

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH COUNTS A/K/A KENNETH
JAY COUNTS, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51549

FILED

MAR 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY J. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

INTRODUCTION

This case arises out of the killing of Timothy Hadland, a former employee of the Palomino night club. During the police investigation, another employee, Deangelo Carroll, confessed to his involvement in the planning and execution of the murder and wore a wire during conversations with other co-defendants, including the Palomino's owner, Luis Hidalgo (a.k.a. Mr. H) and the Palomino's manager, Anabel Espindola. Eventually, the State charged numerous individuals in the killing, including appellant Kenneth Counts. The State charged Counts with one count of conspiracy to commit murder and one count of murder and filed a notice of intent seeking the death penalty. After an eight-day capital murder trial, the jury acquitted Counts of murder, but convicted him of conspiracy to commit murder. The State then sought habitual criminal status for Counts. Counts filed a motion for a new trial, but the district court denied his motion. The district court then sentenced Counts to a maximum term of 240 months with minimum parole eligibility after

96 months. The district court ordered the sentence to run consecutive to Counts's California time, and it credited Counts with 1,029 days served.

On appeal, Counts raises the following challenges: (1) insufficient evidence supports the conviction of conspiracy to commit murder, (2) the State improperly withheld Brady material, (3) the district court erred in denying Counts' motion for a new trial, (4) the district court erred when it applied habitual criminal status, and (5) cumulative errors warrant reversal. For the following reasons, we conclude that there is no error in the district court's trial and sentencing proceedings.

The parties are familiar with the remaining facts and procedures of this case and we do not discuss them except as necessary for our disposition.

DISCUSSION

Sufficient evidence supports the conviction

Counts argues that no rational trier of fact could find him guilty of conspiracy to commit murder. We disagree.

When reviewing a conviction for sufficient evidence, this court determines whether any rational trier of fact could find the essential elements of a crime beyond a reasonable doubt, and it views all evidence in the light most favorable to the prosecution. Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

The essential elements of conspiracy to commit murder are (1) an agreement between two or more persons (2) to commit murder. See Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998) (describing conspiracy in general). Conspiracies are difficult to prove and often rely on inferences as opposed to direct proof. Id. Thus, a coordinated series of acts furthering murder is sufficient to infer an agreement and,

therefore, a conspiracy. See id. Murder is the unlawful killing of another with either express or implied malice aforethought. NRS 200.010(1).

In Peterson v. Sheriff, 95 Nev. 522, 598 P.2d 623 (1979), this court found there was sufficient evidence to convict a defendant of conspiracy to commit murder when the evidence was a diagram of the intended murder victim's house in one defendant's handwriting and a meeting between the two defendants and an undercover officer where the parties discussed the contract price. Id. at 524, 598 P.2d at 624.

Here, the following evidence is sufficient to infer an agreement between Carroll and Counts to commit the murder of Hadland: (1) Carroll and Mr. H had a discussion at the Palomino nightclub; (2) Carroll told Rontae Zone, the State's witness, that Mr. H would pay to have someone killed; (3) after Carroll spoke with Zone he met with Counts; (4) Carroll picked up Counts on the way to meet Hadland; (5) while Carroll distracted Hadland, Counts crept out of the vehicle and fired two shots into Hadland's head; and (6) upon returning to the Palomino, Mr. H gave Carroll \$5,000 to pay Counts. Viewing the evidence in the light most favorable to the State, we conclude that there is sufficient evidence for a rational trier of fact to find, beyond a reasonable doubt, the essential elements of conspiracy to commit murder.

We reject Counts' contention that his conviction should be overturned because the jury did not convict him of murder for two reasons. First, in Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995), this court declined to provide relief for inconsistent verdicts because the defendant is given the benefit of acquittal and, therefore, he must "accept the burden of conviction on the counts on which the jury convicted." Id. at 1117, 901 P.2d at 675 (quoting United States v. Powell, 469 U.S. 57, 69 (1984)). This

court recognized that a jury can extend clemency by acquitting a defendant of a murder charge while convicting him of conspiracy to commit murder. See id. (applying the rationale to the jury's finding of aggravating factors in the murder of one victim but not the other). Second, as the facts discussed above demonstrate, there is substantial evidence to support Counts' conviction for conspiracy to commit murder. Id. at 1117, 901 P.2d at 676. As a result, there is sufficient evidence to uphold the conviction.

Brady claim

Counts argues, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), that the State had an obligation to disclose all evidence that is material to guilt or punishment, but it failed to provide the defense with Anabel Espindola's statements that were incorporated in an arrest warrant for Mr. H. The State did not enter the statement into evidence, but it used it to impeach Counts. We disagree because there was no Brady evidence to disclose.

Both parties recognize "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Whether the evidence is material is a mixed question of law and fact, and therefore this court reviews de novo the district court's ruling. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). In reviewing the undisclosed evidence, we review the evidence as a whole. Id.

Nevada's Brady analysis requires disclosure by the State if the following three factors exist: (1) the evidence is favorable to the defendant; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) the evidence is material. Id. at 67, 993 P.2d at 37. Below, we

address each of these three factors in turn and conclude that none of these factors are satisfied.

The evidence was not favorable

Here, the district court held that the undisclosed evidence was not exculpatory, and therefore we review the evidence to determine if it is favorable to the defendant. The relevant portion of the arrest warrant attributed the following information to the Espindola interview: (1) Carroll called Espindola's cell phone at 16:58 and 19:27; (2) Carroll privately met with Mr. H; (3) later, Mr. H told Espindola to call Carroll and tell him to "go to plan B;" (4) Carroll responded to Espindola's phone call on Counts' cell phone; (5) later that night, Carroll returned saying "it's done, he needs to get paid," and Mr. H told Espindola to get \$5,000 to pay "him." We conclude that this evidence does not appear favorable to Counts because Espindola's statements support Zone's testimony that Counts is the person Carroll used to kill Hadland and the person Mr. H paid for the killing. Further, Counts never formally requested to review the interview notes, even though he was aware of the notes through Brady requests by Mr. H and his son and co-defendant, Little Lou. Therefore, we conclude that the district court properly held that the evidence did not contain favorable evidence.

The State did not withhold evidence because the evidence was discoverable through other sources

We also conclude that Espindola's statements, including the timing of the phone calls, were discoverable through diligent investigation by the defense. "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). Here, Counts could have questioned Espindola before

trial or put her on the stand during trial. In addition, Counts and his counsel were present when Espindola entered her guilty plea, but did not directly contact Espindola's attorney, Christopher Oram. However, Counts did attempt to contact Oram through another attorney, but the district court did not find that contacting the other attorney constituted diligent investigation because Counts' attorney never attempted to call Oram directly. We agree that the defense counsel's attempt was not diligent because counsel could have directly contacted Oram. Finally, Counts could have obtained the phone records through his own diligent investigation. Because Counts could have independently obtained the information, the State was not required to disclose the evidence.

The evidence was not material

We also conclude that the evidence was not material. "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable possibility that the omitted evidence would have affected the outcome." Mazzan, 116 Nev. at 66, 993 P.2d at 36. Zone testified to the following facts: (1) around noon, Carroll asked him and another person if they were interested in committing a murder; (2) about three hours later, Carroll said Mr. H needed someone dealt with; (3) later that evening Carroll drove to Counts' house and went inside for about 15 minutes, then the two came out together; (4) Counts was wearing all black, including a hooded sweatshirt and gloves; (5) upon arriving at Lake Mead, Counts asked if Zone had a gun; (6) Counts had his own gun; and (6) Counts quietly crept out of the van and shot Hadland. Counts asserts that the timing of the phone calls in Espindola's statement conflicts with Zone's testimony. We disagree. The two evidentiary sources do not appear to conflict because the times stated in Espindola's statement and the phone calls are within the time period to which Zone testified.

Therefore, we conclude that Espindola's statements would not have affected the outcome.

In sum, Espindola's statements are not Brady evidence because they are unfavorable to Counts, they were discoverable by the defense, and they are not material because there is no reasonable likelihood it would have affected the result.

Newly discovered evidence

Counts argues that the State improperly withheld exculpatory information, and therefore the district court erred when it denied his motion for a new trial. Specifically, Counts argues he is entitled to a new trial because newly discovered evidence demonstrates that the State's main witness, Zone's, testimony differed from evidence obtained by the State in Espindola's statement and in phone records obtained by the State as a result of Espindola's statement. We disagree.

Under NRS 176.515(1), a district court may grant a new trial on the basis of newly discovered evidence, and this court reviews the district court's decision for an abuse of discretion. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). Establishing the basis for a new trial on newly discovered evidence requires the following: the evidence must be (1) newly discovered; (2) material to the defense; (3) undiscoverable through reasonable diligence; (4) non-cumulative; (5) reasonably affect the result; and (6) the best evidence the case admits. Id. at 406, 812 P.2d at 1284-85.

As discussed above, we conclude that the evidence Counts claims entitles him to a new trial is not material to the defense, was reasonably discoverable through a diligent investigation, and would not affect the result. Thus, we conclude that the evidence was not newly

discovered and the district court properly denied Counts' motion for a new trial.

The district court properly applied habitual criminal status to Counts

Counts makes two arguments regarding his status as a habitual criminal. First, the State improperly sought habitual criminal status. Second, the district court erred in ordering habitual criminal treatment of Counts because it did not employ the required weighing or come to a "just and proper" determination. We conclude that both arguments lack merit.

First, Counts provides no evidence or supporting case law that the State improperly sought the habitual criminal status, and therefore we decline to address the issue. See In re Discipline of Schaefer, 117 Nev. 496, 510, 25 P.3d 191, 200 (2001).

Second, this court reviews a district court's decision to impose habitual criminal status for abuse of discretion. Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). Under NRS 207.010(1)(a), a district court can impose habitual criminal status under the following circumstances: (1) the defendant has two prior convictions; (2) the convictions are in Nevada or another state; and (3) those convictions are felonies in Nevada or the other state.

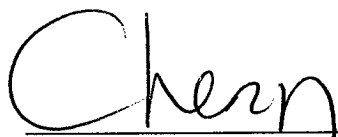
In this case, Counts had two prior felony convictions in California, and an active warrant in California for his probation violation. Counts' first felony conviction was in 1996. After receiving probation, Counts fled California to Nevada and Nevada law enforcement arrested him for selling drugs and having a stolen gun in a car. Nevada authorities reduced the charges to a gross misdemeanor so Counts could return to California for a second felony drug conviction in 1999. Counts again fled California to Nevada. The fact that the first conviction was 12 years old

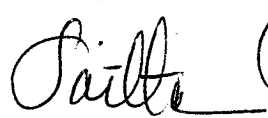
and the second conviction was 8 years old does not make the convictions too stale to support a finding of habitual criminal status. We therefore conclude that NRS 207.010(1)(a) applies, and the district court properly imposed habitual criminal status on Counts because he had two prior felony convictions in California.

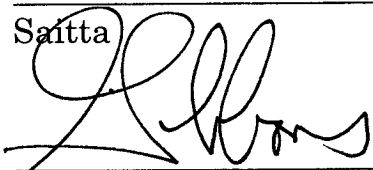
There are no cumulative errors

Counts' final argument is that cumulative errors in the trial and sentencing proceedings warrant reversal. Since we conclude there are no errors in the district court's trial and sentencing proceedings, there is no cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Kristina M. Wildeveld
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk