

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRISTON LEE BASS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51822

HARRISTON LEE BASS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53072

FILED

MAY 18 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Y. [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a judgment of conviction, pursuant to a jury verdict, of 1 count of second-degree murder, 49 counts of sale of a controlled substance, and 6 counts of possession of a controlled substance for the purpose of sale, and from a district court order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

A jury convicted appellant Dr. Harriston Lee Bass, Jr., of second-degree murder for selling a controlled substance that caused Gina Micali's death, 49 counts of selling a controlled substance, and 6 counts of possession of a controlled substance for the purpose of sale. After trial, a bag of prescription medications, which had been the State's proposed exhibit 12, was opened and examined by both parties at attorney Edward Bernstein's office, who was handling a wrongful death suit related to this criminal proceeding. Because the bag allegedly contained all of the medications that Bass dispensed and sold to Micali on October 4, 2005, he moved for a new trial or dismissal based on newly discovered evidence, arguing that the State's theory that Micali died from medication Bass dispensed and sold to her on October 4 was no longer viable. The district

court denied the motion. Bass' appeals from his judgment of conviction and from the denial of his motion for a new trial were consolidated for decision.

On appeal, Bass argues that: (1) several jury instructions were erroneous; (2) the statutes under which he was charged and convicted are unconstitutionally vague; (3) three of the counts of which he was convicted are redundant; (4) the State's failure to preserve and collect evidence denied him due process; (5) the district court abused its discretion when it allowed testimony about a financial analysis regarding the prescription drugs he sold; (6) he was prejudiced by judicial misconduct; (7) the district court abused its discretion when it denied his motion to continue the trial; (8) the prosecutor had a conflict of interest; (9) he was prejudiced by prosecutorial misconduct; (10) the State failed to present sufficient evidence to support his conviction of selling controlled substances to Samuel Baker; (11) his sentencing was based on inadmissible, false, and inflammatory evidence; and (12) the district court abused its discretion when it denied his motion for a new trial or dismissal based upon newly discovered evidence.

For the reasons set forth below, we conclude that all of Bass' contentions are without merit. Accordingly, we affirm the judgment of conviction and the order denying a new trial. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Jury instructions

Bass argues that Jury Instruction Nos. 6, 11, and 12 were erroneous. We disagree.

"District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 319

(2008). We review a district court's refusal of a jury instruction for an abuse of discretion or judicial error. Id. Whether a proffered instruction is a correct statement of the law, however, presents a legal question which we review de novo. Id.

Jury Instruction No. 6

Bass contends that Jury Instruction No. 6 was incomplete because it did not define intervening cause within the proximate cause instruction.

In Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002), we approved a jury instruction regarding proximate cause. Id. at 550, 50 P.3d at 1125. Here, Jury Instruction No. 6 was nearly identical to the instruction in Williams and was an accurate statement of the law regarding proximate cause. Moreover, Nevada law does not specifically define intervening cause. Therefore, we conclude that the district court did not abuse its discretion in not providing an additional instruction on intervening cause.

Jury Instruction No. 11

Bass asserts that Jury Instruction No. 11 improperly commented on the evidence and placed undue emphasis on the Board of Pharmacy's regulations. We conclude that Jury Instruction No. 11 is a proper recitation of NRS 453.226. While the instruction does not directly quote NRS 453.226, it nonetheless provides all of the information included in the statute and does not misstate the law. Accordingly, the district court did not abuse its discretion in giving the instruction. In addition, we note that Bass has failed to provide citations to legal authority in support of his argument that Jury Instruction No. 11 is an incorrect statement of the law.

Jury Instruction No. 12

Bass argues that Jury Instruction No. 12 is a misstatement of the law, improperly comments on the evidence, and places undue emphasis on the Board of Pharmacy's regulations.

NRS 453.321(1) states that "[e]xcept as authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to: (a) [i]mport, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance." (Emphasis added.) NRS 453.321(4) provides the penalties for violating subsection 1 in matters concerning a schedule III, IV or V controlled substance.

Jury Instruction No. 12 stated:

Pursuant to Nevada Revised Chapter 453.321(1)(4), it is unlawful for a medical doctor to sell, supply, dispense or transport or attempt to sell, supply, dispense or transport prescription drugs containing a schedule III (three) controlled substance if that medical doctor has not been issued a dispensing certificate pursuant to the Nevada Board of Pharmacy regulations or has failed to renew the dispensing certificate pursuant to Nevada Board of Pharmacy regulations.

(Emphasis added.)

We conclude that Jury Instruction No. 12 is an accurate statement of the law. Although the instruction here employed the term "medical doctor" instead of "person," the term used in the statute, the district court did not render the instruction inaccurate by tailoring the instruction to the specific facts of the case. The instruction was also correct because the State did not argue that Bass had violated NRS Chapter 453 by prescribing hydrocodone, but rather by selling it. Finally, the instruction did not improperly comment on the evidence or place undue emphasis on the Board of Pharmacy's regulations because, as noted

in NRS 453.226, the only way to dispense drugs is to register with the Board of Pharmacy. Accordingly, Jury Instruction No. 12 merely incorporates aspects of NRS 453.321 and NRS 453.226, and is not an inaccurate statement of the law.¹

Vagueness

Bass contends that the statutes under which he was charged and convicted are unconstitutionally vague. We disagree.

A statute's constitutionality is a question of law that we review de novo. Nelson v. State, 123 Nev. 534, 540, 170 P.3d 517, 522 (2007). Statutes are presumed valid, and the challenger of the law has the burden of proving its unconstitutionality. Id.

A statute containing a criminal penalty is unconstitutionally vague if "vagueness so permeates the text" that the statute (1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited and (2) authorizes or encourages arbitrary and discriminatory enforcement, in most applications. Flamingo Paradise Gaming v. Att'y General, 125 Nev. ___, ___, 217 P.3d 546, 553-54 (2009). "[A] statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute." Nelson, 123 Nev. at 540-41, 170 P.3d at 522 (quoting Williams v. State, 118 Nev. 536, 546, 50 P.3d 1116, 1122 (2002)).

¹Bass also argues that Jury Instruction No. 5 was erroneous because it did not state that the jury must find that he violated NRS Chapter 453. We conclude that this argument is without merit as the instruction specifically stated that the jury must find a "violation of Nevada Revised Chapter 453."

NRS 200.010

NRS 200.010 states that “[m]urder is the unlawful killing of a human being . . . [c]aused by a controlled substance which was sold, given, traded or otherwise made available to a person in violation of chapter 453 of NRS.”

We conclude that Bass’ challenge to NRS 200.010 is without merit. The words of NRS 200.010 have a well-settled meaning and clearly put an ordinary person on notice that it is unlawful to kill a human being by illegally selling him a controlled substance. Accordingly, vagueness does not permeate the text of NRS 200.010 such that it fails to provide sufficient notice and authorizes arbitrary enforcement. Therefore, NRS 200.010 is not unconstitutionally vague.

NRS 453.333

NRS 453.333 governs the penalties for making available controlled substances that cause death. It provides, in pertinent part:

If the death of a person is proximately caused by a controlled substance which was sold, given, traded or otherwise made available to him . . . by another person in violation of this chapter, the person who sold, gave or traded or otherwise made the substance available to him . . . is guilty of murder.

We conclude that NRS 453.333 is not unconstitutionally vague. The words of NRS 453.333 are well settled and have an ordinarily understood meaning: a person commits murder if, in violation of this chapter, he sells or makes available a controlled substance that is the proximate cause of one’s death. Therefore, vagueness does not so permeate the text of NRS 453.333 such that it fails to provide sufficient notice and authorizes arbitrary enforcement. Accordingly, NRS 453.33 is not unconstitutionally vague.

NRS 453.321

In pertinent part, NRS 453.321 provides that “[e]xcept as authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to: (a) [i]mport, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance.”

We conclude that the use of the term “person” in NRS 453.321, as opposed to “physician” or “practitioner,” does not render the statute vague. The term “[p]erson” includes a government or a governmental subdivision or agency.” NRS 453.113. With such a broad definition, we determine that, in the context of the entire statute, an ordinary person would understand “person” as encompassing everyone, regardless of his profession. Therefore, NRS 453.321 is not unconstitutionally vague.

Accordingly, we conclude that the statutes under which Bass was charged and convicted were not unconstitutionally vague because they sufficiently put him on notice of the prohibited conduct as the words utilized have a well-settled meaning when viewed in the context of the entire statute.

Redundancy of counts 51, 52, and 53

Bass asserts that his convictions on counts 51, 52, and 53, which charged him with the unlawful possession of Norco, Lorcet, and Lortab, respectively, for the purpose of sale, are redundant. He argues that these convictions are redundant because all three contain the same substance, hydrocodone, and only differ in brand name.

“[A] claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct.” Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005). Thus, convictions are redundant “when the facts forming

the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment.” Id. at 355-36, 114 P.3d at 292-93 (citations omitted).

NRS 453.338(1) states:

Except as authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to possess for the purpose of sale any controlled substance classified in schedule III, IV, or V.

The clear import of NRS 453.338 is to criminalize the possession of certain controlled substances for the purpose of sale, unless the possessor was authorized to do so. There is nothing within the statutory language of NRS 453.338(1) that indicates the Legislature did not intend to separately punish multiple acts that occur during the course of criminal conduct. The evidence presented at trial established that Bass was not authorized to possess schedule III, IV, or V substances for the purpose of sale. The evidence also demonstrated that from 2003 to 2006, Bass received multiple shipments of prescription drugs, including Norco, Lorcet, and Lortab, all of which are schedule III or IV substances. The evidence showed that Bass would sell these prescription drugs to patients after receiving the shipments. Therefore, the underlying acts that formed the basis of Bass’ convictions were separate, did not overlap, and arose from multiple, repeated events. Accordingly, counts 51, 52, and 53 were properly charged separately and Bass’ convictions were not redundant.

The State’s failure to preserve evidence

Bass asserts that he was denied due process because the State failed to properly preserve potentially exculpatory evidence. Specifically, he contends that the State failed to preserve the prescription bottles found

at Micali's residence and her blood sample. We conclude that Bass was not denied due process by the failure to preserve this evidence.

The State's failure to preserve and collect evidence violates a defendant's right to due process "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." Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001) (emphasis added). "Where there is no bad faith, the defendant has the burden of showing prejudice." Id. To meet this burden, the defendant must show that the State could have "reasonably anticipated that the evidence sought would be exculpatory and material to [the] defense." Id. (internal quotation omitted). It is insufficient for the defendant to support his argument with a mere "hoped-for conclusion" or by stating that the evidence would have helped the defense in its trial preparation. Id. (internal quotations omitted).

Failure to preserve prescription bottle

Bass claims that he was denied due process because Investigator Burney destroyed the Allscripts prescription bottle and the hydrocodone contained within it.

Investigator Burney testified that at the time she destroyed the prescription bottles and the drugs found therein, Micali's death was a suspected drug overdose. She testified that because Micali's death was a suspected drug overdose, she recorded all of the prescription bottles and the amount of drugs contained therein and disposed of them pursuant to protocol. Given the circumstances, there is no evidence to suggest that Investigator Burney acted in bad faith.

Bass has also failed to demonstrate that he suffered undue prejudice as a result of Investigator Burney's actions. Though the bottles

and drugs were not available to Bass at trial, Bass was in possession of Investigator Burney's report and photographs that documented the evidence. Bass used the report and the photographs to impeach Investigator Burney's credibility at trial. Importantly, Investigator Burney's report and photographs gave Bass the same information that that actual bottles and drugs would have provided. Further, because Micali's death was a suspected overdose and did not become a homicide investigation until seven months later, the evidence's exculpatory value, if any, was not apparent before it was destroyed. Accordingly, we conclude that Bass suffered no undue prejudice as a result of Investigator Burney's actions. Therefore, Bass' due process rights were not violated.

Failure to preserve blood sample

Bass argues that his right to due process was violated because the State failed to preserve Micali's blood sample.

In October of 2005, Micali was found dead in her residence. At the time, her death was a suspected drug overdose. Bass was not connected to Micali's death until June of 2006, when Detective Reubart reviewed the medical records seized at Bass' residence. Bass was subsequently arrested for Micali's death in December of 2006. Therefore, for approximately seven months to one year after Micali's death, Bass was not a suspect in her death. Accordingly, we conclude that the State did not act in bad faith when it failed to preserve Micali's blood sample.

Bass has also failed to show undue prejudice. Micali's toxicology report was available to Bass and he had a full opportunity to cross-examine Dr. Gary Telgenhoff, who performed the autopsy on Micali and reviewed the toxicology report. He also had a full opportunity to cross-examine Chip Wall, who had also reviewed Micali's toxicology report. Further, Dr. Telgenhoff's autopsy finding of frothy fluid in Micali's lungs

was consistent with the established lethal level of hydrocodone present in her blood. Therefore, Bass has not demonstrated that the State could have reasonably anticipated that the blood sample would be exculpatory and material to his defense before it was destroyed. Accordingly, we conclude that Bass' due process rights were not violated.²

Testimony concerning financial analysis

Bass argues that the district court abused its discretion when it permitted Detective Reubart to testify about the financial analysis she conducted regarding the controlled substances Bass sold. On appeal, he asserts that her testimony was irrelevant and constituted inadmissible prior bad act evidence. However, Bass failed to object to Detective Reubart's testimony on these bases at trial. Rather, Bass objected to her testimony on the grounds that she was unqualified to testify about his finances.

When a defendant asserts new grounds for objection on appeal, we employ plain error review. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). "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." Id. The appellant bears the burden of establishing that his substantial rights were affected by "show[ing] actual prejudice or a miscarriage of justice." Id.

²We note that we have considered Bass' argument relating to the State's subpoena of the non-Allscripts bottles at Edward Bernstein's office. Bass has failed to support his argument with citations to the record. See NRAP 28(e). Nevertheless, we conclude that Bass has failed to demonstrate how the non-Allscripts bottles were material.

Because Bass failed to preserve this issue for appeal, he has the burden of establishing that his substantial rights were affected by showing prejudice. He has made no attempt to do so in his briefs. Moreover, the record contains substantial evidence supporting the jury's verdict. Accordingly, we determine that Bass' substantial rights were not affected by the financial analysis testimony.

Judicial misconduct

Bass contends that he was denied his right to a fair trial as a result of judicial misconduct. We disagree.

We have recognized that the words and actions of the district court may shape the opinion of the jury members, and therefore, prejudice the defendant. Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998). In making this determination, we review the district court's conduct in its entirety and seek to determine whether it influenced the jury's verdict. Id.

During the reading of the charges, the district court judge allegedly "made faces" and shook her head in the negative. The district court judge also joked with the jurors that they should not feed the bailiff. Bass objected to this conduct. Having reviewed the district court's conduct in its entirety, we determine that it was not so egregious as to influence the jury's verdict. Further, Bass failed to object to the remaining alleged instances of judicial misconduct. We have reviewed Bass' arguments and conclude that he has failed to meet his burden of establishing that his substantial rights were affected by showing actual prejudice or a miscarriage of justice. See id. at 621-22, 960 P.2d at 338 ("Judicial misconduct must be preserved for appellate review; failure to object or assign misconduct will generally preclude review by this court" unless there is plain error that affected the defendant's substantial rights.). Accordingly, we conclude that Bass was not denied his right to a fair trial.

Bass' motion to continue the trial

Bass requested a continuance on the first day of trial due to his need to organize documents. Bass argues the district court abused its discretion when it denied this motion.

We review a “district court’s decision regarding a motion for continuance for an abuse of discretion.” Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). The district court’s decision to deny a continuance is not an abuse of discretion if the defendant “fails to demonstrate that he was prejudiced by the denial.” Id.

The record demonstrates that the documents Bass wanted to organize had been available to the defense for approximately eight months. Bass has failed to demonstrate that he was prejudiced by the district court’s denial of his motion. Accordingly, we conclude that the district court did not abuse its discretion in denying Bass’ motion to continue.

Conflict of interest

Bass argues that the district court erred when it denied his motion to disqualify the attorney general’s office from prosecuting him for having a conflict of interest allegedly arising from that office’s former representation of him.

“The disqualification of a prosecutor’s office rests with the sound discretion of the district court.” Collier v. Legakes, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982). “In exercising that discretion, the trial judge should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially and without breach of any privileged communication.” Id. at 310, 646 P.2d at 1220. “Generally, a prosecutor is disqualified from personally acting in a criminal case if he has previously represented the accused in the same or a

similar matter.” Brinkman v. State, 95 Nev. 220, 222, 592 P.2d 163, 164 (1979).

The district court held a hearing on Bass’ motion. It considered that in 1998, the attorney general’s office represented Bass in a civil suit, whereas here the attorney general’s office was proceeding against him in a criminal proceeding. Further, the attorney who represented Bass in the civil case left the office in 1999 and the attorney who prosecuted Bass in this case joined the office in 2003. We conclude, given the circumstances, that the district court did not abuse its discretion in finding that this was not an extreme case of an appearance of impropriety and that the attorney general’s office could carry out its prosecutorial duty impartially without prejudice to Bass.

Prosecutorial misconduct

Bass contends that he was prejudiced by prosecutorial misconduct when the State misled the jury into believing that Micali died from hydrocodone that she purchased from Bass on October 4, 2005. Bass argues that because the State’s proposed exhibit 12 allegedly contained all of the medications he sold Micali on October 4, 2005, she could not have died from any medication he sold her on that date. Bass failed to object to the State’s theory during opening and closing arguments and did not object to any of the testimony he now contests. Accordingly, we employ plain error review. Green, 119 Nev. at 545, 80 P.3d at 95.

Bass has made no showing that the State’s actions affected his substantial rights by causing prejudice. The State’s theory that Micali died from hydrocodone that she bought from Bass on October 4, 2005, was supported by the evidence. Specifically, Detective Reubart testified that Bass sold Micali three bottles of Lorcet on October 4, 2005. The State also introduced Investigator Burney’s medication receipt that indicated that

the half-full bottle of hydrocodone she found in Micali's residence had been sold on October 4, 2005. Therefore, we conclude Bass has failed to demonstrate how the State's theory of the cause of death affected his substantial rights.

Sufficiency of evidence

Bass contends that because Samuel Baker, one of the individuals to whom Bass was convicted of selling controlled substances to, did not testify at trial, there was insufficient evidence to convict him of selling controlled substances to Baker.

In reviewing challenges to the sufficiency of the evidence, we ask ““whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”” Id. (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984))).

We conclude that there was sufficient evidence to support Bass' conviction of selling controlled substances to Baker. In support of these charges, the State introduced Baker's medical records that it seized from Bass' residence. This evidence, coupled with Bass' testimony that he saw Baker three times and each time sold him Norco (a brand of hydrocodone), was sufficient for a rational juror to find that Bass sold hydrocodone to Baker on three occasions.³

³We note that we have considered Bass' Confrontation Clause argument relating to Baker and conclude that it is without merit. The Confrontation Clause precludes the “admission of testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.” Thomas v. State, 122 Nev. 1361, 1367 n.8, 148 P.3d 727, 732 n.8 (2006). Bass created the medical records seized

continued on next page . . .

Bass' sentencing

Bass argues that his sentencing was improper because it was based on inadmissible, false, and inflammatory evidence. Specifically, Bass asserts that the presentence investigation report (PSI) stated that he was guilty of causing multiple deaths.

We have consistently afforded the district court wide discretion in its sentencing decisions. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Accordingly, we will refrain from interfering with the sentence imposed, “[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

We conclude that the PSI did not contain erroneous information. It clearly stated that Bass did not have a previous criminal record. The PSI only listed three individuals who had overdosed on controlled substances prescribed by Bass. Further, there is no evidence that the district court relied on this portion of the PSI in sentencing Bass. Accordingly, we conclude that the record does not demonstrate that Bass was prejudiced by consideration of impalpable or highly suspect evidence.

Bass' motion for a new trial or dismissal based on newly discovered evidence

Bass contends that the district court erred when it denied his motion for a new trial or dismissal based on the controlled substances

... continued

at his residence and they did not contain any hearsay statements by Baker. Accordingly, Bass' right to confront Baker was not violated.

found in the State's proposed exhibit 12. We disagree, because we conclude that this evidence was not newly discovered.

Pursuant to NRS 176.515(1), a district court may grant a new trial on the ground of newly discovered evidence. The decision to grant a new trial on this basis is within the district court's discretion and we will not reverse the decision absent an abuse of discretion. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). In Sanborn, we stated:

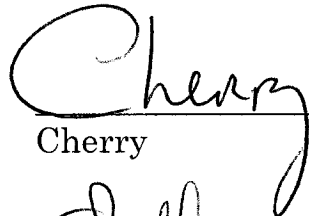
To establish a basis for a new trial on this ground, the evidence must be: newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; 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.


Id. at 406, 812 P.2d at 1284-85 (footnote omitted) (emphasis added).

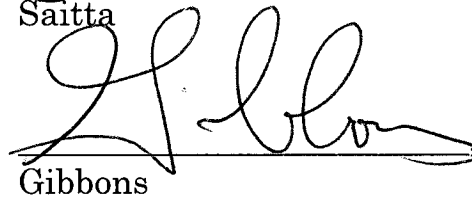
We conclude that the district court did not abuse its discretion when it found that the three bottles of Xanax and five bottles of Norco contained within proposed exhibit 12 were not newly discovered. In support of its finding, the district court listed four instances when Bass was informed of the proposed exhibit's contents: (1) during the preliminary hearing, the State provided Bass with a document that indicated that Joseph Micali told Detective Reubart that he retrieved prescription bottles from Gina Micali's home that he later turned over to Gary Call, an associate at Edward Bernstein's law office; (2) the preliminary hearing transcript demonstrates that the State attempted to introduce exhibit 13, which contained the prescription bottles Joseph Micali retrieved from Gina Micali's residence; (3) the State provided Bass with a letter from Call to Detective Reubart that stated that Call turned over eight Allscripts

prescription bottles to Detective Reubart; and (4) during trial, leading up to the State's attempt to introduce proposed exhibit 12, Joseph Micali testified that he put the prescription bottles he retrieved from Gina Micali's residence in a brown bag. Accordingly, the district court's determination that the evidence was not newly discovered was firmly rooted in evidence and, therefore, not an abuse of its discretion. Because we conclude that the evidence contained within proposed exhibit 12 was not newly discovered, we need not address the remaining Sanborn factors. Therefore, the district court did not abuse its discretion when it denied Bass' motion for a new trial.⁴ Accordingly, for the foregoing reasons we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Cherry

 _____, J.
Saitta

 _____, J.
Gibbons

⁴We note that Bass argues that he received ineffective assistance of counsel. This issue, however, is not appropriate on direct appeal. See Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995) (“[T]his court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal.”).

cc: Hon. Jackie Glass, District Judge
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