the proposition that the State has a duty to conduct any particular test of evidence.⁴ Further, Detective Michael Keating testified that the crime was a hand-to-hand sale of narcotics, witnessed by additional police officers, and the evidence was destroyed because “that’s what we do on our cases with drug paraphernalia. . . . There’s no real need for them.” In rejecting Ward’s proposed instruction, the district court found that the evidence was not material, “but even if

¹Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001).

²Id. (citations omitted).

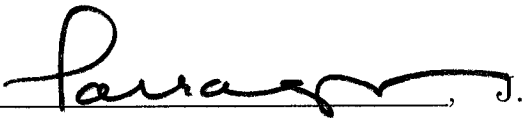
³Klein v. Warden, 118 Nev. 305, 314, 43 P.3d 1029, 1035 (2002) (quoting United States v. Agurs, 427 U.S. 97, 112-13 (1976)).

⁴See Arizona v. Youngblood, 488 U.S. 51, 58-59 (1988).


I'm wrong in that, it's clear that [the destruction] doesn't rise to the level of gross negligence or bad faith, it would have been simple negligence." We agree and also conclude that Ward's argument is merely speculative, and he has failed to prove that had the evidence been preserved that there was a reasonable probability that the result of the trial would have been different.⁵ Therefore, we conclude that the district court did not abuse its discretion by rejecting Ward's proposed jury instruction.⁶

Having considered Ward's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.


Parraguirre


Hardesty


Saitta

⁵See Nolan v. State, 122 Nev. 363, 374-75, 132 P.3d 564, 572 (2006).

⁶Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (“The district court has broad discretion to settle jury instructions, and this court reviews the district court’s decision for an abuse of that discretion or judicial error.”).

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Fred Louis Ward
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk