

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JAMES KING,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50065

**FILED**

SEP 25 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion for a new trial. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

On February 3, 2005, we affirmed David James King's conviction for first-degree murder by means of child abuse after his direct appeal.<sup>1</sup> Less than a month later, a blanket the victim was wrapped in on the night of his death, which both sides had attempted to find prior to trial, was found. King moved the district court for a new trial based on newly discovered evidence, arguing that the blanket corroborated his testimony that his baby died from choking on his own vomit rather than blunt head trauma. After a two-day hearing, including the testimony of five expert witnesses who examined the blanket and its blood and vomit stains, the district court denied King's motion for a new trial. The district court concluded that the result would not be any different from the first trial if the new evidence were to be introduced at a subsequent trial. King now appeals the denial of his motion for a new trial based on newly

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<sup>1</sup>King v. State, Docket No. 42286 (Order of Affirmance, February 3, 2005).

discovered evidence. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Standard of review

We review a district court's decision regarding a motion for a new trial based upon newly discovered evidence for an abuse of discretion. McLemore v. State, 94 Nev. 237, 241, 577 P.2d 871, 873 (1978).

Motion for a new trial

In order to prevail on a motion for a new trial based upon newly discovered evidence, the evidence must be: (1) newly discovered, (2) material to the defense, (3) unable to have been discovered and produced for trial even with the exercise of reasonable diligence, (4) not cumulative, (5) indicative that a different result is probable on retrial, (6) not simply an attempt to contradict or discredit a former witness, and (7) the best evidence the case admits. Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995) (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)).

King argues that the new evidence indicates that he was not telling an implausible story and that such evidence is probative as to other causes of death, including natural causes. However, the district court denied King's motion for a new trial, reasoning that "[t]he only thing that would change is that the blanket evidence would arguably support the defendant's contention that the child vomited and bled at some point, leading again to differing speculative causes of death." In making this determination, the district court analyzed the new evidence under all seven prongs set forth in Callier.

Newly discovered

The district court found the evidence was newly discovered because both King and the State knew about the blanket evidence but it was not discovered until after trial, through no fault on either side.

Material

The district court did not find the evidence to be material. The district court detailed that the blanket was not material to the defense because it was still unclear whether the vomit or blood on the blanket belonged to the victim. Thus, the district court found that even with the blanket, Dr. Posey, a forensic pathologist and King's own expert witness, could not establish a cause of death—the very same conclusion already testified to by the defense expert at trial.

Reasonable diligence

The district court heard evidence about the loss of the blanket prior to trial and found that the blanket was lost through simple negligence. Accordingly, the district court found that the State exercised reasonable diligence in searching for the blanket. Moreover, King does not argue that the State was not reasonably diligent in failing to find the blanket prior to trial.

Not cumulative

The district court found the evidence was not cumulative because there was no testimony (aside from King's) at trial with respect to the victim's vomit or blood.

A different result is improbable on retrial

The district court determined that the new blanket evidence would not likely render a different result upon retrial because the defense expert, Dr. Posey, already testified that he could not determine a definite cause of death. King theorized that the victim choked on his vomit. Dr.

Posey merely testified that he could not determine a definite cause of death, but it was possible that the victim died from causes other than blunt head trauma. Consequently, the district court noted that the new evidence “merely repackages the defense’s expert testimony adduced during the trial.”

Not mere impeachment evidence, unless the witness impeached is so important that a different result must follow

The district court found that the blanket evidence “would only tend in an oblique way to discredit those witnesses who said that they did not see blood anywhere.” That is, the district court reasoned that the blanket evidence would not discredit the State pathologist’s testimony that no blood was found in the airways, lungs, or elsewhere at autopsy. The district court thus concluded that the blanket would not necessarily impeach witnesses who said they did not see blood or vomit.

Best evidence

The district court found that the blanket evidence was not the best evidence that could be admitted in the case because it does not evidence what happened, how it happened, why it happened, where it happened, or when it happened. Rather, the district court determined that the autopsy evidence was the best evidence in the case.

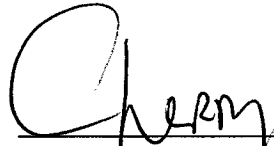
No abuse of discretion


We conclude that the district court did not abuse its discretion in finding that the newly discovered evidence did not meet the standard required to grant a motion for a new trial. The district court heard and analyzed the evidence pursuant to the standard and determined that the newly discovered blanket evidence was not sufficient to warrant a new trial. The district court gave concrete reasoning for each prong of the standard for a new trial based upon newly discovered evidence and, as

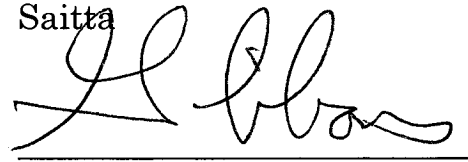
such we conclude that it did not abuse its discretion in denying the motion for new trial.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. J. Michael Memeo, District Judge  
Elko County Public Defender  
Attorney General Catherine Cortez Masto/Carson City  
Elko County District Attorney  
Elko County Clerk