IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN RODNEY ORTH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49522

FILED

SEP 25 2008

TRACIE K. LINDEMAN
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 trafficking in a controlled substance and two counts of being an ex-felon in possession of a firearm. Second Judicial District Court, Washoe County; Robert H. Perry, Judge. On May 4, 2007, appellant Sean Rodney Orth was adjudicated a habitual criminal and sentenced to serve three concurrent terms of life imprisonment with parole eligibility after ten years.

Orth raises six issues on appeal: (1) the district court improperly admitted evidence of his character, including evidence of a prior bad act, (2) the district court erred in precluding potential exculpatory testimony, (3) his statements made during his arrest were obtained in violation of his Miranda[1] rights, (4) the police did not have valid consent to search Orth's rented vehicle, including the trunk and its contents, (5) the district court erred in adjudicating him a habitual criminal, and (6) the district court erred in denying his motion for a new

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

trial. For the reasons explained below, we conclude that Orth is not entitled to relief on his claims.

Character evidence

Orth first claims that the district court improperly admitted evidence of his character, including evidence of prior bad acts, without first holding a Petrocelli[2] hearing or offering a limiting instruction. Orth's claim is that the cumulative effect of the evidence was that "the jury was focused on [his] prior bad acts and poor character traits and convicted him based upon the prosecutor's efforts over the evidence itself." Specifically, Orth refers to the testimony of Natalie Brignand, Marla Barker, and statements by police officers regarding their investigation of him for a prior misdemeanor. In its brief, the State concedes that some of the evidence was improperly introduced, but notes that Orth did not object to any of the evidence and contends that the errors did not prejudice him.

"Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."[3] In particular, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes."[4] Because Orth did not object to

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[2]Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-508 (1985), reversed in part on other grounds by Petrocelli v. Angelone, 242 F.3d 867 (9th Cir. 2001), opinion corrected and superseded by 248 F.3d 877 (9th Cir. 2001).

[3]NRS 48.045(1).

[4]NRS 48.045(2).

admission of the evidence, plain error review is appropriate.[5] "In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights."[6]

After a careful review of the record, we conclude that admission of the testimony of which Orth complains does not rise to the level of plain error. We do note that testimony that Orth was suspected of a misdemeanor crime was evidence of a prior bad act and was erroneously admitted. However, we conclude that the admission of that evidence did not affect Orth's substantial rights. We also conclude that when viewed in context of the trial as a whole, admission of the other evidence of which Orth complains did not affect his substantial rights and thus does not rise to the level of plain error.

Orth further argues that the district court erred in failing to offer a limiting instruction regarding testimony of his misdemeanor crime. In Tavares v. State, we held that the burden is on the prosecution to request a limiting instruction when prior bad act evidence is admitted and on the district court if the prosecution fails to do so.[7] Accordingly, even if the defense does not raise the issue at trial, we will not apply a plain error standard when reviewing a trial court's failure to offer a limiting instruction. Rather, we will determine "whether the error 'had substantial

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[5]Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008).

[6]Id. (internal quotations and citations omitted).

[7]117 Nev. 725, 30 P.3d 1128 (2001).

and injurious effect or influence in determining the jury's verdict.'"[8] Accordingly, "unless we are convinced that the accused suffered no prejudice as determined by [this] test, the conviction must be reversed."[9] We conclude that the fact that the jury was made aware that Orth was under investigation for an unnamed misdemeanor did not have a substantial or injurious effect or influence in determining the jury's verdict. Accordingly, we conclude that no relief is warranted.

Exclusion of Eric Meyer's testimony

Second, Orth claims that the district court erred in excluding Eric Meyer's testimony at trial. Orth argues that the exclusion of this potentially exculpatory witness infringed on his right to present a defense and warrants reversal. We conclude that Orth's claim lacks merit.

The night before trial, Orth and Meyer had a conversation at the jail. As a matter of standard procedure, the conversation was recorded. The police officers who reviewed the interview interpreted it as Orth coaching Meyer to claim ownership of the guns that had been recovered by the police. The next morning—the morning of trial—Orth sought to have Meyer added to his witness list. Apparently, Meyer intended to testify that he was the owner of the guns that were found in the rental vehicle. The district court found that Orth knew of Meyer's existence and his relevance as a witness for several months before trial and that pursuant to NRS 174.234, Orth's failure to name him as a

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[8]Id. at 731-32, 30 P.3d at 1132 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[9]Id. at 732, 30 P.3d at 1132.

witness was intentional and in bad faith. The district court also determined that the issue of gun ownership was only "marginally relevant to the crime of possession of a firearm."[10] Furthermore, the district court had previously determined that the State's DNA evidence linking the guns to Orth was inadmissible because it had not been disclosed early enough in discovery. However, the district court stated that if Meyer was permitted to testify that he owned the guns, the district court would allow the State to rebut with the DNA evidence. Orth's counsel stated that with that understanding, it was in Orth's best interest not to call Meyer as a witness.

Orth now contends that Meyer was a key witness and the district court's decision violated his constitutional right to prove his theory of the case. In Williams v. State, we reaffirmed "that '[t]he due process clauses in our constitutions assure an accused the right to introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case.'"[11] Orth contends that the appropriate action to take in this case was to continue the trial rather than preclude his right to a fair trial. However, the record does not reflect that Orth requested a continuance.

"'It is within the district court's sound discretion to admit or exclude evidence,' and this court reviews that decision for an abuse of

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[10]See NRS 202.360(1).

[11]110 Nev. 1182, 1185, 885 P.2d 536, 537-38 (1994) (quoting Vipperman v. State, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980)).

discretion or manifest error."[12] When a defendant fails to disclose potentially exculpatory evidence in violation of procedural rules in order to gain a tactical advantage at trial, it is not an abuse of discretion for the district court to preclude that evidence.[13] Here, the district court found that Orth must have known of the relevance of Meyer's testimony well before trial and that Orth made "an intentional choice not to have disclosed that name before." We conclude that the district court acted within its discretion when it excluded Eric Meyer's testimony at trial.

Custodial interrogation

Orth's third claim is that his statement to Detective Reed Thomas shortly after he was arrested was obtained in violation of the Fourth Amendment and should not have been admitted at trial. Officers John Silver and Eric Koch arrested Orth, handcuffed him, and placed him on the curb of the sidewalk. Orth was not read his Miranda rights and made statements to Officer Silver.[14] A short time later, Orth was moved to the back of a patrol car and Detective Thomas advised Orth of the charges against him. Orth became angry. Detective Thomas told Orth he

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[12]Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (quoting Means v. State, 120 Nev. 1001, 1008, 103 P.3d 25, 29 (2004)), cert. denied, ___ U.S. ___, 128 S. Ct. 1061 (2008).

[13]See U.S. v. Henderson, 241 F.3d 638, 650 (9th Cir. 2000) (holding that district court did not abuse its discretion in precluding testimony of alibi witness when witness was not properly disclosed before trial).

[14]Orth's pretrial motions to suppress were the subject of a two-day evidentiary hearing. However, Orth did not include a transcript of this hearing in his appendix and, because the statements were not admitted at trial, the record does not reveal the nature of Orth's statements to Officer Silver.

was not interested in arguing with him and closed the door of the patrol car.

Sometime later, through another officer, Orth requested that Detective Thomas speak to him again. Detective Thomas walked back to the patrol car, rolled the window down, and asked, "What's on your mind, Sean?" Orth replied, "That shit's not mine." Orth also stated that it did not belong to Barker either and argued that the vehicle was not his and that he had not been in it. After several minutes of conversation, Orth told Detective Thomas that he should contact the DEA because he could "buy 5 pounds of dope at two places in Nevada and two in California right now." Orth further stated, "If you were smart, you'd get the DEA down here right now." Police testimony at trial indicated that Orth was attempting to offer them "substantial assistance" in return for leniency.[15]

Orth filed a pretrial motion to suppress his statements to the police. The district court determined that Orth was in custody and that he should have been read his Miranda rights. For that reason, the district court suppressed Orth's statements to Officer Silver. However, the district court found that Orth's statements to Detective Thomas were voluntary and were admissible at trial.

Orth claims that the district court erred because he was not read his Miranda rights when arrested and his statements to Detective Thomas were made under duress. Again, "'[i]t is within the district court's sound discretion to admit or exclude evidence,' and this court reviews that

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[15]See NRS 453.3405.

decision for an abuse of discretion or manifest error."[16] "The Fifth Amendment privilege against self-incrimination requires that a suspect's statements made during custodial interrogation not be admitted at trial if the police failed to first provide a Miranda warning."[17] The term "interrogation" is not limited to express questioning by police, but includes its "functional equivalent."[18] Therefore, the term "interrogation" will be applied to "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[19]

The State concedes that Orth was in custody, but argues that his statements to Detective Thomas were not the result of a custodial interrogation. We agree that the question, "What's on your mind, Sean?" did not constitute a custodial interrogation. Detective Thomas left Orth in the back of a police car and closed the door. All interactions with Orth after that point were at Orth's request. Therefore, we conclude that the district court did not abuse its discretion when it found that Orth's statements to Detective Thomas were not made under duress, but were offered voluntarily.

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[16]Thomas, 122 Nev. at 1370, 148 P.3d at 734 (quoting Means, 120 Nev. at 1008, 103 P.3d at 29).

[17]Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001) (citing Miranda v. Arizona, 384 U.S. 436, 479 (1966)).

[18]Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[19]Id.

Search and seizure

Fourth, Orth asserts that Natalie Brignand did not have authority to consent to a search of the rental vehicle, and thus the search was in violation of the Fourth Amendment. Orth also argues that the search of the trunk of the car and the duffel bag found therein violated the Fourth Amendment.

Orth's vehicle was rented by Brignand, a stranger he had just met. Brignand called the rental agency and made the reservation. She went down to the airport, completed the rental agreement and then gave the vehicle keys to another person, who then gave them to Orth. Brignand testified that she offered to list Orth as an authorized driver so she "could get the insurance, and it would be legal." Orth declined, stating that he did not have a copy of his driver's license and would have to go get one from the DMV. Orth was not listed on the lease agreement as either a party to the agreement or an authorized driver.

Preliminarily, we note that an individual may not challenge a search on Fourth Amendment grounds unless that individual has a reasonable expectation of privacy in the subject of the search.[20] In making such a determination, we must decide whether a defendant had "an actual, subjective expectation of privacy" and if "that expectation was a legitimate, objectively reasonable expectation."[21] We adopt the view that an unauthorized driver of a rental vehicle does not have a legitimate

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[20]Rakas v. Illinois, 439 U.S. 128, 143 (1978).

[21]U.S. v. Smith, 263 F.3d 571, 582 (6th Cir. 2001) (citing Smith v. Maryland, 442 U.S. 735, 740 (1979)).

expectation of privacy in that vehicle.[22] Therefore, we conclude that Orth has failed to make a threshold showing that he is entitled to relief on this claim.

Even assuming that Orth has standing to challenge the search of the rental vehicle, Brignand had authority to authorize a search of that vehicle. "A search conducted without a search warrant issued upon probable cause is considered unreasonable and unconstitutional unless the search falls within a specific exception to the warrant requirement."[23] "One such exception is the valid consent of a third party who possesses actual authority over or other sufficient relationship to the premises or effects sought to be inspected."[24] "Actual authority is proved (1) where defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property."[25] A

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[22]U.S. v. Riazco, 91 F.3d 752, 754-55 (5th Cir. 1996); U.S. v. Wellons, 32 F.3d 117, 119-20 (4th Cir. 1994); U.S. v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990); United States v. Obregon, 748 F.2d 1371, 1374 (10th Cir. 1984); United States v. McCulley, 673 F.2d 346, 352 (11th Cir. 1982). Compare with U.S. v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006) (stating that an unauthorized driver of a rental car does have a legitimate expectation of privacy if an authorized driver gave permission to use the vehicle), and U.S. v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998) (holding that if an unauthorized driver has permission from the renter to use a rental vehicle he has "a privacy interest giving rise to standing").

[23]State v. Taylor, 114 Nev. 1071, 1078-79, 968 P.2d 315, 321 (1998) (citing Katz v. United States, 389 U.S. 347, 357 (1967)).

[24]Id. at 1079, 968 P.2d at 321 (citing United States v. Matlock, 415 U.S. 164, 171 (1974)).

[25]Id. (citing U.S. v. Kim, 105 F.3d 1579, 1582 (9th Cir. 1997)).

district court's determination of a third party's authority to consent to a search is reviewed de novo.[26]

Prior to trial, and again at trial, the district court ruled that "the search of the vehicle . . . was legal, valid, and under all the facts and circumstances, was a proper search." The district court also found that the evidence sought to be suppressed "would inevitably have been discovered."[27] After reviewing the record, we agree with the district court that the search of Orth's vehicle did not violate the Fourth Amendment. The facts demonstrate that Brignand did not have direct access to or control over the vehicle during the two-week period that Orth was using it. However, we conclude that by asking a stranger to rent a vehicle and to place her name on the rental agreement, Orth assumed the risk that Brignand would consent to a search of that vehicle.

Moreover, at a minimum, Brignand had apparent authority to authorize a search of the rental vehicle. If an officer reasonably believes that a third party has authority to consent to a search, the search will not be invalidated on Fourth Amendment grounds.[28] In this case, police officers discovered that the vehicle Orth was driving was a rental car. The police contacted the owner of the vehicle, Alamo Rent-A-Car, and were informed that Brignand was the renter and authorized driver of the

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[26]Id. at 1078, 968 P.2d at 321.

[27]Orth disputes the district court's finding that the evidence would have been discovered inevitably. However, because we conclude that the search was not in violation of the Fourth Amendment, we need not consider this claim.

[28]Id. at 1080, 968 P.2d at 322.

vehicle. We conclude that the investigating officers acted reasonably in contacting Brignand to request consent to search the vehicle.

Orth argues that even if Brignand had authority to consent to a search of his vehicle, that consent did not extend to the duffel bag found in the trunk or the eyeglass case found inside the duffel bag. In Orth's view, the police were required to obtain a separate warrant before searching those containers. Orth relies on United States v. Welch,[29] in which the Ninth Circuit determined that while the defendant's boyfriend could consent to a search of the rental vehicle that they shared, he did not have the actual or apparent authority to consent to a search of the defendant's purse. The court found no indication that the boyfriend had joint access to or control of the girlfriend's purse and concluded that the circumstances did not support a reasonable belief on the part of police that the defendant's boyfriend had authority to consent.[30]

Here, however, the facts presented to detectives would not have led them to question Brignand's authority to consent to a search of the duffel bag. Officer Joseph Lever testified at trial that the trunk was empty other than the black duffel bag. He testified that nothing he found in the trunk had Orth's name on it or led him to believe that the contents belonged to Orth. Testimony at trial indicated that the eye-glass case found in the duffel bag appeared to belong to a woman. The officers had

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[29]4 F.3d 761, 765 (9th Cir. 1993), receded from on other grounds by U.S. v. Kim, 105 F.3d 1579, 1580 (9th Cir. 1997).

[30]Id.

been informed that the vehicle was rented to Brignand, and Brignand did not limit the scope of her consent.

In Florida v. Jimeno, the United States Supreme Court reviewed a search made with a defendant's consent and stated that it is "objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs."[31] We conclude that the same rationale extends to the consent of a third party.[32] Here, the owner of the vehicle was contacted and directed officers to the vehicle's renter. Brignand, the only authorized user of the vehicle, consented to a search of the vehicle. Without information being presented to police officers that would lead them to question Brignand's authority or understand that she limited her consent, we conclude that the investigating officers acted reasonably in searching the trunk of the vehicle and its contents.

We conclude that, for all of the reasons listed above, Orth is not entitled to relief on this claim.

Adjudication as a habitual criminal

Orth's fifth complaint is that the district court erred in adjudicating him a habitual criminal. In particular, Orth contends that (1) he did not have notice that the State was seeking habitual criminal status, (2) his first two felony convictions were companion cases for which he was sentenced on the same day and should be treated as one stale, non-violent crime, (3) his fifth felony conviction, which occurred in New York

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[31]500 U.S. 248, 251 (1991).

[32]See U.S. v. Elliott, 50 F.3d 180, 185-86 (2d Cir. 1995).

state, is not a felony in Nevada, and (4) his third and fourth felonies were non-violent and should not be considered for habitual criminal purposes. For the reasons stated below, we conclude that Orth's claims are without merit.

Orth first complains that he did not have notice of the State's intention to seek a habitual criminal adjudication. The record belies Orth's claim. NRS 207.016(2) specifically permits a habitual criminal count to be filed after a conviction, as long as it is filed at least 15 days prior to sentencing. Five days after trial, on December 11, 2006, the State filed an amended information that included a habitual criminal count. Orth was sentenced on May 4, 2007. We conclude that Orth had proper notice of the State's intention to seek habitual criminal status.

Orth next contends that because his first two felonies and his third and fourth felonies were sets of "companion cases" he should be considered as only having three prior felony convictions, rather than five. In Rezin v. State, we determined that "where two or more convictions grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information, those several convictions may be utilized as only a single 'prior conviction' for purposes of applying the habitual criminal statute."[33]

Here, however, Orth's first two convictions were for separate crimes and were not prosecuted in the same information. Judgments of conviction were filed in both cases on January 14, 1994. However, the record indicates that the crimes occurred on different days, at different

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[33]95 Nev. 461, 462, 596 P.2d 226, 227 (1979).

locations, and did not grow out of the same act, transaction, or occurrence. Therefore, we conclude that the district court properly treated them as separate convictions.

Likewise, Orth's third and fourth felony convictions did not arise out of the same act, transaction, or occurrence. Orth pleaded guilty to possession of a short-barreled shotgun, and a judgment of conviction was entered on October 27, 1998. The crime occurred on August 9, 1998. A separate judgment of conviction was entered on December 10, 1998, after Orth pleaded guilty to eluding a police officer. That crime occurred on September 14, 1998. There is no basis in the record to support Orth's assertion that these two crimes should be treated as one felony conviction.

Next, Orth claims that his conviction in New York would have been a gross misdemeanor in Nevada because he was only sentenced to one year in jail. The State provided the district court with copies of Orth's convictions in New York for second-degree assault and third-degree robbery. The State also provided copies of New York law stating that the penalty for Orth's conviction was a sentence of one to seven years but that judges in New York have the authority to reduce the sentences. The State argued that a judge's exercise of that discretion did not render the crime any less of a felony and that the New York law was based on the fact that New York had already reached its jail population limits. In response to Orth's argument about his New York convictions, the district court stated that it had taken all of the information into consideration. We conclude that the district court understood the nature and history of Orth's convictions in New York, and properly exercised its discretion in considering the New York conviction and adjudicating him a habitual criminal.

Finally, Orth claims that some of his felony convictions should not have been considered for habitual criminal adjudication because they were either stale or non-violent. The district court has the discretion to dismiss a count of habitual criminality,[34] and "[t]he decision to adjudicate a person as a habitual criminal is not an automatic one."[35] "[A] district court may consider facts such as a defendant's criminal history, mitigation evidence, victim impact statements and the like in determining whether to dismiss such a count."[36] We have stated that "it may be an abuse of discretion for the court to enter a habitual criminal adjudication when the convictions used to support the adjudication are nonviolent and remote in time."[37] However, Nevada law does not preclude consideration of such convictions when making a habitual criminal determination. "NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court."[38] "Thus, as long as the record as a whole indicates that the sentencing court was not operating under a misconception of the law regarding the discretionary nature of a habitual

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[34]NRS 207.010(2); O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007), cert. denied, ___ U.S. ___, 128 S. Ct. 153 (2007).

[35]Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

[36]O'Neill, 123 Nev. at 16, 153 P.3d at 43.

[37]Clark, 109 Nev. at 428, 851 P.2d at 427.

[38]Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

criminal adjudication and that the court exercised its discretion, the sentencing court has met its obligation under Nevada law."[39]

Here, the record indicates that the district court properly exercised its discretion. The district court noted that some of Orth's convictions were over ten years old. However, the district court stated that it had reviewed all of the prior convictions and that habitual criminal status was appropriate. Specifically, the district court stated, "I believe, in view of the criminal history that's been indicated here, that it is an appropriate case for the imposition of the habitual criminal because of the nature and length of the criminal history, the nature of the crimes, the fact that they represent clear and obvious threats to members of society and the police." Because the record indicates that the district court properly exercised its discretion in adjudicating Orth a habitual criminal, we conclude that this claim lacks merit.

Motion for new trial

Finally, Orth claims that the district court erred in denying his motion for a new trial. He claims that he is entitled to a new trial because the jury was not made aware of a "deal" between Barker and the State and because the State failed to provide him with potential Brady material. Specifically, Orth claims he was prejudiced because the State withheld DNA evidence related to Barker and Meyer and failed to provide him with transcripts of his conversation with Meyer and Meyer's subsequent interview with Officer Lever.

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[39]O'Neill, 123 Nev. at 16, 153 P.3d at 43.

A "district court's denial of a motion for new trial will not be reversed absent an abuse of discretion."[40] The district court held an evidentiary hearing and determined that there was no evidence of a deal between Barker and the State. Having carefully reviewed the record, we conclude that the district court did not abuse its discretion in this regard. Likewise, the record reveals that the State did not withhold any available DNA evidence, that Orth was aware of his own conversation with Meyer,[41] and that nothing in the record before us suggests any probability that earlier disclosure of Officer Lever's interview would have led to a different result at trial.[42] Therefore, we conclude that the district court did not err in denying Orth's motion for a new trial.

Having considered all of Orth's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Cherry

_____, J.
Maupin

_____, J.
Saitta

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

[41]Id. at 495, 960 P.2d at 331.

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

cc: Hon. Robert H. Perry, District Judge
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