IN THE SUPREME COURT OF THE STATE OF NEVADA

LEROY LEE JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52476

FILED

APR 16 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, three counts of burglary while in possession of a deadly weapon, and four counts of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David Wall, Judge.

Three Clark County budget motels were robbed during September 2007. A victim of the third robbery recognized and identified appellant Leroy Jones as the robber. Jones had previously worked night security at that motel. At trial, his principal defense theory was that the State's main witness testified against him as revenge for his unfaithfulness to her during their alleged relationship. On appeal, Jones's primary argument is that the State violated Brady v. Maryland, 373 U.S. 83 (1963).[1] For the following reasons, we disagree with Jones and therefore affirm the judgment of conviction.

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[1]Jones raises seven additional arguments: 1) the district court erred by admitting photo printouts from the September 19, 2007, surveillance video; 2) the district court erred by refusing Jones's proposed jury instructions and issuing inadequate and misleading jury instructions; 3) the district court violated Jones's Fifth, Sixth, and Fourteenth Amendment rights by admitting his partial statement to the police; 4) the

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Under Brady v. Maryland, 373 U.S. at 87, a prosecutor must disclose evidence favorable to the defense if the evidence is material either to guilt or to punishment. Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000) (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)). "Failure to do so violates due process regardless of the prosecutor's motive. Evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. (citing Jimenez, 112 Nev. at 618-19, 918 P.2d at 692). "A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial." Id. (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)). However, "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).

""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."" Browning v. State, 120 Nev. 347, 370, 91 P.3d 39, 55 (2004) (quoting Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001)). ""To

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. . . continued

district court's evidentiary rulings undermined Jones's presumption of innocence and violated his due process rights; 5) the State presented insufficient evidence to convict Jones; 6) prosecutorial misconduct warrants reversal; and 7) cumulative error warrants reversal. We have considered each of these arguments and conclude that they lack merit.

establish prejudice, the defendant must show that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense.'" Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) (quoting Cook v. State, 114 Nev. 120, 125, 953 P.2d 712, 715 (1998)). Moreover, "'[i]t is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence" or "that examination of the evidence would be helpful in preparing [a] defense.'" Id. (quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)).

Jones asserts three distinct Brady violations. He first claims that the State's failure to provide defense counsel with the September 19, 2007, robbery surveillance video violated Brady. The State argues that it did not provide defense counsel with the video because it would not play on the State's equipment. At trial, the State produced photographic stills in lieu of the actual video. The State also provided these photos to the defense before trial. The State further maintains that the evidence was available through other sources because defense counsel could have viewed the video at the motel where the robbery occurred. See Steese, 114 Nev. at 495, 960 P.2d at 331. Despite having the opportunity to view the video, Jones fails to reveal what material and exculpatory evidence did not translate from the video to the photographs. Because Jones's argument is based merely on what he hoped the video would show, it is insufficient to demonstrate a Brady violation. Daniel, 119 Nev. at 520, 78 P.3d at 905.

Second, Jones claims that the State violated Brady by failing to collect fingerprint and DNA evidence from each crime scene and by failing to search Jones's residence for fruits and/or instrumentalities of the crimes. Although police officers generally have no duty to collect all potential evidence, we have adopted a two-part test to determine when the

State's failure to gather evidence warrants a dismissal of charges. Gordon v. State, 121 Nev. 504, 509, 117 P.3d 214, 218 (2005).

> The defense must first show that the evidence was material, i.e., that there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available. Second, if the evidence was material, the court must determine whether the failure to gather it resulted from negligence, gross negligence, or bad faith. In the case of mere negligence, no sanctions are imposed, but the defendant can examine the State's witnesses about the investigative deficiencies; in the case of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the State; and in the case of bad faith, depending on the case as a whole, dismissal of the charges may be warranted.

Id. at 509-10, 117 P.3d at 218 (quoting Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001)); see also Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998).

At trial, detectives testified that they do not collect fingerprint and DNA evidence at every crime scene. Additionally, detectives are less likely to collect fingerprint and DNA evidence in highly trafficked areas, like robbery scenes, because the evidence is prone to be wiped away. Further testimony established that fingerprint evidence is not always left behind when a person touches a surface. The lack of fingerprint and DNA evidence appears immaterial because there was a strong likelihood that detectives would not have found fingerprint and DNA evidence linking Jones to the crime regardless of whether he was involved. Not searching Jones's apartment similarly appears immaterial because a search might not have produced the fruits and/or instrumentalities of the crime regardless of whether Jones committed the crime. Jones is therefore

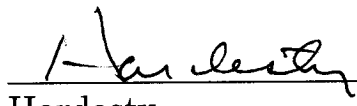
unable to demonstrate that there is a reasonable probability that the result of the trial would have been different if the evidence had been available. Gordon, 121 Nev. at 509-10, 117 P.3d at 218.

Even if the evidence was material, however, we conclude that the failure to collect the evidence would constitute mere negligence at most. When detectives negligently fail to collect evidence, a defendant's remedy is limited to cross-examination of the detectives regarding investigative deficiencies. Gordon, 121 Nev. at 510, 117 P.3d at 218; Daniels, 114 Nev. at 267, 956 P.2d at 115. Here, Jones's counsel thoroughly cross-examined lead detective Mayo about the investigation.

Third, Jones claims that the State violated Brady and Miranda v. Arizona, 384 U.S. 436 (1966), by failing to advise defense counsel about a post-arrest conversation between Jones and a detective and for introducing evidence about that conversation at trial. Because Jones was a party to the conversation, defense counsel had access to the evidence through Jones. Steese, 114 Nev. at 495, 960 P.2d at 331. The State therefore did not violate Brady by failing to inform defense counsel about the conversation. The admitted evidence relating to the conversation was also limited to testimony about Jones's post-arrest mood. Because the evidence did not relate a factual assertion or disclose any information, we conclude that the State did not violate Miranda. See Doe v. United States, 487 U.S. 201, 210, (1988)). The district court further protected Jones's Fifth Amendment rights by issuing a jury instruction indicating that the State and the defense stipulated that Jones did not

make any incriminating statements to law enforcement officers. Accordingly we,

ORDER the judgment of the district court AFFIRMED.



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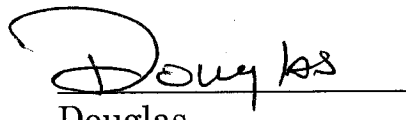

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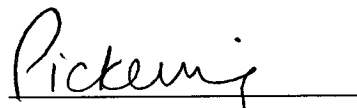

_____, J.
Pickering

cc: Hon. David Wall, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk